

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 - 706

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 13TH  
NOVEMBER, 2003, AT 11AM:

MR. MCGONIGAL: Chairman, before you commence, there

is a matter I'd like to draw to your attention on

Mr. O'Brien's behalf, and it relates to the exchange

which occurred yesterday between Mr. O'Brien and

Mr. Coughlan, on page 95, at question 486, when

Mr. Coughlan considered it necessary, for one reason

or another, to remind Mr. O'Brien that he was under

oath. And Mr. O'Brien has asked me, and I agree with

him, to indicate that he considered it offensive at

the time and feels that it should be withdrawn.

Mr. O'Brien is fully aware of his obligations and

responsibilities when giving evidence. He has done so

previously. And he doesn't understand why it is

necessary for anyone to remind him that he is under

oath. He is concerned that the line of inquiry the

alleged line of inquiries which were being pursued

yesterday had moved, effectively, from a line of

inquiry to an adversarial situation between himself

and Mr. Coughlan. He is equally concerned that that

would appear to indicate a contradiction between what

you yourself said,

Mr. Chairman, when Mr. O'Brien started to give

evidence, that this was an opportunity for him to give

his side of the story, that you were prepared to listen and that it was an inquiry. It seemed to me clear that yesterday we had moved far from a line of inquiry to an attempt by counsel for the Tribunal to put a line which he believes in his own mind may have some merit, but which is totally unsupported by any evidence so far produced to this inquiry. And I am concerned, apart from Mr. O'Brien's concern in relation to what was said, I am concerned about two things:

First of all, that we have moved far away from the Terms of Reference which the Dail asked us to inquire into, which after all, were the acts and decisions of Mr. Lowry, not the circumstances of how an asset of the State was competed for or not competed for.

But the second thing which is concerning me, is an issue which we have been raising time and time again, and that is, it does appear, and it was confirmed yesterday afternoon, that the Tribunal have a case which they are trying to maintain and have maintained almost since the day this inquiry started, and that is contra to the powers and procedures of a Tribunal of Inquiry under the '21 Act, as amended.

These are serious matters and issues which have arisen time and again. I want to try and I think, Mr. Chairman, with due respect, that if an even keel is to be kept on this, it is time we go back to an

inquiry relevant to the Terms of Reference, and that we try and avoid abusive language or an apparent attempt to suggest that an intelligent witness doesn't recognise his responsibilities in relation to the oath.

CHAIRMAN: It seems to me almost inevitable that in the course of detailed and extended examinations of witnesses, there will be occasional instances in which matters will become marginally less restrained than in the norm, and if I am to intervene and to direct corrections on every such occasion, it seems to me it would interrupt the entire flow of evidence.

As regards the very brief and scarcely substantial passage of arms referred to yesterday, I do not interpret what may have arisen as impugning the character or suggesting to Mr. O'Brien that he is somebody who has utter disregard for the sanctity of an oath, and I regard it as one of those matters that simply takes place in the course of an extended examination.

I stand over what I said two days ago, about this being an opportunity, and an important opportunity, for Mr. O'Brien to impress upon the Tribunal his side of events. It is clear by now from the many days of this Tribunal that the function of counsel for the inquiry is twofold: First of all, to elicit a witness's own Statement of Evidence in accordance with

what has been supplied to the Tribunal on foot of meetings and attendances, and in doing so, to seek to give that witness an opportunity to put his or her best foot forward. In addition to that, under the model that has been adopted in this Tribunal, it has been the practice that counsel will, on occasions, put to witnesses possible inferences that could be drawn from portions of that evidence and if, on occasions, some degree of offence is taken as regards the juxtaposition of those two roles, it seems to me inevitable if counsel is to be given an opportunity to discharge the twofold task of examination.

If there appears to be any unfairness or hectoring of Mr. O'Brien by any counsel, I will, of course, as Chairman, take such steps as may be necessary. But on foot of what has taken place to date, it seems to me a very substantially temperate and appropriate examination.

I am not indicating what particular lines of inquiry or otherwise may most pertinently commend themselves to me, but I think it understandable and inevitable that a degree of Tribunal counsel's examination will focus upon the aspects of financial means and ownership of the consortium, particularly in regard to the means of Communicorp as set forth in the applications and as referred to in the presentations. Beyond that do I not propose to take any further step.

A. Mr. Chairman, if I may reply, and just make a comment.

I am obviously a little bit disappointed. We spent an hour and a half yesterday talking about what a guarantee was. And this is an example where it would be helpful if there was somebody there with real financial experience maybe assisting the Tribunal on their side and trying to interpret commercial arrangements, commercial words in what were very important documentation that I was working through at the time. And I think things, unfortunately, became very heated when I didn't agree with

Mr. Coughlan, and I suppose from my point of view, I think that somebody is being pejorative when they say, "may I remind you that you are under oath". I didn't particularly think that that was a very fair thing to say at that time when I was being helpful. So and I would like to obviously try and keep things on an even keel and start and try and give my evidence in the fullest way possible.

CHAIRMAN: Well, I'll bear in mind what you say in that regard, Mr. O'Brien. And I am not neglecting the aspect of the Tribunal having independent financial advice by some expert. In fact, certain steps have already been taken in train in that regard. And as regards any particular portions where you feel matters may be put in a way that is unfair to you, I will do my level best to see that an appropriate balance is

kept. But over a long examination, I think if I am to be intervening on every conceivable passage of arms, the debates that are going to follow from that are going to mean that the whole process is going to take longer. But if it seems to me to get unfair, I will seek to chair this as independently and fairly as I can.

A. Thank you, Chairman.

CONTINUATION OF EXAMINATION OF DENIS O'BRIEN BY MR.

COUGHLAN:

MR. COUGHLAN: And if I might just say, Mr. O'Brien, if I had suggested to you or reminded you that you were under oath, that might be viewed by you as being offensive. I didn't say that to you, Mr. O'Brien. I asked you to distinguish between the evidence you had just given under oath and the statement you had made previously to the Tribunal, and given. So

A. I really I am no lawyer, but I don't see the difference. Maybe I misinterpreted it.

MR. COUGHLAN: I can assure you I was not being offensive to you.

Q. Now, if I might just recap so, Mr. O'Brien, for a moment. The letter of the 10th July, 1995, from Mr. Prelz of Advent to Mr. Haga, was the letter we were looking at, but it's in similar terms to the letter to Mr. Brennan. I think we looked at both of those?

A. Bar, I think, ten words.

Q. Bar ten words. Not operative or relevant, just indicating that they are going to somebody different I think, would be a fair way of putting it?

A. Not particularly, no.

Q. And you have informed the Tribunal that as far as you were concerned, that was stronger than a guarantee; that was your view, isn't that right?

A. What I said was, this was an offer which was better than a guarantee.

Q. And you then told the Tribunal that you wrote a letter I'll just find it for a moment now

A. Accepting, is it?

Q. Yes, that is the letter at Tab 23?

A. Yes.

Q. And we have opened this letter, so you have informed the Tribunal that as far as you were concerned, that was an acceptance of the offer?

A. I was trying to demonstrate to Telenor that we believed that this was an offer that we could accept, and we thought that that would go another step further to try and satisfy the gentleman concerned, I think it was Knut Haga or Amund Bugge.

Q. I think did you tell the Tribunal that as far as you were concerned, that was an acceptance of the offer?

A. Yes.

Q. Did you send that letter to Mr. Prelz?



A. Yes, I did.

Q. Right. Now, on the if you go to the next tab then,

Tab No. 24, this is a fax which Mr. Peter O'Donoghue

sent to Mr. Haga of Telenor on the 31st July of 1995.

Just for the moment, before I get into that,

Mr. O'Brien, between, say, the I want to take a

number of segments. Between the 16th June up to you,

the time when you obtained the letter from Mr. Prelz,

say in July, I appreciate that that would have been

under negotiation and your solicitors were involved in

it, were Telenor saying anything to you about the

guarantee or had the adjournment of the competition

taken the heat out of it as far as you and they were

concerned, do you think?

A. Well, as I explained, the lieutenant of Advent, which

was Knut Haga

Q. Of Telenor

A. Sorry, of Telenor, he was trying to get a financial

guarantee.

Q. He had been reminding you of it, you believe?

A. Yeah, but I actually, at that time, was concerned more

about finalising the bid where I was writing a large

portion

Q. I appreciate that, but it's just, there may be

documentation. But you believe that at least he might

have been reminding you, perhaps words to the effect,

any sign of the guarantee? Or words to that effect?

A. Yeah, he probably would have most of his contact with Peter O'Donoghue.

Q. Fair enough. Fair enough. And that may be correct because it's Peter O'Donoghue is, sends this fax to him on the 31st July?

A. Yes.

Q. Now, again things were coming to a critical point, isn't that correct? The bid now had to be in on the 4th August I think, isn't that right?

A. Well, we were in the 16 to the

Q. No

A. Moved on.

Q. This fax sorry, yes, the 16th up to the period when you got the letter from Mr. Prelz?

A. Yeah.

Q. And then from that period up to the 31st July, up to close to submitting the bid, was there anything much going on as far as you were concerned now on this front? If you can't remember, tell me and I am not going to ask you to

A. There were communications, but I cannot be more specific than that.

Q. All right. In any event, on the 31st July, 1995, Mr. O'Donoghue sent this fax to Mr. Haga. And it said:-

"Further our conversation today" so they must have been taking about it "I confirm that Advent

International Corporation and Communicorp Group Limited have formerly entered an agreement whereby Advent have committed up to €1/230 million to the Communicorp Group in the event that Esat Digifone is successful in its bid for the second GSM licence in Ireland. In consideration of Advent making these funds available, Communicorp has agreed that Advent will be entitled to participate in up to 5% of the equity capital of Digifone Limited. Denis O'Brien is also a signatory to this agreement.

"Accordingly, as the above parties represent 100% of the shareholders of the Communicorp Group, they have given their consent to the increase of capital required in Communicorp to facilitate the investment in Esat Digifone.

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

"With best regards,  
Peter O'Donoghue."

Now, do you know anything about that communication?

A. Other than it was sent to me by the Tribunal.

Q. Other than it was sent to you by the Tribunal. And do you agree with Mr. O'Connell, who was the solicitor who was in fact involved with Advent's solicitor dealing with the agreement of the 12th July which gave rise to the 5% equity, that this is not a correct statement of what that agreement was about?

A. I didn't read Mr. O'Connell's evidence.

Q. Very good. Now

A. That's not to say that I don't know broadly what his evidence is, but on this point

Q. I appreciate that. Mr. O'Connell had no doubt. He was the solicitor involved in it. He knew what the agreement was about, and it certainly wasn't that.

A. What is the point the

Q. The point there is that the 5%, the consideration of the 5% equity for Advent is consideration for committing up to 1/230 million. The agreement clearly states that the consideration of 5% is for furnishing the letters of comfort, isn't that right?

A. Well, the 12th July agreement, which we really didn't open into yesterday, but I think broadly it was saying it dealt with the two letters of comfort, the condition precedent, and it dealt also with the 30 million. So

Q. It dealt with the 30 million. I think you agreed with me that that was a moot issue, in that what that did was it conferred a right on Advent to invest, but no obligation to do so and no enforceability on your part to compel them to do so?

A. That's where we disagreed.

Q. You said there was enforceability on your part?

A. Absolutely.

Q. Fine, all right.

A. I think, Mr. Coughlan, all of this is down to the fact that the 3rd June agreement was probably poorly drafted, because it did not define what a financial guarantee was. Like, for example, if I said to you say you had a liability and I say to you, Mr. Coughlan, I will financially guarantee that liability. That's a financial guarantee, if it is acceptable to you. So there are different kinds of guarantees, and I suppose, in the hurry, and this is not a criticism of anybody, but in the hurry to get that Joint Venture Agreement signed, maybe people should have defined that better to create so that there would be no misunderstanding that it was created for two or three months after the 3rd June, and that's probably why we are in the middle of this module looking at these different letters.

Q. Perhaps. And it's just something that did occur to me, and I suppose I should ask you about it.

The Joint Venture Agreement was entered into the 3rd June, the beginning of June of 1995. You had had discussions with Telenor in April, in late April 1995, more formal discussions and involvement in May, and then the Joint Venture Agreement came within a few weeks of everything happening. Would that be fair to say?

A. Yeah.

Q. Now, I know you have a view of how things subsequently

emerge and your view of what Telenor of your view of what Telenor may have been engaged in or desired about their control of the company or something like that?

A. That could be paranoia as well.

Q. Yes, it could be paranoia. But as of this time, say, May/June of 1995, you were getting on well with Telenor, would that be fair to say? You were very happy to have them. They were a good company?

A. Yes, things became strained when after going to so much trouble to get what we got out of Advent, that that was not acceptable. And I think it's a cultural thing more than anything else, and they were in the black and white mode, where it was probably in my case I would have said to my partner: Look, I know you are doing your best, and maybe we'll accept this in the interests of making sure that this, the foundation of our partnership for the future is going to be solid. And that's not a criticism of Telenor, but that's the reality.

Q. Before you got before you got to that stage, when you got the Joint Venture Agreement and it contained this clause, the financial guarantee clause, you were getting on well with them, I take it, at the time? You had no bad view of them, you thought they were good people?

A. We had a lot of fun in the early weeks, and in fact,

we started, when they sent all the people over we started with a party.

Q. Well and you were aware of your own financial position. But you were always confident about being able to get money at the end of the day, would that be fair to say?

A. Meet my commitments, yes.

Q. Did you consider, at that time, seeing as you were getting on well with them and it wasn't being, it wasn't communication between lawyers, that's not how you were communicating, you were communicating directly with them, did it ever occur to you at that stage to say to them, look, this is a little bit harsh just at the moment, a little bit onerous at the moment, perhaps we could discuss this and sort it out some way to your satisfaction?

A. Well, we actually it's an interesting suggestion, and we actually did that maybe in a different way. Where we tried to perform on it, and ultimately we did perform on it, but the Advent agreement didn't perform in their eyes. And, yes, we did say, guys, we are doing our best here, you know, everybody I mean, there were so many different other priorities at the time. There was DDI/DDO capacity, all the other things going on, and in the middle of all of this we were trying to get 5 million as a financial guarantee from somebody, and maybe it's

Q. I suppose what I am wondering is, why did you take on such an onerous obligation?

A. Because they insisted on it as part of the Joint Venture Agreement.

Q. No, I understand it was in the Joint Venture Agreement, and you signed it. I am just wondering, when you received the draft, why did you agree, yourself, to take on such, what I suppose we would all agree was an onerous enough obligation?

A. When I read the wording of it I said to myself, hey, this is not that bad, a financial guarantee. It wasn't a bank guarantee, it was a financial guarantee.

Q. Yes, I know

A. And I can probably get that from somebody.

Q. I see. I see.

A. And, I don't think you could criticise Telenor for looking for it either.

Q. I am not. I am not, but

A. Because they didn't know us.

Q. Because in the normal business relationship I was just wondering why you were prepared to take on an onerous obligation when a discussion with them might have

A. We did try.

Q. sorted that out and maybe varied the Joint Venture Agreement to some extent?

A. We definitely did try that, Mr. Coughlan.

Q. You did?



A. Ah yes, yeah.

Q. All right. Now, if you go to Tab 25. And this is a note made by Mr. O'Connell. And it's of a conversation he had with Mr. Peter O'Donoghue on the 31st July, 1995. That's the same date as the fax sent by Mr. O'Donoghue to Mr. Haga in the previous tab.

And the note is as follows:-

"Peter O'Donoghue Telenor agreement.

Initial 50/50, then 40:20:40. Ultimately with 33 and 33 in public domain."

A. What that means is if we were going to float the company.

Q. Float which company? That would be Digifone?

A. Mm-hmm. In the application we made reference that we were considering bringing public investors in.

Q. "Not keen to be obliged to pay up large amounts of money too early only as required. Dependent on First Boston funding."

What's that about?

A. I actually don't know what he means by that.

Q. Could I just perhaps recap a little. You had had a meeting with CSFB in May of 1995, isn't that right?

A. Mm-hmm.

Q. You had in Tab 19, I am sorry to take you back

A. Yeah, I think I can help you.

Q. Tab 19 I think is a letter of sorry

A. That's Baker McKenzie.

Q. 19A, sorry, perhaps yes, 19A, it's behind that. Do you see that?

A. Yes.

Q. On the 22nd June of 1995 Peter O'Donoghue sent to Mr. O'Connell of William Frys, he said: "Please find attached draft engagement letter from CS First Boston which I would appreciate if you would review."

And if you look at the draft letter, I think the notes on it are made by Mr. O'Connell. He suggests various additions or alterations, all of a fairly

A. Standard.

Q. standard and technical nature.

A. I should point out, First Boston would never sign a letter unless they actually believed that they would raise money. Okay?

Q. No, I am not saying anything about First Boston. What I am asking you about there, is that it seems to be around this time that you engaged First Boston, would that be right, in an informal way?

A. It was my plan C. I had plan A, which is Advent; plan B, IIU; and plan C was CSFB. So I had three different strands of money.

Q. Right.

A. In other words, I wasn't going to be caught out.

Q. Right. But around this time, it looks like you entered into some sort of an engagement agreement with CSFB?

A. This is not the executed copy but

Q. This is not the executed copy, but I am just saying around this time it would be fair to say?

A. Yes.

Q. Now, coming back to Mr. O'Connell's note then, at Divider No. 25, where it reads: "Not keen to be obliged to pay up large amounts too early only as required. Dependent on First Boston funding."

Can you help us there? And perhaps I should tell you what evidence Mr. O'Connell has given about this, because he was the man who made the note.

A. Yeah, okay, go ahead.

Q. It's Day 243, page 5, question number 22, when he was asked: "What does dependent on First Boston funding mean?" And Mr. O'Connell's answer was: "I think it means that he wanted, he expected to be able to get the money he needed for the investment in Esat Digifone from Credit Suisse First Boston funding in the USA which was being worked on, had been since May I think, or June."

Now, can you help us?

A. Well that's, I suppose he was, he was looking out and seeing what would happen eventually, which ultimately did happen, and that was Credit Suisse First Boston completed their offering.

Q. Now, then the note continues: "June '95 Joint Venture Agreement." We know about that.

A. There is one point coming back to that, though.

Q. Yes, indeed.

A. And this is the concept that we avoided raising money until we actually had the licence, because we knew the value of our group would increase substantially, and that it would be less dilutive. In other words, if you have a business that's worth between 30 and 50 million, and it goes to 70 or 80 million, and you are raising capital in on top of 80 million versus 50 million, there is less dilution.

Q. I understand.

A. So I think that's only raise money as money is required is that point.

Q. I understand that.

"June 1995 Joint Venture Agreement.

Agreement will be reviewed by Department of Communications.

Agree Telenor appoint CEO.

Will not provide 1/25 million guarantee. Only have letters of comfort (from Advent).

There is a joint venture bank account.

Esat has spent 4-500K (itemised). Telenor 200K also used."

Now, whatever discussions we had about guarantee yesterday, this appears to be Mr. O'Brien (sic), an accountant and a businessman, a financial controller I think in your company

A. Mr. O'Brien?

Q. I beg your pardon, Mr. O'Donoghue, informing Mr. O'Connell that, "Will not provide  $\text{€}1\frac{1}{2}$  million guarantee only have letters of comfort from Advent."

A. Where are you getting that from?

Q. From the note.

A. But

Q. This is what Mr. O'Donoghue is telling Mr. O'Connell.

A. How do you know that?

Q. Because Mr. O'Connell has told us that. Mr. O'Connell takes a note of what somebody tells him. That's what he did as a solicitor or does as a solicitor.

A. So what's the point here?

Q. The point I am asking you about here is, Mr. Peter O'Donoghue is informing your solicitor that, "Will not provide  $\text{€}1\frac{1}{2}$  million guarantee. Only have letters of comfort (from Advent)."

A. Sure, this is two weeks after the event. There was never any mention of a 5 million guarantee on the 12th July. It was the 30 million plus the letter of comfort. We are going back to

Q. Yes, I understand that, Mr. O'Brien. I thought that two weeks later the one person who would have understood the position of what you had was Mr. Peter O'Donoghue?

A. Both of us understood it.

Q. Both of you understood it. But here he is telling

Mr. Owen O'Connell, the solicitor?

A. Mmm. But what does that differ from what I said

yesterday? I said that we had an offer, which is

better than a guarantee.

Q. I think what you said was, you had an agreement,

because you had an offer

A. We had an agreement, an offer and a commitment. Three

things.

Q. You had an agreement, you had an offer sorry, you

had an offer, and you accepted the offer, and there

was an agreement, is that right?

A. And we had a commitment from them.

Q. You had a commitment, right. So you so, cannot throw

any light on why Mr. O'Donoghue would be telling

Mr. O'Connell that "you will not provide guarantee,

Only have letter of comfort"?

A. You see, this is I was the principal here.

Q. Yes.

A. It was my opinion that what we had was stronger than a

guarantee. And I don't think we are ever going to

agree on this point, Mr. Coughlan.

Q. I'm not arguing that point with you. I'm asking you

to look at what Mr. Peter O'Donoghue informed

Mr. O'Connell. I am just asking you to take that into

account. Did you know

A. They never did provide a 5 million guarantee. What

they did was they provided a 30 million guarantee.

Q. But if you continue on in the note, "Only have letter of comfort." There is no discussion there that what was in existence was better than a guarantee?

A. But you have got to, please, put that in the context, and you have got to direct that what was the context of the conversation you had with Mr. O'Connell and Mr. O'Donoghue? Otherwise both of us are speculating, and certainly I wouldn't like to speculate about two people conversing over matters.

Q. Well, can we take it that Mr. O'Donoghue would be conversing with the solicitor

A. Mr. O'Donoghue was

Q. on business matters connected with

A. He would be dealing with a wide range of issues as Chief Financial Officer. But funding in this regard was certainly one of the areas that I was probably taking a major lead.

CHAIRMAN: Well, I am clear on your point on it, Mr. O'Brien, anyway. You are saying that on foot of your dealings with Mr. Prelz, what you were of the view you had secured was something that exceeded what was sought in strict legal terms by Telenor?

A. Much, much, much better.

Q. MR. COUGHLAN: Now, just looking at this note?

A. Which one?

Q. Mr. O'Connell's note. Doesn't it seem to be the

situation, Mr. O'Brien, that what Mr. O'Donoghue is telling Mr. O'Connell that, "Only have letters of comfort", is indicating that it is something less than a guarantee, or would you agree with that?

A. Again, you want to really look

Q. Do you agree with that?

A. I don't no, I don't agree with that, because you have got to

Q. Why?

A. We are looking at material seven, eight years ago. We are looking at it cold. Right, you are taking pieces of paper and saying look at this. You have got to actually think of what the context was. Now, you'd want to have taped conversations nearly of everything that happened during that period to get a real flavour. So you know, I can selectively say, look at this, Mr. Coughlan. You can say, selectively look at this, but you really have to look at the context of the discussion, and it's seven years ago. Like, I couldn't remember a conversation a year ago,

Mr. Coughlan. How can I even speculate what was going on in the mind of Mr. O'Donoghue seven years ago?

Q. Well, it would appear that Mr. O'Donoghue, you would agree, was at least discussing your business?

A. Well, he worked for our company.

Q. Yes, that's what I mean?

A. And a valuable contributor.



Q. Well, anyway, you do not agree that what is being indicated there is that the letters of comfort are something less than a guarantee, you don't agree?

A. Yesterday in my evidence, we trashed that.

Q. Sorry, you don't agree, is that right?

A. No.

Q. Now, that's on the 31st July of 1995.

Now, if you go to the next tab, which is Tab No. 26, this is Knut Haga sending you a fax, isn't that right, dated 2nd August, 1995, and he sent a copy to Per Simonsen?

A. Just one second now, I am on 27, what are you on?

Q. I beg your pardon, it's 26. Do you have that, a fax from Knut Haga to you? And he encloses also a letter that he has sent to Ms. Helen Stroud on the 1st August, 1995, I think.

Now, what he said to you was: "Dear Denis, "With reference to Joint Venture Agreement, dialogue with Peter O'Donoghue and facsimile letter from Peter 31 July (enclosure), I would like to express my concern related to the issue 'Financial Guarantees'.

"Based on the letter from Peter" and remember, that particular letter from Peter O'Donoghue had indicated that in consideration for Advent committing to invest 30 million, that they would receive 5% of the equity of Digifone, that's what that letter was about, I'll ask you to bear that in mind "Based on the letter

from Peter, I required a similar statement from Advent International through Baker McKenzie. Ms. Helen Stroud called this afternoon and told me that there was not made any agreement between Advent and Communicorp related to the said IRi;½30 million."

A. I think they say were not. But it's words again.

Q. What it means is that there was no agreement made between Communicorp and Advent related to the i;½30 million?

A. But clearly he is wrong.

Q. Sorry, this is what he is saying.

A. He is wrong.

Q. Sorry. May I just finish it, please?

A. Go ahead, sorry.

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

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

Now, he enclosed with that a letter he had sent to Helen Stroud of Baker McKenzie, who was acting for Advent, isn't that right?

MR. MCGONIGAL: That's not accurate. I think what was enclosed is a letter from Peter O'Donoghue of the 31st

Q. MR. COUGHLAN: Sorry, I beg your pardon. It's Peter's letter of the 31st, yes, which we have just opened.

We just opened that.

A. Is that on a different tab?

Q. It's on Tab 24. And that letter from Peter O'Donoghue is:-

"Further to our conversation today, I confirm that Advent International Corporation and Communicorp Group Limited have formerly entered an agreement whereby Advent have committed up to  $\frac{1}{2}$ 30 million to the Communicorp Group in the event that Esat Digifone is successful in its bid for the second GSM licence in Ireland. In consideration of Advent making these funds available, Communicorp has agreed that Advent will be entitled to participate in up to 5% of the equity capital of Digifone Limited. Denis O'Brien is also a signatory to the agreement.

"Accordingly, as the above parties represent 100% of the shareholders of the Communicorp Group, they have given their consent to the increase of capital required in Communicorp to facilitate the investment in Esat Digifone."

Now, I wonder if Mr. McGonigal is correct, and he may be correct, but it is my understanding that in the fax of the at Tab 26 that I just opened, which Mr. Haga sent you telling you about what he had been told by Baker McKenzie, he enclosed a letter or a fax he had sent to Baker McKenzie, to Ms. Helen Stroud, on the 1st August, 1995?

A. I am sorry, I am completely lost, because we are a tab forward, then we are going back to another tab, and maybe the tab at the back should be attached to this letter so that we have a context. So

Q. Perhaps. It's very simple if we just and perhaps I'll just explain it to you.

A. Okay.

Q. Peter O'Donoghue sent a fax to Mr. Haga saying that Advent, there was an agreement whereby Advent had committed  $\$30$  million to invest in Communicorp, in consideration for which they were to get 5%, an entitlement to invest 5% in Esat Digifone. It's as simple as that.

A. Well, you know, you mention Mr. O'Connell's notes there. Well, then, that completely disagrees with what you are alleging Mr. O'Donoghue said on the 31/7.

Q. No.

A. It does.

Q. No, just bear with me for a moment.

A. Okay. I don't want to confuse you because I am confused as well.

Q. Well, let's seek some clarification. Mr. O'Donoghue sent such a fax to Mr. Haga telling him that there was an agreement between Advent and Communicorp, and the agreement was this: That Advent had committed to invest  $\$30$  million in Communicorp, and that the consideration for that was that Advent would be

entitled to invest 5% in Digifone. That's what he sent that's what he sent to Mr. Haga. Are you with me?

A. And also for the he hasn't said this, but the agreement said other things for the comfort letters

Q. It's the documents we are dealing with now. That's what he said, isn't that right?

A. That's what he has written here, yes.

Q. Now, you are right when you say that the note of Mr. O'Connell's, which is at Tab 25, Mr. O'Donoghue is telling Mr. O'Connell something, and he is telling Mr.

O'Connell that, "Will not provide  $\frac{1}{2}$  million guarantee. Only have letters of comfort (from Advent)."

A. But this is the point, we got 30

Q. But I agree with you, they are contradictory?

A. We got 30 instead of 5. Six times greater.

Q. If you just, I am trying to watch the documents now, and I'll slow down.

A. Okay.

Q. Mr. Haga received Mr. O'Donoghue's fax, obviously?

A. Yeah.

Q. Telling him this. Mr. Haga then set about carrying out an inquiry himself, not unreasonably?

A. Well, normally if you are doing a deal with somebody and you have got different parties, they don't the individuals lawyer to lawyer they talk, but not one

of the parties to an agreement talking to so it's a little bit unusual.

Q. Okay, it was a little bit unusual, but that's what he did protecting the interests of his company.

A. But it shows how open we were on this whole issue, that we would allow a conversation between lawyers acting for Advent and a lawyer acting for Telenor.

Q. Did you give permission for Mr. Haga to ring Helen Stroud?

A. Well, we didn't

Q. Do you know?

A. Well, I don't know, but clearly it was unusual, and it was, a kind of the spirit of being open is, we have a problem, and we are trying to satisfy you. But it is unusual.

Q. Yes. Now, Mr. Haga, having contacted Ms. Helen Stroud in Baker McKenzie, who were Advent's solicitors, then sent you a fax on the 2nd August of 1995 saying

A. Where is that?

Q. That is at Tab No. 26.

A. No, she didn't. She sent it to no, he sent a note to Helen Stroud.

Q. No, no

A. And Per Simonsen sent, or Knut sent me a fax.

Q. Yes, that's what I said, yes.

A. Okay.

Q. Knut sent you a fax, and he copied it to Per Simonsen.

And he said to you that he was referring to Peter O'Donoghue's sorry, and it's marked "urgent", I think.

"Dear Denis,

"With reference to Joint Venture Agreement, dialogue with Peter O'Donoghue and facsimile letter from Peter 31 July (enclosure)."

That is the fax we have just looked at.

A. Can we cut to the chase here because I can tell you exactly what my evidence is on this?

Q. No, you can tell us that. I want to follow the documents for the moment.

A. All right, go ahead, yeah.

Q. He told you, on the 2nd August, that based on the letter from Peter, that there was this agreement. He required a similar statement from Advent International through Baker McKenzie. He told you that in this, that "Ms. Helen Stroud called this afternoon" that's the afternoon of the 2nd "and told him that there was not made any agreement between Advent and Communicorp related to the said IR i;½30 million."

Then he goes on to say

A. But sure, we know that's untrue. You know and I know that's untrue.

Q. What's untrue, that Ms. Stroud told him this?

A. How could she ever tell him that when she executed drafted the agreements.

Q. If you just bear with me?

A. Okay.

Q. This is what he told you?

A. No, this is what he wrote to me.

Q. Yes, he wrote to you?

A. But it's so farfetched that the lawyer acting for Advent who drafted the agreement would turn around and say that there was no agreement sorry, "Were not made" I don't know where the English is coming from "any agreements between Advent and Communicorp relating to 30 million."

Q. You are saying that Ms. Stroud couldn't have said that?

A. She couldn't have said that.

Q. Your own solicitor has said that, Mr. Owen O'Connell, that that agreement didn't mean that?

A. No, he is saying but look at the words here, "Told me that there was not made any agreement between Advent and Communicorp related to 30 million." She couldn't have said that because she drafted it. Her name is all over it, and when this, the condition precedent wasn't met, who was the person who went into bat for Advent? Helen Stroud.

Q. I just want to be clear about this now. I then want to go over the document. This is Mr. Haga to Ms. Helen Stroud, dated 1st August, 1995.

"Thank you for your letter of the July 13th. Based on



the received information, I would kindly ask you to provide Telenor with some statements from AIC confirming the following:

1. That the forwarded financial information (enclosure to your letter dated 13 July) related to various funds as of the 31/12/1994 is correct please make references to each specific fund."

That would be information that Baker McKenzie furnished in relation to Advent's funds?

A. Can I just tell you, if I was getting that letter and I was Helen Stroud, I would say, who is this guy questioning a 1.4 billion institution, whether they have the financial whether the forwarded financial information related to various funds is correct, she would say, this guy is off his tree. It's like ringing AIB and saying, is your annual report right?

Q. All right.

"2. That no material changes have occurred since the 31 December, 1994. Please make references to each specific fund."

A. Same point.

Q. Same point.

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

A. That's true.

Q. You see then written opposite is "No"?

A. Who wrote "no"?

Q. Sorry

A. They should have said yes.

Q. I presume it's Mr. Haga as a result of receiving a telephone call, which he has informed you about, he received from Ms. Stroud on the afternoon of the 2nd August of 1995. And he wrote to you immediately and faxed you immediately?

A. But that's not true.

Q. All right.

A. Like, we'll open the 12th again, let's go through it again and because the words there are very clear. They made an offer of 30 million. This is where we need somebody to help everybody

Q. Knut Haga wrote to you saying that Ms. Stroud had told him that there was no such agreement. That's what he wrote to you?

A. You see, these are two people you are asking me to comment on communications between two people.

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

A. In some ways it's fantasia, that you've got a guy asking confirm your financial information and you are a 1.4 billion company; that you have no material changes and you are a 1.4 billion company; and then that an agreement has been signed between Advent and

Communicorp, and we all know that's signed because we all opened it yesterday.

Q. Did Mr. Haga write to you and say that Ms. Stroud of Baker McKenzie had told him that there was no agreement in the terms as indicated in Mr. O'Donoghue's

A. It's in the letter here.

Q. Yes. What did you do when you received that letter, or that fax?

A. I don't know what I did. I mean, in reading the letter now, it was gaga.

Q. Well, did you pick up the phone immediately to Knut Haga and say, this is gaga, I have a concluded agreement, I have accepted an offer?

A. The whole thing was gaga because we were trying to satisfy them, and we more than satisfied them, and he still wouldn't accept it, and there was a complete breakdown: what we thought we had delivered, which was fantastic, and what he was looking for, which was a black and white financial guarantee.

Q. Oh no, no, not if you look at this letter now. You see a slight shift taking place, in fairness to Telenor?

A. I am not being critical of Telenor.

Q. Now, if you look at the second-last paragraph. "If this information is correct, I believe we may have serious problems related to establishing an acceptable

level of financial comfort."

A. But he was wrong.

Q. Just Mr. O'Brien, that's what he said to you, isn't that right?

A. He was wrong.

Q. Did you ring him?

A. How can you ask me a question like that seven years later, whether I picked up the phone to a person? I'd make a million calls between 1995 and now.

Q. Mr. O'Brien, you have told us that you had a concluded agreement. You had a concluded agreement. There had been an offer, which was an open-ended offer. And that you had sent a letter to Mr. Prelz accepting that offer and you had an agreement, isn't that right? That's what you have told us?

A. That's right. And also, Telenor asked how long they would leave that offer open for.

Q. I am going to

A. We should look at that because it's a very important point.

Q. It is very important.

A. It's critical.

Q. It's absolutely critical.

A. Because that's an acceptance that there was an offer.

Q. I'll come on to it in a moment, Mr. O'Brien. Did you tell Telenor, when you received this letter, that this is gaga, this is lies, this couldn't be said, or words

to that effect?

A. Well, I wouldn't accuse him of being a liar.

Q. I am not talking about Mr. Haga, he had received information from Ms. Stroud?

A. Again, I am trying to paint the context here. Helen Stroud, Massimo Prelz, ourselves were absolutely cheesed off with the behaviour of Telenor at this point in time. We had more than delivered what we said we'd agreed to. Taking account, and this is I keep coming back to this the 3rd June joint venture, it said a financial guarantee. It didn't define what a financial guarantee was. And that's a critical point in all of this. And in some ways you are resting your views on this, or you are trying to make a case to me

Q. Mr. O'Brien, I am not trying to make any case to you, and please do not say that. I am not trying to make any case to you.

A. Okay.

Q. I am asking you, you received a letter from Knut Haga. You have told us that you had a concluded agreement with Advent. Now, you say that the contents of this letter was, in your mind, gaga?

A. Yeah.

Q. Did you tell Mr. Haga that you had a concluded agreement?

A. I am sure I would have actually, well I wouldn't

communicate with Ms. Stroud because that wouldn't have been appropriate. My solicitors would have communicated with her. But I would have informed probably Massimo Prelz. As I said yesterday, I was in constant contact with him and said, what is going on?

Q. Now, your own solicitor, Mr. Owen O'Connell, who has also given evidence, and who was the solicitor on the other side to Ms. Helen Stroud dealing with the agreement which was concluded on the 12th July of 1995

A. Mm-hmm.

Q. has given evidence to this Tribunal that the contents, or the statement made by Mr. Peter O'Donoghue in that fax could not have been attributable to the agreement of the 12th July.

A. Well, maybe Mr. O'Connell

Q. Is that gaga?

A. is looking at things in his eyes, but as I explained, somebody's commercial eyes are different to maybe a solicitor's eyes, and in my mind yesterday, I explained to you what we had was something better than we ever thought we'd get, and Mr. O'Donoghue was also equally happy, if I recall rightly. So, you know, it's fair to say that people coming before the inquiry, they will have different opinions, and in this case this is a classic example where my commercial opinion is different to my legal adviser's

opinion. Also, and critically, he was not party to the discussions that I had with Mr. Prelz about the terms and the sort of nature, the guaranteed nature that I felt that Mr. Prelz would meet his commitments.

Q. Mr. O'Connell not only was a solicitor, but practices in the area of commercial law, isn't that right?

A. That's correct.

Q. And Mr. O'Connell was well able to, in the course of his evidence, to distinguish between commerciality and legal enforceability.

A. He is a formidable commercial lawyer.

Q. But he was able to explain that to us, and we understand that.

A. Yes.

Q. Ms. Stroud of Baker McKenzie was handling the affairs of Advent in these dealings with your company, isn't that right?

A. She was acting for them, not for us.

Q. That's what I just said, Mr. O'Brien.

A. Yeah, I am just confirming that.

Q. She was handling the affairs of Advent?

A. Mm-hmm.

Q. She informed Mr. Haga that there was no agreement related to the IRi $\frac{1}{2}$ 30 million, as had been stated by Mr. O'Donoghue in his letter or fax of the 31st July, 1995, and you say that that was gaga. She conducted the negotiations, she was involved in the concluding

of the agreement, and she must have known that that was what the agreement was?

A. But an added point here is like, if you want to spend more time on this, I think the person to call is Helen Stroud.

Q. Well

A. And if you have

Q. We did call your solicitor, Mr. Owen O'Connell?

A. He wasn't party to the conversation between Stroud and Mr. Simonsen or Mr. Haga.

Q. No. What he was was your solicitor handling your affairs in dealings with Ms. Helen Stroud on behalf of Advent which resulted in the concluded agreement of the 12th July, isn't that correct?

A. Well

Q. Is that

A. she was acting for Advent.

Q. And who was acting for Communicorp? Mr. O'Connell?

A. Mr. O'Connell. But in some ways we don't agree or sorry, disagree, Mr. Coughlan. Because as I explained yesterday afternoon at great length, is that I felt I had something better because I also had a verbal assurance covered over many conversations with Mr. Prelz, that strengthened that agreement even further. That's important.

Q. Mr. O'Brien, I'll give you every opportunity, and you are entitled to express that view, of course. But I



am asking you to consider the evidence which was given by your solicitor, who was involved in the concluding of this particular agreement. And he has told this Tribunal, not just looking at the agreement and expressing an opinion from the outside, he was actually involved in it, that what Mr. O'Donoghue says in this particular fax could not be stated to be as a result of the agreement of the 12th July?

A. Well, I think you need to direct that to Mr. O'Donoghue, not to me.

Q. No, you have said that you agree with what is stated here, that there was such an agreement?

A. Broadly I agree, yes, what he is saying, because there is a piece of paper which is a document of four pages and then there is conversations.

Q. Very good.

A. And it's like the Irish Distillers case.

Q. What's like the Irish Distillers case?

A. Where people have a verbal agreement on a commitment, and they honour those commitments, and that was the sale of shares from one party to another during the Pernod Rickard Irish Distillers takeover.

Q. You have told us that you wrote a letter accepting the offer, and you therefore had a legally binding concluded agreement, is that right?

A. I had a binding well, sorry, a legally binding to work out the ultimate thing, which was obviously what

was the value of the licence, what was the value of the business at that time when we were going to try and draw the funds.

Q. If you go to the next tab, and I'll just it's Tab No. 27 and I suggest to you that this would seem to indicate that you did not make contact with Mr. Haga after you received the fax of the 2nd August, 1995, and inform him that you had a legally binding agreement, and you didn't know what this was all about, because if you look at this particular fax, it's a fax dated the 3rd August

A. I never said I went back to Mr. Haga. I said that I communicated with Mr. Prelz.

Q. You communicated with Mr. Prelz.

A. Yeah, so I mean...

Q. What did you say to Mr. Prelz?

A. I am surmising, but I'm saying there is maybe there is a misunderstanding here between Mr. Haga there is some dialogue going on and it's untrue.

Q. Untrue?

A. Untrue.

Q. Untrue, all right. If you then go to the next tab, and this is a fax dated the 3rd August, 1995, from Mr. O'Donoghue to Mr. Massimo Prelz.

"Telenor have requested us to provide them with a slightly reworded financial guarantee from yourselves.

I attach the requested wording. I do not believe the

attached is any more onerous than what you have previously provided us with, and I would be grateful if you could prepare a letter addressed to Telenor along the lines of the attached.

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

Then he says how he is contactable.

In fact, we have reviewed all the documents, because we understood that the attachment was a document which comes along a little bit later, but in fact, the attachment is this document. I'll give it to you.

(Document handed to witness.)

A. I think I need to explain this, if I may, Chairman?

CHAIRMAN: If you want to read the document and take your time, Mr. O'Brien.

Q. MR. COUGHLAN: In fairness, I have only given you the document this morning.

A. 24 hours before submitting the bid Advent still were not happy with the financial guarantee, so we then said, okay, let's try again with Advent and try and give them words that Telenor would be happy with. And this was, effectively, a note sent or a draft letter sent to Prelz very much tongue in cheek because, at that stage, Advent didn't want to hear any more from us about this issue about a guarantee for Telenor, and this was the last throw of the dice to find a way to

cure the problem with Telenor and the financial guarantee.

Q. All right. Okay. Just let's look at the document so.

And what was sent to Advent to see if they would sign was a letter addressed to Mr. Simonsen.

"Dear Per,

"Advent International plc hereby guarantee Telenor AS that it will offer i;½30 million to Communicorp Group Limited for the necessary equity increase in Esat Digifone Limited to establish and operate a GSM network in Ireland.

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

"Yours sincerely."

A. We knew they'd never sign that.

Q. Was that sent?

A. I believe it was, yes. But we knew they'd never sign it.

Q. What was the difficulty in so doing if you had a concluded guarantee with Advent or a concluded agreement with Advent, can you tell me?

A. Well, you see, this is the Telenor words, not our words. Like, we didn't come up with this wording, this was their wording. We felt already that we had an offer for 30 million of funding, plus the verbal

assurances. So this is their wording, not our wording.

Q. That isn't the question I asked, Mr. O'Brien. The question I asked you was this: What explanation did Advent give you for not signing this when, as you say, there was a concluded binding agreement between you? How could it have adversely affected the position of Advent if you had that binding agreement?

A. If I remember rightly, Advent threw their hands in the air and said, we are not entertaining anything, we are not even going to look at this.

Q. Who said that?

A. Advent.

Q. Look at this, right.

A. I think that ties into what we called the little rant, yesterday.

Q. We now move on to the note at the next tab, Tab 28.

This is the note made

A. The rant.

Q. As you describe, the rant. And this is Mr. O'Donoghue's note of what happened when Mr. Prelz spoke to him on the 3rd August, isn't that right, the day that this particular fax was sent enclosing the draft letter of guarantee?

A. Yeah, he is effectively saying get lost, plus other things.

Q. He is saying something a lot more.

A. No, he is saying other things, but he is saying, we are not dealing with this.

Q. He is saying that you are trying to mislead Telenor, isn't that right?

A. No, you see, he says here, you are trying to mislead, but he probably thought that we had written this letter up, but we never wrote the letter. It was Telenor's words.

Q. No, I wonder you see yes, all right.

A. If you get this letter if you got this letter on the fax, you'd say, you wrote me this letter, what are you at? Okay? But in reality, we never wrote this letter, or drafted it. This was the words that the lawyers for Telenor or the gentleman concerned, Knut Haga, had drafted up as a last throw of the dice before we were actually going to go down and give the bid in.

Q. But, Mr. O'Brien, I want to ask you this: does that seem does that, what you describe as 'the rant', seem consistent with your assertion that you had a concluded agreement with Massimo Prelz?

A. Yes, because

Q. Does it?

A. Yeah, well I mean certainly this is an outburst from Massimo Prelz, which wouldn't be that frequent, but he would throw a lot of things, speak very fast, and like, just get a lot of things off his chest. He

probably wouldn't mean half the things he says, from my experience.

Q. All right. But what he said here anyway, and as you said yesterday, Mr. O'Donoghue would be a reasonable recorder of what transpired?

A. When I think of this even further, the rant bit is the way he ties the 5% and the 3.2, which were never together. So that's how upset he is.

Q. All right. He is upset there, that's the way you view it.

"He stated that the word 'committed' was misleading, and the fact that there was no offer, 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 in 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."

Isn't he saying to Mr. O'Donoghue here, not only is it that there is no agreement, he is saying there is no offer?

A. No, no, he is not. Please now... First he is saying that the letters require the approval of the committee. He is absolutely right in that sense. And that no letter would be forthcoming, and that was because they are completely cheesed off at this stage. He does Mr. O'Donoghue rightly corrects him and

says that, you know, that there were terms, you know, outlined to me. He says that he had put outline terms to Denis that's to me. Now, Peter wasn't aware of the terms, okay? But he did remind Massimo that he had put outline terms.

Q. And he reminded Massimo that they were not acceptable to you, isn't that right?

A. But in his mind he would assume that, but we hadn't even I had never discussed what the terms were, simple

Q. I see.

A. with Peter O'Donoghue. So there is nothing in this memo here, really, that

Q. Very good

A. is of importance.

Q. I don't know.

A. Well, nothing hangs on it, in my view.

Q. Right. Then if you go to the next tab

A. Yeah, this is the letter.

Q. 4th August, 1995, Peter O'Donoghue wrote to Massimo Prelz.

"Dear Massimo,

"I attach a copy of a revised letter that Telenor have requested Advent to provide to Communicorp Group Limited. They wish to establish that the offer referred in your letter to them on the 12th July, 1995, will remain valid for a period of 60 days after



the GSM licence is awarded.

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

And the form of the draft that was provided was in these terms, addressed to Communicorp Group.

"Dear Sirs,

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

That seems to reasonably reflect what's contained in the letter of the 10th July, that particular phrase.

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

Now, again, that would appear that Telenor had now moved from a position, perhaps, of seeking a financial guarantee, but were seeking some sort of financial assurance or comfort?

A. No, no. No, no, no. They are wishing to establish that the offer

Q. Yes.

A. will not be revoked for a period of 60 days. Now, that means that they actually think that there is an offer in existence.

Q. Perhaps. Perhaps.

A. Well, it would be more than a perhaps.

Q. Perhaps they think there is an offer in existence. If there was an offer in existence, and you say it was an open-ended offer, but you say further that you had accepted the offer and had a concluded agreement, it is correct to say that Advent would not sign that letter, isn't that correct?

A. Why would Advent? They weren't party to it.

Q. Sorry, Mr. O'Brien, would you just look at the previous document, which is the fax which Peter O'Donoghue sent to Massimo Prez enclosing this and asking him to sign it.

A. No, but you said that Telenor were going to

Q. Sorry, I beg your pardon, Advent didn't sign this, wouldn't sign this?

A. Go back to the same point, they threw their hands in the air and said, listen, we have had enough of this rubbish.

Q. But

A. It's a very interesting the letter here is helpful in understanding one thing, and that is; Telenor were not accepting that we had an offer if they were asking us to make sure that it was valid for 60 days.

Q. How would Telenor know? They weren't party to anything. You were telling them that, and they accepted it at face value?

A. They had sight of the documentation.

Q. Well, if you look at the document I wonder, are you wholly correct in that?

A. No, no, I am

Q. I am just asking you to look at the document.

"Advent International plc on behalf of its funds under management confirms that it has offered..."

Were Telenor looking for confirmation?

A. They knew what was in the agreement.

Q. Sorry

A. They knew what they were in on the 12th July.

Q. Had Telenor seen the agreement of the 12th?

A. I believe so, I couldn't be a hundred percent.

Q. Who saw it?

A. Knut Haga.

Q. Knut Haga saw it. Did you give it to him?

A. I don't know who gave it to him, but

Q. You are saying Knut Haga

A. Had it.

Q. had the agreement of the 12th?

A. How could he go and talk to Helen Stroud without having knowledge of the documentation?

Q. I think well, well sorry, we'll deal with that in due course. I think Telenor were given access to Advent for precisely the type of legal opinion or confirmation about their funds. I understand that to be the position, but I just want to ask you now

A. There was a spirit of openness with them. We weren't

trying to hide anything.

Q. Are you telling the Tribunal that Knut Haga had the agreement of the 12th July, 1995?

A. I could not be a hundred percent certain, but as far as I can recollect, that he did have a copy of it, or else somebody did show him, one or the other, or explain to him verbally what was in the agreement.

Three

Q. Who would have

A. That would have been probably Peter O'Donoghue.

Q. You think Peter O'Donoghue would have shown him the agreement of the 12th. Very good.

A. Or else he would have, either one, two, three, given him a copy of it, shown it to him or else given him verbally what was in the document.

Q. Oh, yes

A. It's a one, two, three.

Q. Mr. O'Donoghue did send a fax dated the 31st July to Mr. Haga saying that there was an agreement, that in consideration of committing to invest

A. He was only

Q. i.e. £30 million, that there was Advent's entitlement to have 5% of Esat Digifone?

A. But he was confirming what he had already told him, I am sure, verbally, that letter was not

Q. Are you sure of that?

A. From what I can recollect seven years ago, I would be

comfortable that

Q. That Peter O'Donoghue

A. would have told him what was going on with Advent in terms of what we were trying to do. I mean, it's littered all over the documentation.

Q. All right. We'll take that up with Mr. O'Donoghue in due course, and with Mr. Haga.

A. I am sure he will be helpful.

Q. When Mr. Owen O'Connell gave evidence on this period, he informed the Tribunal, at, again, Day 243, page 14, question 55, when he was asked: "Do you know why this particular letter was sent so just the day after?"

That was probably a fairly heated discussion on the phone between Mr. O'Donoghue and Mr. Prelz. We have seen that recorded."

A. The rant.

Q. You describe is as "the rant".

"I think Peter O'Donoghue was still trying his best to square the circle. He was trying, on the one hand, to satisfy Telenor, who were still demanding the commitment they were entitled to under the Joint Venture Agreement of June 1995, and he was also trying to get from, get from Advent that commitment when Advent had said they wouldn't give one. And I suppose, as a minor note in all of this, he was trying to get the commitment in a form which wouldn't oblige him to accept it. Now I am aware from the note I did

later."

So, Advent Mr. O'Connell seemed to be of the view that Advent wouldn't give a commitment?

A. They wouldn't give the letters that Telenor had drafted up, given to Mr. O'Donoghue and sent off to

Q. Can I just ask you why? Just why? If there was

A. Because they had already given an agreement of the 12th July, and they said, we are not giving you anything more.

Q. What was the big problem of giving a letter which really confirmed that? What was the problem?

A. I'd say the problem was they were completely frustrated primarily by the whole process.

Q. Now, Advent were a 32% shareholder in Communicorp, isn't that right?

A. Approximately, yes.

Q. With a 25% voting right?

A. Yes.

Q. Mr. Massimo Prelz was a director of Communicorp, isn't that right?

A. Correct.

Q. It was in the interests of Communicorp to be involved appropriately in this GSM bid, isn't that right?

A. He had a personal commitment to it.

Q. Yes. And here was a man, albeit wearing his cap representing Advent's interests, but that company, having a substantial shareholding in Communicorp, you

are saying just being completely frustrated and throwing his hands up in the air and having a rant because Telenor were looking for a confirmation that there was i<sub>6</sub>1/230 million offered and that that offer would remain open for 60 days?

A. A very important point here: They already believed they had done everything to satisfy Advent.

Q. I understand what you are saying, Mr. O'Brien

A. And in my mind they had, and more.

Q. Wasn't this jeopardising, or potentially jeopardising the submission of the bid?

A. Not at all.

Q. Not at all?

A. Not at all. I mean, this, to me, is just a little epilogue in an overall picture between, of all the different things that were going on for six months in 1995.

Q. Well, I wonder are you correct there, Mr. O'Brien?

Because Mr. O'Connell has informed the Tribunal that,

again, as he continued his answer to question 55 on

page 14 of Day 243: "I was just going to

say" sorry, question 57 "I was just going to say

that on the same day, I am aware that Mr. Bugge of

Telenor was in to see me and he was telling me he was

going to advise Telenor to withdraw."

Now

A. But sure

Q. was that not potentially jeopardising the bid?

A. Not at all. Sure, he was a junior lad. Nice fella, but he was never going to ring back home and say, don't do this on my recommendation. And in fact, he was in the office with Knut Haga on the day that we were putting the bid in, if I recall rightly, and I said "Lads, we are going down to put the bid in, are you coming or not?" And they got out of their chairs, went down and got into the car and came down with me.

Q. So was there something going on whereby they were sitting in their chairs or dragging their feet about going down to submit the bid because of this particular issue?

A. But they were obviously going back to Norway and saying, look, we have carried this as far as we can. We are a partner. They have done their best. And somebody said, well, go down and give the bid in. In other words, they were pregnant. They were pregnant.

Q. I don't understand.

A. In other words, they were committed. There was no way back. They had spent weeks and weeks, their best people over helping to write the bid. We were all committed to giving in the bid, and that was the end of it.

Q. Very good. Now, if I might just recap. There was a Joint Venture Agreement on the 3rd June of 1995 which required you to furnish a financial guarantee for 1/25



million and for half the licence fee, isn't that

right?

A. Mm-hmm, yes.

Q. You approached Anglo Irish Bank briefly in relation to that, without any joy?

A. That's correct.

Q. You then spoke to Mr. Massimo Prelz. And you concluded an agreement on the 12th July of 1995, isn't that correct?

A. Correct.

Q. Advent furnished two letters: One was a letter to Mr. Martin Brennan in the Department, and one was to Telenor, isn't that correct?

A. Yes.

Q. The letter stated, amongst other things, that we had offered, or have offered  $\text{€}1/230$  million for the equity participation, isn't that right?

A. They used the word "have".

Q. "Have", is that right?

A. I believe so.

Q. The agreement was signed on the 12th July of 1995, is that correct?

A. Correct.

Q. You wrote a letter on the 14th July, 1995, wherein to Mr. Prelz, sorry, it's addressed to Mr. Prelz wherein you refer to the agreement, you refer to you recite you refer to an offer of  $\text{€}1/230$

million, isn't that right?

A. That's correct.

Q. And the final sentence is that you inform him that you are accepting the agreement of the 12th July, 1995?

A. That's right. I explained to you that that was trying to demonstrate to Telenor, once again, that we would accept it.

Q. Yes. You have informed the Tribunal that not only did you have an offer from Advent, but that you had a concluded agreement because you accepted that sorry, first of all, you had an offer from Advent which was an open-ended offer, and there were no terms agreed?

A. I had an offer. I accepted the offer.

Q. Yes.

A. And I explained to you it was a double calculation then.

Q. Explain to me the double calculation, please?

A. We had to determine when the funds were going into the company, we would, at that point in time, we determined the value of the licence.

Q. Yes.

A. So, for example, if the licence was maybe 20 or 30 million, you'd add that to the value of our existing business; let's hypothetically call it 100 million.

So they are going to put in 30 million, so 30 over 100, that would be the dilution, but within that 30,

there was also going to be some debt which would be non-dilutive, but it would have a high coupon. If the coupon did not if we did not pay the coupon, well then it would convert into the equity. There was also a liquidation preference, whereby, say, the project was an absolute failure, and we went to sell the business on to somebody, well then they would get their money out first and probably a multiple of their money as well. And those are the kind of terms that I had with Mr. Prelz.

Q. I see. And those and those alone?

A. There may be other ones as well, but I am surmising the key facets of what I understood to be my understanding with Mr. Prelz.

Q. So just explain that to me, so, again, just in one area.

A. And voting as well, sorry.

Q. And voting as well. What had you discussed with Mr. Prelz in relation to voting?

A. That I would have weighted voting.

Q. And did he agree to that?

A. Not unusual. I mean, if you take very large companies around the world, particularly companies like what we were doing; the entrepreneur, the founder would have weighting votes, for example, Rupert Murdoch has more votes in his company than the actual equivalent equity amount.

Q. Did Mr. Prelz agree to that?

A. Yes. This was the whole Irish element.

Q. And this was all in a discussion relating to 30 million?

A. Correct.

Q. And what was the viewed dilution going to result in the shareholding in the company?

A. That was to be determined as part of the piece of calculus.

Q. What would it have been, do you think?

A. No idea.

Q. No idea.

A. I mean, we did well, move the video forward: The business was worth 96/97 million when we did our offering with Credit Suisse First Boston when we had concluded what we had started in May of '95.

Q. Right. So those terms were agreed between you and Mr. Prelz?

A. That's right. Those terms then exploded on two counts: One, the condition precedent, okay? That was one way of us getting out on the 5%. And the second thing is, we had reached concluded an agreement with Mr. Prelz whereby we would demerge our business in December, the 24th, 1995, where the radio went to me, I compensated him with shares, and he got a larger shareholding in the telecoms business. And also, he participated in the equity offering which was put

together in New York by Credit Suisse First Boston

when he joined the other four or five institutions.

Q. All right. Now, you had no doubt that you had a concluded agreement with Mr. Prelz?

A. Yes.

Q. And that related and that was the agreement of the 12th July of 1995, which represented all of these things?

A. Put it into context: I knew, going in for the licence, that I had 30 million in the bag, and that I could meet my commitments as they fell due when we were to get the licence.

Q. Mr. O'Brien, you can say that. I want you to answer the question. That that was the agreement of the 12th July, 1995?

A. Correct.

Q. That agreement?

A. Yes.

Q. That you had with Mr. Prelz?

A. And the letter.

Q. And the letter of the 14th. That is the agreement?

A. That's what was wrapped into it.

Q. Now, Mr. Owen O'Connell has given evidence to this Tribunal, as I have just said, and he was the solicitor acting for you in relation to the concluding of that agreement of the 12th July. And he has given evidence to this Tribunal that that agreement had

nothing whatsoever to do with the  $\frac{1}{2}$ 30 million.

A. Say that again.

Q. Yes. That that agreement, in essence, was that in consideration of furnishing the letters of comfort, Advent would have an entitlement to 5% in Digifone, probably in the institutional block, but that in the event that it couldn't be provided in the institutional block, that you'd have to use your best efforts to make it available anyway?

A. Sorry, what was the best efforts?

Q. That if it couldn't be in the 5% of the institutional block

A. Oh, yes, yes.

Q. that you would have to use your best efforts to make it available to them?

A. Yes.

Q. But that it had nothing to do with an agreement

A. We'd have to open

Q. Sorry, that it had nothing to do with an agreement whereby they were committed to invest  $\frac{1}{2}$ 30 million in Communicorp. Now, that is the evidence of the solicitor who acted for you in relation to that agreement, in respect of that agreement?

A. The agreement had three elements: Comfort letter to the Department; comfort letter to Telenor, no real change; and then the actual 12th July agreement. Now, if he is defining about the 30 million out of the 12th

agreement, whether there was a commitment out of that, I'd have to open up the agreement and try and wade through it or consult with my legal team. But I know, and he was not party to this, and I keep coming back to this in trying to explain to you that I had a conversation, multiple conversations with him, that he was on the hook for 30 million with me if we won the licence.

Q. Ms. Helen Stroud, who conducted the negotiations on behalf of Advent, according to Mr. Haga, has also expressed the view that that particular agreement was nothing

A. You can't say that.

Q. Would you just bear with me for a moment had nothing to do with the 30 million?

A. That's third party, it's more, it's fourth party evidence. In other words, she is saying something to him, he is then translating it, okay, into what he thinks she is saying, okay? And now you are saying that that is what Ms. Stroud that's her evidence.

Now

Q. I am not saying that. I didn't say that.

A. You are saying that she is saying that we didn't have an agreement.

Q. According to Mr. Haga, he is being informed by the solicitors for Advent that that agreement had nothing to do with the 30 million, and in fact, there had

been no offer.

A. But I mean, at length I tried to explain to you that Ms. Stroud was wrong in saying that, and maybe he picked it up wrong. So we really can't hang everything on what Mr. Haga is interpreting in a telephone conversation with Ms. Stroud.

Q. Mr. Massimo Prelz, in the note which Mr. Peter O'Donoghue made, is also saying that there was no agreement and no offer with the  $\text{€}1/230$  million, isn't that right?

A. He is saying well, Mr. O'Donoghue again corrected him and said Massimo, there is an offer there. I mean, I think you are trying to pick bits and paint a big picture, but you have got to actually look at all the other smaller bits to make up the picture.

Q. A letter of guarantee which Mr. O'Donoghue furnished to Advent on the a draft letter to be furnished to Telenor of the 3rd August of 1995 would not be signed by Advent, isn't that correct?

A. I explained to you that we knew that they were never going to sign a letter because they were completely cheesed off.

Q. A letter of the 4th August, 1995, a draft letter furnished to Advent asking them to confirm that it had offered 30 million to Communicorp Group Limited, and asking that this be left open for 60 days, was not signed by Advent, isn't that correct?



A. Very important: This is confirming what was already confirmed.

Q. Confirming

A. Except the first part, because if you open the 12th July, it says clearly that there is an offer of 30 million. So this is an example of people going back to Advent and Advent being completely exhausted by the process and saying, I am not going to write this letter.

Q. No, I just want you to look at this draft very carefully, Mr. O'Brien.

This is not the letter or the draft of the 3rd August seeking the guarantee was to be addressed to Mr. Per Simonsen of Telenor, isn't that correct?

A. Yeah, Per Simonsen

Q. It was to Telenor?

A. From yes.

Q. From Advent, that's what being sought?

A. Yes.

Q. They wouldn't sign that. You then go to the draft furnished on the 4th August, 1995. This is not to be addressed to Telenor. This is to be addressed to the Communicorp Group Limited, in which Advent had a vested interest, a third interest, approximately. And what is being sought here is that they should confirm that they had offered 30 million to Communicorp Group Limited, to its own company, a company which it had an

interest in, and it wouldn't sign that, isn't that

right?

A. This is a young fella running around trying to get letters where people were not prepared to sign.

Q. No, no Mr. O'Brien just look at it, just look at it.

A. I was there. I know.

Q. Just look at it. Mr. Massimo Prelz is sent a fax by Mr. Peter O'Donoghue. Mr. Peter O'Donoghue is not a young fella running around?

A. No, no, I am talking about Mr. Haga. He is doing his job, okay? But everybody is getting so exasperated with them, they don't want to know, we don't want to talk about this any more, I am not signing any more letters, Massimo going with his rant, Peter O'Donoghue trying and trying and trying before the deadline to get a letter that will satisfy Telenor, and it just doesn't happen.

Q. Mr. O'Brien, just look at this very closely.

Mr. O'Donoghue sent a fax to Mr. Prelz, and he enclosed a draft he wished him to sign.

Mr. Prelz it is not addressed to Telenor, it is addressed to Communicorp, and all the letter requests is that there be confirmation that the  $\text{€}1/230$  million has been offered, and that the offer is true and valid until 60 days after the Minister for Transport, Energy and Communications has awarded the licence to Esat

Digifone. So all it is asking is confirm that there has been an offer, and that the offer is open for a period. Now, that is to be addressed to a company in which Advent have a significant financial interest, and Advent wouldn't sign that?

A. That's got nothing to do with it, the fact that it had a significant interest. They have already confirmed what they're being looked for in this letter, and if you're sitting in London or in Italy, or wherever he was that day, you are probably saying, this is mad, I have already executed agreement dated 12th July with an offer of 30 million. What am I writing this letter for? Now, the young fella, Mr. Haga, is running around beating the doors down in a panic to get a letter that will satisfy the financial guarantee.

Q. And you are saying to them at this stage, getting close to it this is the 4th

A. I said to my guys, we're wasting our time.

Q. We are going down with a bid, are you staying there?

A. Correct. That's brinkmanship.

Q. They are under pressure, they either did it or the bid didn't go in?

A. You are in or you are out. Very simple. And that's the way things like this work. Either you're in and committed and you move forward, or else you reverse out. But they were on the best deal of all time because they weren't funding the full 100% of the

costs. They weren't fulfilling even half the costs at the time. They were doing a small percentage. We had already risked the capital.

Q. You see, with the exception of you, Mr. O'Brien, everybody else who appears to have been involved around this issue between yourselves and Advent

A. I'm pulling the strings.

Q. Just, if you listen to the question first is clearly indicating that not only is there no agreement, but that there is no offer. Would you agree?

A. Peter O'Donoghue doesn't agree with that.

Q. Very good.

A. I don't agree with it. We were the executives. We were the guys pulling the strings. We were the people in the command tower, if you like to call it, calling the shots.

Q. Your solicitor has given evidence about this. We see from Mr. Prelz's reaction, and we see their refusal to sign the two letters which were furnished on the 3rd and the 4th

A. You should open up the letter that Mr. O'Connell wrote to Telenor explaining to them

Q. I have every intention of doing so.

A. Okay. Because it will be helpful to everybody.

Q. Because to be honest with you, it seems at first sight, to be confirmation of the view he has expressed

in evidence?

A. It shows the position that Telenor was in at that time, which was a very favourable position, but you have got to say you have got to think of it and expand this and say, there was an offer, and Denis also had negotiated outline terms in principle for, when I needed the money that I could call upon it irrevocably from Mr. Prelz.

Q. I have every intention of coming to that in due course, and the evidence of Mr. O'Connell, particularly when he was asked about that by Mr. Fitzsimons on behalf of Telenor. Every intention.

A. Good, okay.

Q. But around this time, and from documents we have looked at, with the exception of you as principal

A. Sorry, I mean hold on now, I said Mr. O'Donoghue, but I think the Esat/Communicorp would have been as one.

Q. The Esat/Communicorp people as one. The Advent people do not appear to be supporting that position, isn't that correct?

A. They are really saying we are not signing anything else, which is evidenced by them not signing up to any of these letters, the rant, everybody getting upset and exasperated.

Q. May I ask you this: When you went to Advent, having failed, and there is nothing wrong with that, with

Anglo on the guarantee issue

A. Yeah.

Q. you were looking for a letter of guarantee, that your discussion with them was along those lines?

A. No, I said to them, we have to satisfy them.

Q. May I ask you this: Why did you get a letter from them addressed to Mr. Martin Brennan in the Department?

A. Because we needed that also for the bid.

Q. What did you need for the bid?

A. Well, if you look at the terms of reference, or the RFP, we had to show financial capability or capacity, I can't remember which word it was, or similar, and we wanted to demonstrate that we had that, and over-demonstrate it because we never needed 30 million.

Q. I beg your pardon?

A. We never needed 30 million.

Q. And you went to them, so, for two reasons: One was to try and satisfy Telenor, and the other was to get a letter from them

A. For the bid.

Q. for the bid?

A. Yeah, and the letter was similar in the bid to what Telenor received.

Q. And what went in with the bid was the letter addressed to Martin Brennan, dated 10th July, and your letter of

the 14th July, isn't that correct?

A. I don't remember putting in the 14th letter.

Q. The only reason I ask you about that is because

Mr. Arve Johansen makes reference to that in a letter he sent to you dated 2nd October.

A. I would have to open up the correspondence. I'm

Q. Yes. But the agreement dated 12th July did not go in with the bid, did it?

A. I don't believe so. It wasn't relevant.

Q. Now, as far as you were concerned, you had accepted the offer from Advent, and you say all the Communicorp people were together in that regard, is that right?

A. Well, Peter O'Donoghue wasn't disagreeing with me.

Q. Would you go to Tab No. 30, please.

Now, you had, you have told us, a concluded agreement, subject to working out the calculus on the issue?

A. It was just a formula. We said, here is the formula, and once we reach that stage we know the key formula.

Q. But there had been offer and acceptance, and the main terms had been agreed between you, is that right?

A. Yes.

Q. Now, you wrote to Amund Bugge on the 4th August, 1995, at Tab 30.

"Dear Sirs,

"We wish to confirm that we have received an offer from Advent International Corporation Limited of funds sufficient to perform our obligations in respect of

the bid. We wish, however, to seek alternative sources of funds because the terms of Advent's offer are unfavourable to us."

What does that mean, Mr. O'Brien?

A. It means that we had an offer. We accepted the offer.

And we had a formula, but the terms were very unfavourable.

Q. Mr. O'Brien, could I just ask you to take this slowly.

You have just told the Tribunal that you had a concluded agreement

A. Mm-hmm.

Q. with Advent?

A. Yeah.

Q. That agreement was subject to sorting out the nuts and bolts, one that was definitely concluded?

A. We had accepted the agreement that we would negotiate, or finalise the 30 million, but they weren't I mean, what I'm saying here is that the terms were not

Q. But you agreed these terms, you told me a few moments ago?

A. Outline

Q. You agreed them?

A. Outline terms were agreed.

Q. You agreed those. You had an agreement?

A. Outline terms were agreed.

Q. What's the difference?



A. But I had a right to if if there was a better deal, I could take it.

Q. Was that agreed

A. Yeah.

Q. between yourself and

A. Mr. Prelz.

Q. Tell me about that now.

A. Well, he you see, he had a right to participate he had an offer there was an offer round provision in the documentation, where if there was further funding, you got better terms, he would have to either match them and take up the shares or pass. So effectively here, really what I'm saying is that the terms weren't that favourable, but if I got better terms I could go back to him again, and ultimately that's what happened.

Q. No, what Mr. Prelz had was a privilege under the agreement of the 12th, that he was entitled to invest or to provide funds, if it was going in in the form of debt into the company, on agreed terms or on terms similar to the most favourable terms that you could obtain, isn't that right? It was a right, and it was a privilege which Mr. Prelz had, isn't that right?

A. I am just trying to read this letter then because

Q. I'd like you to comment on it in light of the evidence you have given.

CHAIRMAN: Well, I think it's reasonable that

Mr. O'Brien read that letter. We are at five to one.

I think it's preferable we defer until ten past two.

MR. McGONIGAL: There is just two matters that slightly concern me, and I suppose I should just draw them to your attention.

First of all, in relation to Helen Stroud and whether or not there was an agreement, Mr. O'Connell at 242, transcript 243, question 41 appears to deal with that.

And he seems to give an explanation that, "yes, although when she says there was no agreement, I think she is meaning there is no legally binding agreement for the provision of the 30 million, rather than there was no agreement at all" because, in fact, there were a series of agreements, and it seems to be, that that part of his evidence should also be borne in mind.

The second matter that is causing me some little interest is that in the fax of the 3rd August of 1995 from Peter O'Donoghue to Massimo Prelz, the document says: "Telenor have requested us to provide them with a slightly reworded financial guarantee from yourselves. I attach the requested wording. I do not believe the attached is any more onerous than what you already previously provided us with."

And if I could stop there and gently inquire as to whether I am right in assuming that what that is referring to is the letter to Mr. Haga of, I think it's the 10th July, where he refers to the fact, where

Massimo Prelz confirms that they have offered 30 million to Communicorp, because if it isn't, I will be curious as to whether the Tribunal has the document which is referred to in that sentence, because those documents seem to run together, should be read together and have a simple explanation when taken together.

CHAIRMAN: I'll reflect on that over lunch, Mr. McGonigal. Thank you. Ten 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:

MR. McGONIGAL: Mr. Chairman, just before Mr. Coughlan

I know Mr. Coughlan is going to start on a document which he has just handed to us which the Tribunal turned up over lunch and seems to relate to some of the matters that have been under discussion.

CHAIRMAN: Yes.

MR. McGONIGAL: And should properly be considered with those documents. Two matters, Mr. Chairman. First of all, Mr. O'Brien has only been handed a document and hasn't had an opportunity of either considering it or considering it in relation to the document.

On a more general note, can I, in the spirit of cooperation, make a point that is of concern to Mr. O'Brien and also to ourselves, that I know that

there are a huge number of documents which are in the possession of the Tribunal. We are concerned, we have expressed our concern in relation to the fact that we have only got one-sixth or one one-seventh of those documents and we are concerned that within the remaining documents there have been and are material which are relevant to issues which are not only current but have been tried. And while I appreciate that the Tribunal are doing more than their best to keep everyone abreast of what is happening, there is just a slight concern that every now and again documents are coming at us. We are not saying we are not being given time to consider them. I am just concerned that there are documents which may be missed which will be of relevance to the issues. I suppose that is the way I would put it, because I know that the Tribunal will give time to the witnesses to consider them. I just want to lay that gentle marker down at the moment, so, if I may.

CHAIRMAN: Yes. Yes, very good.

MR. COUGHLAN: As My Friend says, it is as the evidence emerges in the course of an inquiry that the focus may shift one way or the other and something may come into greater focus. This particular document, I appreciate My Friend's point.

CHAIRMAN: Well, I certainly accept that unless Mr. O'Brien was particularly anxious to deal with it

today, it would be unfair to expect him to face it on-the-hoof, so to speak.

MR. COUGHLAN: Absolutely. I should just explain that this particular document was found in Communicorp documents, it wasn't that it came from anywhere else. And the search was prompted by comments made by My Friend before lunch, and we set about looking at all the documents again.

CHAIRMAN: Yes.

Q. MR. COUGHLAN: Now, I think we were, before lunch, Mr. O'Brien, at Tab 30 looking at a letter dated the 4th August, 1995, which you had sent to Mr. Bugge, who was of Telenor. And I think I just opened it to you.

"Dear Sirs,

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

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

Now, can you assist the Tribunal about that letter?

A. In what particular way?

Q. Well, what does it mean?

A. It is a letter from me to Telenor with one of the young fellas, not Knut Haga, Bugge I think he was a legal guy.

Q. Mr. Bugge, in fairness to him, Mr. Bugge?

A. Mr. Bugge.

Q. Yes.

A. And I am confirming that we have received the offer from Advent and we wish, however, to seek alternative sources of funds because the terms of offer were unfavourable to us. I think the point I would make in that first paragraph is that the offer from Advent remained in place and they had this right to match or not to match, which is ultimately what they did. And I go on to say, "We are aware of your concern", that Communicorp would have the funds, and if we don't get those funds, if we don't, obviously if we yes, if we fail to raise other funds, then we will fall back on the Advent agreement.

Q. I see. "We will accept and conclude Advent's offer of funding."

A. That's correct. So we have accepted it already and we haven't concluded.

Q. No, read the wording carefully, Mr. O'Brien: "We will accept..."

A. Yes.

Q. "...and conclude"?

A. Correct.

Q. So clearly what you are saying there is that they have not been accepted?

A. Well, can we look at the letter where I said we have accepted. What tab is that?

Q. You told us you have accepted it. I will go back to that.

A. It is Tab 23: "We would like to confirm acceptance "

Q. " of the agreement of the 12th of July."

A. Yes.

Q. Right. That is what it states?

A. So we have already told that to

Q. You have told Advent?

A. to Advent.

Q. Sorry?

A. Now we tell Telenor.

Q. No, can we just take this very slowly, Mr. O'Brien, now. You told Advent in that letter of the 14th July, 1995, that you accepted the agreement of the 12th July, isn't that right?

A. That's right.

Q. You have told us in evidence that that, in your mind, was an acceptance of the offer of 30 million, is that right?

A. Correct.

Q. And you told us that you had agreed the terms verbally with Massimo Prelz, subject to a bit of calculation?

A. Well, yes.

Q. That is what you told us. Now I want to know what this letter is all about so?

A. Well, Mr. Coughlan, let's be very clear; just a bit of calculation plus, you know, what the dilution was and everything else.

Q. Yes, but you have told us of all of that?

A. Yes.

Q. So as far as you were concerned, you had a concluded agreement with Advent?

A. Correct.

Q. Now, what you tell Communicorp Group here or what you tell Mr. Bugge here is that, "We confirm that we have received an offer from Advent."

A. Well they knew that already, yeah.

Q. "We wish, however, to seek alternative sources of funds because the terms of Advent's offer are unfavourable to us."

A. That's correct.

Q. So you had concluded an agreement with Advent on terms which were unfavourable to you; that was a concluded agreement, is that right?

A. Well, we are saying that, you know, they are not as favourable as we thought that we might achieve in the



event that we won a licence and as I said to you before lunch, we were entitled to go and seek better offers and then negotiate with Telenor, with Advent on that basis.

Q. All right. You then go on to say, "We are aware of your concerns to ensure that Communicorp has access to sufficient funds to perform its bid obligations and accordingly agree that if we fail to raise sufficient third party funding in time to provide Esat Digifone with funds, as accepted by the bid, we will accept and conclude Advent's offer of funding."

It is very clear language, Mr. O'Brien?

A. Very clear.

Q. Isn't it as clear as a pikestaff that what you were saying here is: I have an offer, I haven't accepted because the terms are unfavourable and I want to look for funding somewhere else, but if I can't get that I will accept the offer?

A. I am only confirming to him what I have already told Advent and I am saying that we will accept and conclude.

Q. Mr. O'Brien, listen to the question, Mr. O'Brien, please, now. You have told us that you accepted the offer from Advent, isn't that right?

A. That's right.

Q. What you are telling Mr. Bugge here is that you have received an offer from Advent and that if you can't

get better terms as to financing somewhere else, you will accept that offer and conclude the agreement, isn't that what you are telling Mr. Bugge?

A. That's right.

Q. And isn't that clear evidence, Mr. O'Brien, out of your own hand, that you had not a concluded agreement?

A. No.

Q. All right. Now, if you

A. You are missing the point, you see.

Q. I am missing the point? Well, please explain to me.

A. There are two parts of the 12th July or the letters of comfort. They make me an offer, and then I have all the verbal stuff that I have agreed with Mr. Prelz, okay? So I am saying that we will agree everything in this letter, like, we will accept and conclude with Advent, and that is the important point here because the other letter talks just about the terms of the 12th July. I am talking about the whole package.

Q. But, Mr. O'Brien, over yesterday afternoon and this morning you have told us over and over again that you had a concluded whole package agreement?

A. We did, yeah.

Q. Right. You had that?

A. Yeah.

Q. But what you told Mr. Bugge on the 4th August was that you had an offer, but that if you couldn't get better terms somewhere else, you would accept the offer and

conclude the agreement with Advent?

A. We are saying here

Q. They are two different things completely?

A. They are not really at all, no, because I am saying here, if we don't get third party finance we are going to run with the Advent offer and conclude it.

Q. Would you repeat that please, just so I can be clear what you said?

A. If we don't get third party, sufficient third party funding, we will we are going to run with the Advent offer and conclude it.

Q. No, the word the words are "accept and conclude"?

A. No, I didn't say that, I said if the stenographer could read what I just said.

Q. Sorry, I am looking at the letter.

A. But you asked me what I am saying.

Q. I beg your pardon, I am sorry.

A. It is different.

Q. The letter clearly says, "We will accept and conclude Advent's offer of funding," doesn't it?

A. I am trying to translate this letter where we were eight years ago, so I am trying to help you and say

Q. Oh, I know that. At the time that you were writing this letter were you receiving legal advice?

A. On this specific letter, I don't know.

Q. This was the 3rd and the 4th August; had Mr. Gerry Halpenny not become, in effect, the Communicorp

solicitor? Mr. Owen O'Connell was now, for GSM purposes, the Digifone solicitor?

A. We had a number of different solicitors working for us at the time apart from Frys.

Q. Can I ask you this, without applying a legal standard to it: in commercial terms, wouldn't it convey to any man of commerce that the uses of these expressions 'I have received an offer, if I can't get better terms I will accept the offer and I will conclude the deal', you don't have to be a lawyer to see that there is an offer but not accepted, isn't that right?

A. You see I don't think there is anything wrong between the two letters. If you actually put them side-by-side they complement each other.

Q. Very good.

A. One is I am saying to Advent I am accepting, okay. And here I am saying, I am going to accept and conclude. So if this is a major point

Q. They are two different

A. for the Tribunal, I am lost.

Q. No, Mr. O'Brien, I am asking: "We will accept..."

A. "...and conclude..."

Q. "...and conclude Advent's offer of funding."

A. The way the words are

Q. There are two sentences?

A. The way the words are, "We will accept and conclude"; that is what I said in the other letter because I am

saying I am accepting your offer. Then I am saying to these people, by the way, I will accept and conclude the agreement.

Q. Might I suggest to you, Mr. O'Brien, that is a fairly tortured explanation for this agreement?

A. No, it is not. You are being tortuous, I think, trying to develop something out of two letters which is nothing.

Q. I want to stop now and just recap. Did you or did you not inform the Tribunal that you had received an offer of  $\frac{1}{2}$ 30 million from Advent in the agreement of the 12th July, 1995?

A. You know the answer; yes.

Q. Did you not give evidence to the Tribunal that by your letter of the 14th July, you say that you accepted that offer?

A. To Advent, yes.

Q. Yes. Did you give evidence to the Tribunal that when you were questioned about the terms of the offer, that you had discussed and negotiated the terms verbally with Massimo Prelz subject to certain matters being finalised?

A. Parameters.

Q. Did you say that to the Tribunal?

A. Yes.

Q. And did you say to the Tribunal that as far as you were concerned, you had a binding enforceable

agreement with Advent?

A. Correct.

Q. Why, then, are you telling Telenor, on the 4th August, that you have an offer from them, that you wish to get the terms are unfavourable, that you wish to get funding somewhere else, but if you can't, you will accept the offer and conclude the agreement?

A. This is the most the biggest disconnect we have ever had.

Q. I see.

A. Because what you are forgetting is that we were entitled to seek better offers which were the third parties.

Q. I am not disputing that at all.

A. I am this letter is a very helpful letter.

Q. This letter is a very helpful letter because you say to Telenor "I have an offer".

A. I have an offer and I will accept it if I can't get better terms from somebody else.

Q. Exactly. That is precise?

A. What is wrong with that?

Q. But you have just told us that you had a concluded agreement, Mr. O'Brien. Do you see the difference?

A. No, because I am saying I have one in the bag, an offer in the bag with parameters and then I can go off and get a better one if I want it. Now that is business, Mr. Coughlan, there is nothing strange about

that. I think you are looking at it far too

legalistically.

Q. May I ask you this, Mr. O'Brien, just simple English:

is there a difference between "I have accepted" and "I will accept"?

A. It depends who you are writing it to.

Q. Thank you.

A. It is not a black and white answer. You are looking at things black and white. I can't look at things

black and white, Mr. Coughlan. I would never be where

I am in terms of building a business if I was black

and white. You are looking at the two things narrowly

from a legal point of view.

Q. Can I ask you this, Mr. O'Brien, and I don't think I am looking at it from a narrow legal point of view:

Do you understand the distinction between something

which has occurred and which will occur in the future?

A. It depends what we are talking about.

Q. I see.

A. The offer occurred and I will conclude it in the future.

Q. I will accept

A. Accept and conclude, but the proviso is, and I have

always said this, now I have said this this morning,

and I think yesterday, that we were entitled to seek a

better offer.

Q. Mr. O'Brien, all I want to be clear about, to

understand you on this point; do you understand the difference by saying I have done something in the past and I will do something in the future?

A. It depends who you are saying it to, who the party is.

Q. Well, take it on the basis that they can understand normal language?

A. Advent, I have said I have accepted it and then I say to Telenor, look, if we don't get the third party finance, I will accept and conclude.

Q. All right. Very good, Mr. O'Brien. Very good. We will go to Tab 31, so, Mr. O'Brien. And this is a note of Mr. Gerry Halpenny, who was now acting as Communicorp's solicitor in William Fry?

A. That's correct.

Q. And it is a note. "Amund Bugge/Gerry Halpenny." It is a note that, or it is a note of a conversation or a meeting he had with Mr. Bugge.

"Opinion re Advent offer"

A. We don't know whether have we had confirmation that this was a discussion or a phone call or what was it?

Q. Well, it is probably immaterial whether it was a face-to-face or

A. No big point here, okay.

Q. a phone call, but it is Mr. Halpenny's point, and again it is the practice of a solicitor keeping a note of important matters.

"Opinion re Advent offer to be provided.



"Ask DOB for Advent International offer/agreement.

That is legally binding on Advent.

"Peter O'Donoghue/Denis O'Brien re Advent

International offer."

Then obviously something that Mr. Halpenny is making clear.

"Made clear OO'C" that is Mr. O'Connell "has not seen Advent offer."

MR. MCGONIGAL: Mr. Chairman, it is Mr. O'Connell's note, is the evidence.

CHAIRMAN: Sorry, Mr. McGonigal?

MR. MCGONIGAL: I beg your pardon, I think this may be Mr. O'Connell's note.

Q. MR. COUGHLAN: I think you are right. This may be Mr. O'Connell's note. And he is at a meeting or a discussion with Mr. Bugge and Mr. Halpenny. Nothing turns on that, I don't think.

A. No, nothing turns on any of this stuff, but we will keep going.

Q. Why is that?

A. Because I don't believe that this maybe in your mind that is a very, very big factor, okay, about Advent, 12th July and all of that, but it is explodable and it does explode now. Whether the next step really is we were sent off in a different direction because we had to go for Plan B, I think that is probably more relevant.

Q. What is Plan B?

A. Plan B is IIU.

Q. When was that plan worked out?

A. In August.

Q. I see. So there wasn't a Plan B before this, was there?

A. Well, we thought we had satisfied Telenor on the 12th July and we thought then in the subsequent week or two, with all the other correspondence going backwards and forwards, that we could persuade them of the strength of what they were getting and then there was this cultural disconnect.

Q. Right. But sorry, and I am glad My Friend intervened there because Mr. O'Connell, this is his note; he has not seen the Advent offer?

A. Well, this is the part of the 12th July, the second part which was the verbal offer, so

Q. Well, sorry

A. it backs up the fact that there was an agreement.

Q. Will you just

A. I am trying to help you now.

Q. Mr. Bugge and Mr. Halpenny are present. "Opinion re Advent offer to be provided" that seems to be a request from Mr. Bugge or from Telenor. You can take it that that is so; Mr. O'Connell has given evidence to this effect?

A. I haven't seen his evidence, so I don't know.

Q. "Ask Denis O'Brien for Advent (sic) offer/agreement.

That is legally binding on Advent."

Sorry, I beg your pardon, "Ask Denis O'Brien for

offer/agreement..."

A. "That is..."

Q. "...That is legally binding on Advent."

A. Do you think that is a statement?

Q. Sorry. "Ask Denis O'Brien for Advent

offer/agreement."

A. Yes, "That is..."

Q. "...That is legally binding on Advent."

A. So he is confirming that he had a view that it was

legally binding.

Q. No, I don't know.

A. It looks to me.

Q. He is certainly asking for an agreement, isn't that

right?

A. It is the second part, it is the oral agreement that I

had, yeah.

Q. Just be clear about this now, just be clear about

this. Mr. O'Connell knew all about the agreement of

the 12th July. He participated in it as your legal

advisor, isn't that right?

A. That's correct.

Q. So he knew about the letters of comfort and he knew

the wording of the agreement. And here is, "Ask Denis

O'Brien for offer/agreement." So we have

Mr. O'Connell, your solicitor, who had participated now asking for an offer or agreement. It can't be the 12th July one, Mr. O'Brien; you understand the point?

A. You are precisely making my point that this is the second part of the agreement.

Q. The second part of the agreement. Very good. What second part of the agreement are you talking about now?

A. The one I have referred to all morning.

Q. Well you have told us, and I have tried to listen to you very carefully, you have told us that the offer of 30 million is in the agreement of the 12th July, 1995?

A. Anybody can see that now.

Q. Well, obviously Mr. O'Connell didn't?

A. Well, I am saying to you that I had an offer for 30 million.

Q. All right.

A. Plus I had the second part of the agreement which was oral.

Q. Then, "Peter O'Donoghue/Denis O'Brien re Advent International offer. Made clear OO'C has not seen Advent offer."

A. And then we say that is really binding on Advent.

Q. No, sorry, "OO'C has not seen Advent offer."

A. The second part, yeah. Correct. And he is saying here, "Made clear OO'C has not seen Advent offer", which is the second part. Like, it is very difficult

for you it is difficult for me, but this is eight

years after the event and

Q. I don't think it is difficult for me at all,

Mr. O'Brien.

A. These are four lines.

Q. It is not difficult for me at all Mr. O'Brien. You

have told the Tribunal, and I understand clearly, that

you said that the offer of  $\frac{1}{2}$ 30 million was in the

agreement of the 12th July, 1995?

A. In the comfort letters.

Q. Mr. O'Connell had been involved in the negotiation of

that particular agreement. He saw the comfort

letters. He understood what they were. He knew what

the agreement was about, and he not seen any Advent

offer?

A. But I am telling you that he was not part I mean,

maybe I am not making myself clear to this inquiry.

Q. Right

A. But I am saying that he was not party to this

conversation that I had subsequent to the comfort

letter on the 12th July.

Q. I understand your point.

A. What is this all about?

Q. I understand your point about that, Mr. O'Brien. You

were saying that there were terms agreed between

yourself and Mr. Prelz?

A. And I didn't tell Mr. O'Connell, I didn't tell

Mr. O'Donoghue, they were part they were discussions that I had with Massimo Prelz, and there were plenty of them at the time with the parameters and everything set up, so that if we didn't succeed with other finance, that we could come back to him.

Q. So you didn't tell Mr. O'Connell about them and you didn't

A. I didn't go into the terms, no.

Q. And you didn't tell Mr. O'Donoghue about them. Fine.

A. No, just didn't go into the terms of them.

Q. Fine. What this is recording here, that he hasn't even seen the offer and you say that the offer is in the comfort letters and the agreement of the 12th July. I am just pointing out to you the solicitor who was involved in that didn't see that offer?

A. But he has always said that he wasn't party to the discussions. Don't get excited with me now.

Q. I am not, Mr. O'Brien. I am just asking you

A. I am trying to help you.

Q. could you distinguish between the offer and the terms, the terms you say were part of a discussion that went on between yourself and Mr. Prelz; the offer you say, is contained in the letter of comfort and in the agreement of the 12th?

A. There is two parts.

Q. Yes. That is right.

A. I am saying you take the totality of the two parts.

Q. I am asking you now to concentrate on the two parts for the moment because there is the offer and there are the terms you say that were discussed between yourself and Mr. Prelz?

A. Yes.

Q. Yes. Isn't that right?

A. Yes.

Q. What Mr. O'Connell is talking about here is the offer. He didn't see the offer.

A. I have confirmed to you I didn't tell him.

Q. Mr. O'Brien, I will repeat it once more and once more only. You have told us that the offer is in the comfort letter and in the agreement. Mr. O'Connell knew all about those; he was involved in them. There was no offer that he could see in those agreements in that agreement or in those comfort letters. That is what I am trying to point out to you. I am distinguishing the second part, the discussion of terms?

A. He was only the first part. I was in the first and the second part.

Q. I won't take it any further, Mr. O'Brien.

Now, go to Tab 32, please. And this is a letter from Mr. Halpenny to Mr. Peter O'Donoghue. Do you have that?

A. That's right.

Q. And he wrote to Mr. O'Donoghue.

"Dear Peter,

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

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

I trust this is in order."

Were you informed of this?

A. I was informed that, by my lawyer that because of Clause 4.2, certainly Advent International hadn't lived up to what they said they would do.

Q. But tell me about that discussion, because you said that when Massimo Prelz had the rant; that he believed that he had done all that could be done and you believed he had done all that could be done, and that it was Telenor who were being the unreasonable ones, isn't that right?



A. Well, this is my lawyer informing us that there is a breach, in that they haven't satisfied Telenor, but we were still in the mode of trying to satisfy Telenor.

Q. Mm-hmm. Tell me about the discussion about this.

A. I can't.

Q. It invoked

A. I can't recall a specific discussion, but I didn't pay much attention to this because it just really didn't interest me at that time. I was getting ready to put the bid in. It was the day of the bid. I was more interested in now going for a drink than reading a letter on the 4th August from my lawyers.

Q. Mmm-hmm. But on if you go to Tab 34 for a moment now, please, and there is a note here. Do you see that?

A. Yes, that is my handwriting.

Q. That is your handwriting.

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

So did you have that conversation with Mr. Prelz?

A. If I kept that note I would have, yes.

Q. What was his reaction?

A. Not much.

Q. Not much?

A. No. I mean, we were two shareholders together. I said Look, Massimo, they are still not happy with you and they haven't been satisfied by the correspondence, the letters or the agreements.

Q. Why did you keep a note of it so if that was just that sort of a

A. Because I was aware that Mr. O'Connell, on the 11th, prior to the 11th August had told me that basically they hadn't lived up to their clause, but I was just, out of courtesy, telling him what I was being told by my lawyers; that was our interpretation of it.

Q. That the agreement had been breached by Advent, is that correct? That is the note, isn't it?

A. Yeah yeah. Because the letters that they gave didn't satisfy Telenor.

Q. Right. I then want you now to go to, as you correctly pointed me to before lunch, Mr. O'Connell's long letter at Tab 35. Sorry, I beg your pardon

A. He talks about the enforceability of Advent's offer to EU (inaudible) funding. The offer is verbal.

Q. Yes. I will come to that. I beg your pardon, I just want to go back for a moment. Sorry, if you wouldn't mind going back to Tab 32 again, it is Mr. Halpenny's letter to Peter O'Donoghue.

You see the second paragraph. "We also discussed at

our meeting" sorry, the first paragraph.

"I enclose for your attention a copy of the letter handed over to Amund Bugge today" that is your letter of the 4th August; we have already looked at that letter.

Now, you are indicating in that particular letter to Mr. Bugge, or sorry, yes, to Mr. Bugge, and I am not going to go back over it again, that if you can't get better financing somewhere else, you will accept and conclude the Advent International offer, isn't that right?

A. Summarising, yes.

Q. Summarising it, yes, is that a fair summary of it? And on the same day there is a meeting taking place: "We also discussed at our meeting this morning what steps should be taken with Advent International regarding the funding of the GSM company. As you will recall, Owen O'Connell is strongly of the view that the condition in Clause 4.2 of the agreement dated the 12th July, 1995 has not in fact been satisfied and that you should very strongly consider sending a letter along these lines to Advent International stating that as that agreement is not satisfied, the agreement of the 12th July, 1995, is of no further effect."

Now, you had told Telenor on the day, on that day that you wanted to leave the Advent offer open or

agreement I am not going to get into a dispute with you about that, and here there is a discussion taking place about notifying Advent that they had breached Clause 4.2 of the agreement?

A. Well, it was he was strongly of the view, I mean we this is a pretty serious thing. We would need to have a pretty big discussion about that.

Q. What was the discussion about? Tell me about it?

A. Well, I can't recall the full discussion, but you know, Owen is saying that he is strongly of the view that the condition in Clause 4.2 has not been satisfied.

Q. Was there a discussion around trying to remove Advent from the picture altogether?

A. Not at that time.

Q. At this time?

A. Not at that time.

Q. Why were you discussing Clause 4.2 at all so?

A. Because he was just, in passing, telling us: Look, guys, 4.2, you know, they haven't satisfied that yet, and then maybe he was trying to get us to try and get Advent to cure the problem and then I had a conversation with Massimo on the 11th and I told him about the problem again.

Q. Would you not agree, Mr. O'Connell, (sic) that to receive a letter or, Mr. O'Brien, that to receive a letter from your solicitor, and it does relate to

legal matters, expressing a view that Clause 4.2 of the agreement dated the 12th July has not been satisfied and that serious consideration should be sent, should be given to sending a letter to

A. It doesn't say "serious", it said that you should very strongly consider.

Q. "...along these lines to Advent International" just bear with me "stating as that agreement was not satisfied" the agreement of the 12th July, 1995 "is of no further effect"?

A. He is just doing his job making us aware that they still haven't fulfilled it.

It is not a big deal, this. Like, nothing rests on it for me.

Q. Well, Mr. O'Brien, the day the bid went in there was serious discussion taking place about removing Advent from the picture, I suggest to you?

A. No, there wasn't. How could you deduce that from that?

Q. In effect, that they were out?

A. No, they weren't.

Q. Clause 4.2 had not been satisfied?

A. They were in.

Q. Very good.

A. And I my partner Mr. Prelz, I told him on the 11th, listen, Massimo

Q. Go on.

A. you have breached the agreement. You have got to cure it.

Q. Yes. "On the 11th August, Denis O'Brien met Massimo Prelz in Dublin. Denis O'Brien told Massimo Prelz that Telenor weren't happy and wanted a better letter."

A. We were still trying to get a better letter for them.

Q. Did you ask for a better letter?

A. Of course I did.

Q. Did you ever write and ask for a better letter?

A. Unless it is in the files, I can't recall.

Q. "Denis O'Brien told Massimo Prelz that the agreement between you and Advent had been breached by Advent as Telenor had not been satisfied by the letter."

Well we will have a look at the files and see if you had asked for a better letter?

A. I don't know if there is or not.

Q. Right. We then go on to Mr. O'Connell's letter now.

A. This is the 11th August.

Q. The 11th August.

"Dear Denis,

"As discussed, I had a call at 2 p.m. today from Amund Bugge. He asked whether I was in a position to provide him with the opinion which he had requested last week as to the enforceability of Advent's offer to you of funding. You will recall that because the offer is verbal, it is not possible for me to give any

such opinion. I replied that, having discussed the matter with you, after my last meeting with him, I had taken no further action on the matter as I understood that you would be in touch with his clients directly.

Mr. Bugge expressed surprise, saying that he had spoken to you earlier today on the subject, and believed as a result that I was progressing the matter." That is Mr. O'Connell. "He also told me that his client had instructed him to pursue me for the opinion (you will recall that when he left me last Friday he said that he would be advising his clients to pull out of the transaction altogether this appears not to have happened).

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

The final matter is the PS the PS is unimportant.

A. Can I just read this, sorry, I was trying to read it when you were saying it.

Q. Yes, please do.

A. Okay.

Q. What Mr. O'Connell is talking about there is not the agreement of the 12th July of 1995, isn't that correct?

A. He is probably referring to the second part, yeah.

Q. No.

A. The verbal offer.

Q. No, he talks about the offer. You say the offer is contained in the letter of comfort and in the agreement, Mr. O'Brien?

A. Mr. O'Connell is saying here

Q. You have told him obviously that there is a verbal offer which is something different, is that right?

A. Well, he is saying here two parts; that he had "requested last week as to the enforceability of Advent's offer to you of funding." Now, I think that's the 12th and the letters, the comfort letters.

Q. No, clearly not, clearly not, Mr. O'Brien.

A. Well, we may disagree on that point.

Q. It is not us disagreeing, it is Mr. O'Connell and you. Mr. O'Connell was your solicitor?

A. I will you are saying no, I am saying perhaps.

Q. Look at the next line.

A. "You will recall that the offer is verbal." Now, is he talking about the verbal offer or the offer that was contained in the comfort letter?

Q. What do you think?

A. I don't know. It looks as if he is talking about two different things here. He is talking about enforceability of the letter of comfort, the 12th July agreement, and then he is talking about the verbal



offer that I had, the agreement with Massimo on the second part of the deal.

Q. Look, what Mr. O'Connell is clearly referring to here, and as he said in evidence, was, he is not referring to the agreement of the 12th July, 1995, or to the comfort letters. He is referring to something completely different. Now

A. I think you would have to open up the transcript on what he is saying on this because you are saying things to me about somebody else saying what they said to you. I mean...

Q. Mr. O'Brien

A. It is farfetched.

Q. Mr. O'Brien, what is farfetched? Look at the letter, Mr. O'Brien, and I will now come to Mr. O'Connell's letter of the 17th August which he writes on your behalf to Telenor.

If, as you have told us, Mr. O'Connell was referring to the comfort letters and the agreement of the 12th July and your letter of the 14th July, as being a concluded agreement, he would have been in a position to know about that because maybe not your letter of the 14th July but he knew about everything else; he wouldn't have to ask about it?

A. You see, this is the point that you were making yesterday and today and you are saying that Mr. O'Connell felt that the agreement was not legally

enforceable and I had a completely contradictory view because of the other elements, we will call them the other elements, so he couldn't write an opinion on the other elements because he didn't know anything about them.

Q. He couldn't write an opinion at all?

A. Well...

Q. And we know he couldn't?

A. Well, I think

Q. He told us he couldn't?

A. I think you have to put that into the context that my experience of lawyers now, apart from Senior Counsel, that is their gig but lawyers hate to give opinions, written opinions like solicitors. Like, if you are in a commercial transaction, normally in the night of the closing everybody is looking for opinions, most of the lawyers are ducking and weaving not to give the opinions because they don't like to give opinions because they have to go back to a committee in the practice before they actually give the opinion in most cases. So you have got to put that within the framework of this letter and say, well, was Mr. O'Connell really keen on giving an opinion? I would say he wasn't. And he most solicitors avoid giving opinions at all costs unless they are pushed into doing it.

Q. Most solicitors?

A. That's correct.

Q. I see.

A. That's in the commercial world.

Q. Of course, to furnish an opinion one has to be put in possession of the true facts of a situation on which one could express an opinion, isn't that correct?

A. Well, you might have the facts but you mightn't want to give the opinion.

Q. I understand that. But to give one, you would have to be furnished with the facts; you can't furnish an opinion without receiving the facts, isn't that right?

A. Yeah, and I think

Q. It seems fairly straightforward?

A. It would be, yeah.

Q. Now, obviously between the 11th

A. One thing there.

Q. Yes, please?

A. You see, it wasn't just a venture capitalist company relationship. He was my partner. We were the only two shareholders in Communicorp.

Q. Yes?

A. So it was a deeper relationship than what you would normally have between a company and a venture capitalist.

Q. All the more surprising, I might suggest to you, Mr. O'Brien, that he wouldn't furnish a letter to satisfy Telenor when you already had a concluded

agreement as you have stated?

A. Well, I told you, I hope I tried to explain as best I could the fact that they had thrown their hands in the air.

Q. With you, with you or with Telenor?

A. Well, it was certainly with Telenor and they were exacerbated with us.

Q. And certainly with Peter O'Donoghue and you, it would appear, isn't that right?

A. They were all Telenor Advent were completely, like, frustrated by what was going on. And the mistake we made is we should have brought it to the Chairman of Telenor instead of dealing with somebody down the line, that's the mistake.

Q. If you go to Tab 37, so, for a moment, please. Now, this is the long letter which Mr. O'Connell wrote on your behalf to Telenor, isn't that correct, setting out the position

A. to Mr. Bugge.

Q. to Mr. Bugge. Well, it is to Telenor, Mr. Bugge. And can I take it that you had a discussion with Mr. O'Connell before he wrote this letter, obviously?

A. I said to him can you give the lads an opinion? And he says, no, I can't give an opinion but I will write them a letter showing that they are at no disadvantage where they are.

Q. Did you have any other discussion? Did you even

broadly discuss with him, look, Owen, I had a long

discussion with Massimo Prelz and we discussed

A. Well he knew that already, so....

Q. He knew that. He knew about the terms, you think?

A. I think he did, yes.

Q. All right.

A. I thought it was a very good letter, this.

Q. Yeah?

A. If I had received it from a partner of mine I would have said, Hey, on balance we should run with this.

Q. Yes. I just want to run through it now just very quickly, portions of it.

"Dear Amund,

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

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

"You have been told by Communicorp Group that Advent International has made an offer to it of the necessary funds. You (in common with the Irish Government) have also been provided with a letter undertaken with you

that if it fails to raise sufficient funds from other sources, it will accept Advent's offer. You have sought a formal legal opinion from this firm in relation to Advent's offer. However, I regretted that we are not in a position to provide such an opinion.

Now, I'll pause there. This is a very careful man writing a very important letter on behalf of his client, isn't that right? And what he describes there, I take it, is correct?

A. I am not sure whether he was I am not sure whether he was aware that I had already accepted Advent's offer, but it is a moot point.

Q. It is not at all moot, Mr. O'Brien.

A. It is in my mind.

Q. It is not at all moot.

A. Nothing hangs on it, but anyway....

Q. So you are saying that this very good letter written by a very careful solicitor was following a discussion with you that he was unaware that you had accepted the Advent offer?

A. I don't know whether I had told him or not at that time. I mean, I wrote the letter with my initiative.

Q. In fairness to Mr. O'Connell, as a professional man

A. Yeah.

Q. In fairness to him, I would have to suggest to you that if you had told him, that he would not have written a letter in those terms, in fairness to him?

A. He might have said "which has been accepted".

Q. Now let's be clear about it.

A. Don't forget, Telenor got this letter and my letter confirming, so in some ways Mr. Bugge already knew that I had accepted

Q. This is a lawyer writing to another lawyer being careful about the language used, and clearly states that, "You (in common with the Irish Government) have been provided with a letter of comfort from Advent concerning this. Communicorp Group has undertaken to you that if it fails to raise sufficient funds from other sources, it will accept Advent's offer."

Now, clearly Mr. O'Connell knew nothing about your accepting an offer and concluding an offer?

A. Precisely the point.

Q. You said a few moments ago that he probably or might have known about it?

A. No, I said he probably didn't know about it.

Q. Why didn't you tell him?

A. For I don't know why I didn't tell him, but I mean, I didn't see it as a big deal.

Q. Isn't the reason that it is not here, is that you didn't tell him because it hadn't happened, Mr. O'Brien?

A. It had happened, it is in the letter.

Q. All right.

A. What date was the letter that I sent to let's go

back to that.

Q. Yeah.

A. What date was the letter that

Q. The 4th August?

A. So it had happened, it had happened.

Q. Which letter are you talking about now?

A. The letter that I wrote to, I wrote to Advent saying that I would accept it.

Q. That is the letter of the 14th July?

A. Yes.

Q. You said that you had accepted the agreement of the 12th July?

A. Yes, that's right.

Q. Mr. O'Brien, this is your solicitor writing.

A. Yes.

Q. He is a man of ability and standing and has to have professional standing.

A. Sure we know that. I hired him.

Q. Of course. So he can't be writing and giving erroneous information on your behalf?

A. I mean, he just didn't know that I had accepted the Advent offer.

Q. Why didn't you tell him? If you allowed him to write a letter saying that you will accept it, why didn't you tell him?

A. Sure, I didn't see this letter before. I am sure I did not see this letter. He wrote this letter and



sent it off to Bugge. We probably discussed what he was going to say in the letter, but what is where does it all hang out? How can we spend hours and hours about something that for me is nothing?

Q. Right.

A. This is a rant in circles.

Q. No, Mr. O'Brien, because it is going to lead us all to the presentation. I just want to let you know.

A. I am looking forward.

Q. I am not trying to take you short at all.

A. Oh good.

Q. That is why we are discussing all of this.

A. Then it has relevance, then?

Q. It certainly has relevance.

A. Good.

Q. Now, as he says, "You have sought a formal legal opinion from this firm in relation to Advent's offer.

However, I regret that we are not in a position to provide such an opinion.

"As we have explained to you, Communicorp Group does not wish to take up the Advent International offer mainly because it is on very disadvantageous terms. A number of other funding avenues are being pursued and it is hoped that these will prove fruitful very quickly. In particular, a US equity and debt placing by Credit Suisse First Boston is at an advanced stage and is designed to provide ample funds for

Communicorp's present and planned projects including GSM. Indeed, Credit Suisse First Boston have shown particular interest in the GSM project. Communicorp does not wish to enter into discussions with Advent International in order to have a letter provided to you in terms stronger than the letter of comfort which you already have. This is due to the delicate nature of the commercial and political relations between Communicorp and Advent; in essence, while Communicorp could very likely obtain a letter for you from Advent, which would be in stronger terms than the existing letter of comfort, the indirect commercial cost to Communicorp as regards other discussions which are underway with Advent and other parties would be very high."

Now, what is that about?

A. No big news in the first one anyway, the first paragraph.

Q. Yes?

A. Telenor knew we were talking to CSFB. They knew we were looking at different avenues of funding.

Q. Yes?

A. And they knew we were still trying to get a letter from Advent that would satisfy them and we are pointing out to them that really that we don't want to pursue this anymore with Advent to get a stronger letter because

Q. Because what?

A. It says here, "This is due to the delicate nature of the commercial and political relations between Communicorp and Advent." And we are saying that we could get a letter but we don't want to go and get one.

Q. You had told Mr. Prelz, on the 11th, that he had not satisfied Clause 4.2 of the 12th July agreement, isn't that right?

A. That's right. The 11th August.

Q. And you had, in the course of that agreement and in correspondence surrounding that agreement, had, I think you said your lawyers had wisely inserted that clause, is that right?

A. Yes.

Q. But that agreement also required you to use your good auspices or best efforts to try and obtain the consent or agreement of

A. And I have to say, all of this demonstrates that we actually did that, we tried everything to try and get a letter that would satisfy Telenor.

Q. May I ask you, is that what this means so? You know at this stage that you could probably sorry, maybe not, you are telling Telenor this, that you could probably get a stronger letter from Advent which would satisfy them, but you didn't want to do so because that would upset the apple cart in any commercial

dealings you would yourself have

A. Well, Advent, as I described, they were already thoroughly upset, and I wasn't going to push it any further because I didn't want to have a breakdown with Advent in terms of the relationship.

Q. It seems like a fairly easy thing to say, doesn't it? You had already written to Telenor on the 4th August saying that, Look, we are trying to get better financial arrangements somewhere else. What would be wrong with saying that to them? What was this about?

A. We are saying to Telenor, Look, we have done our best. And all the correspondence that you have opened in the last two days has shown how far we actually went to try and satisfy Telenor on this issue.

Q. Well, tell me that I just want to be very clear about that. There is a letter from Ms. Helen Stroud at the beginning of negotiations to Mr. Owen O'Connell asking specifically if the letter for Telenor would be in the same terms as that which was being provided for the Department?

A. And we know that it is the same letter, nearly.

Q. That is what they asked. What other steps did you take?

A. Open up all look at all the correspondence, like I am accepting the offer

Q. Sorry, between that and the 31st July when Telenor and yourselves were in serious dispute about that?

A. We must be in different rooms here because what I have heard anyway in the last number of hours of evidence is all the different things we tried to do to satisfy Telenor: letters, conversations; they are all in the tabs here.

Q. Before the trouble started coming up to the submission of the bid what other steps had you taken?

A. Before and after. Right from the 12th July when we thought Eureka! We have got something that will satisfy them. Then they said, No, we are not happy. Then we started a whole train of activities to try and make them happy and ultimately unfortunately we failed at this particular account with Advent.

Q. Well, can I ask you so, why is it being suggested in this particular letter that you could probably get a better letter when you had failed on the 3rd and failed on the 4th, and Mr. Prelz had had his

A. We had decided not to push it any further with them. Finish. That was it.

Q. Okay.

A. When you have somebody that doesn't want to give you something, you can't keep asking them and asking them; otherwise they are going to be, there will be a material breakdown in the relationship.

Q. Well, you had already told them that they were in breach, isn't that right?

A. Well, we rightly so, we told them that. I mean,

that would be the right thing to do, would it not?

Q. Wasn't the effect of that that they would lose the 5%?

A. We were looking still to see if they could cure the problem.

Q. But sure you are saying here you weren't?

A. We were. Look at all the different correspondence.

Q. No, no, this letter of the 17th August?

A. No, going back to the 4th August.

Q. Sorry, you told them on the 11th they were in breach of Clause 4.2?

A. That's right.

Q. The effect of that was to take them out of the 5%; that was the purpose of it?

A. Not at that not yet, no, that is not true.

Q. What was going on here so, if you were still trying to get a letter

A. I was on Plan B, which was CSFB; Plan C which was IIU.

So Plan

Q. You told us this morning that Plan B was IIU, Plan C was CSFB?

A. Does it really matter?

Q. It may be here nor there.

A. Well, we will call B, IIU, and C is CSFB. CSFB is C.

Q. The one thing that is clear, when this letter was written on the 17th August you had already had contact with Mr. Dermot Desmond?

A. That's right.

Q. So you were on plan, whatever it was, B or C?

A. B. We will call it B for clarity.

Q. And the purpose of and Plan B required or necessitated Advent being out of the picture?

A. Well, we tried to satisfy Telenor with Advent and basically we were driven towards the next option, which was Plan B. And then Plan C came into effect when Telenor realised that maybe IIU shouldn't underwrite the 40%.

Q. Sorry, I just didn't hear you there.

A. We had to go

Q. We can check it, don't worry.

A. We had to go to Plan C when Telenor then said that they would like to participate on the underwriting in April/May 1996. We will get to it, I am sure it will be months away but we will get to it. It could be years away at this rate.

Q. I am a bit confused with that because I always thought that CSFB had been in the equation from May of 1995 but was

A. It was trundling along, it was trundling along. They were part of the mix, they were part of the solution with CSFB because, as you know, they bridged us.

Q. Yes. Now, the rest of this letter goes into Mr. O'Connell arguing various positions; if you did, if you didn't get the funds, Telenor could walk away, could acquire new partners or take over the whole

thing. He is setting out that sort of argument to

them, isn't that

A. If I got one of these letters from a lawyer of my partner's down in the Caribbean, I would sit down with him and try and resolve the problem. I would say, Look, you are looking for something I can't give you, can we get somewhere in the middle? That didn't happen.

Q. Right?

A. Maybe that was culture.

Q. Yes. Because we then are coming?

A. Do you want to open the rest of this?

Q. I don't think it has been opened so many times.

A. You are bored. I am bored.

Q. I have summarised it. It is Mr. O'Connell

A. It is a hell of a letter.

Q. It is Mr. O'Connell advocating a position that in fact he is saying to Telenor you won't be in any worse a position?

A. It is a great letter. Now you know why I had Owen O'Connell with me. A perfect example.

Q. Yes. I am not in any way suggesting that

A. He is helpful.

Q. that he wasn't in relation to matters.

CHAIRMAN: There is a note of consensus that

Mr. O'Connell's letter was excellent. We will move from it.



A. It should have won a Booker prize, Mr. Chairman.

Q. MR. COUGHLAN: What I was really drawing your attention to was the legal aspects or it, Mr. O'Brien.

We are coming, now, close I just want to very briefly touch on one thing because I will be coming back to it.

A. Okay.

Q. On the 10th, the 10th August you have an entry in your diary: "Glasgow DD," or words to that effect?

A. "1/1 Celtic Liverpool."

Q. Right. Did you seek the invitation?

A. No way.

Q. Sorry, this

A. This was Plan B, was it?

Q. Well, it developed into Plan B.

A. It developed into Plan B; it was a social...

Q. Mr. Desmond invited you?

A. Yes, to Celtic.

Q. To Celtic. Were you a social acquaintance of his before that?

A. Of course I was, yes.

Q. Were you? And had you regularly attended functions?

A. Not football matches, no, but I think he bought Celtic or was in the process of buying Celtic. It was a pre-season game, he knew I was into soccer, rang me up and said, Listen, are you coming up? We are going up for the night.

Q. Right.

A. A couple of other people there, that was it.

Q. Right. And on the who else was there? Are they relevant to this?

A. JP, Michael Taylor.

Q. And you had some form of a discussion?

A. On the way home, yes, on the plane.

Q. On the way home on the plane. Was it just yourself and Mr. Desmond?

A. We were sitting we went down the back and had a chat on one of the bench seats.

Q. How did that arise, might I ask, or

A. He said he started asking me about the GSM Licence and, you know, because there was other people on the plane with us, I said, okay, let's nip down the back and have a chat about it and I told him that I had problems satisfying my partner and he said tell us about it and I told him all about the bid and that. I suspect that from his own sources he knew that we were going to put in a good bid. You know, we had common friends, common advisers, the word would have been about that we were going about this in a very serious way and he would have known that from me anyway.

Q. And who do you think his sources might have been?

A. Well, he would have picked up on it. Like, for example, Eileen Gleeson did work for one of his companies.

Q. Yes?

A. I am sure he said to Eileen, how are things going with the bid?

Q. Yes?

A. And Eileen would have said it is going well. That is the kind of chitchat stuff.

Q. Yes. And can I take it it was he kind of initiated all of the conversation

A. Yes.

Q. about it?

A. Yes. Well, he asked me about what was going on and how things were going and I said well a big problem I have is trying to satisfy Telenor.

Q. Right?

A. And he said maybe I can help you on that, and we got talking about it and very soon after that, he we had lots of conversations. I sent him a fax with sort of a

Q. You sent him a fax on the 11th?

A. A shot at, you know, trying to determine, define something that might make sense from him and we negotiated then. There were lots of meetings with Michael Walsh.

Q. When did they start, do you think. Roughly?

A. They started on the 10th.

Q. Of?

A. The 10th/11th August.

Q. Of August?

A. Yes. And they finished the 27th, 28th, 29th  
September.

Q. Yes. I can see that that

A. There were a lot of, there was a lot of key

Q. Was there a lot of discussion in August between  
yourself and Michael Walsh?

A. There would have been, yeah, discussions. There would  
have been discussions with Dermot on the blower.

There would have been meetings, I had a meeting with  
Dermot on the 17th, I believe.

Q. That is in September, but I am just trying to

A. In August, yeah.

Q. You think in August you would have had meetings,  
discussions, telephone conversations with either  
Mr. Desmond or Mr. Walsh?

A. We were trying to work out whereby Dermot and IIU  
could become a solution to the issue that we had with  
Telenor.

Q. Right.

A. I felt that Dermot was the kind of person who was,  
maybe, could understand what was at stake here; what,  
you know, if you won a licence what would it mean in  
terms of building a business.

Q. I understand.

A. I talked to him some years before about coming in as  
an investor in Esat, but it didn't come to anything at

the time.

Q. Right. Okay. Now, if you just go to Tab 38, I was just wondering what was going on I am sorry, I beg your pardon. I beg your pardon, I don't want to you look at that, that is out of sequence.

A. The 7th, yes.

Q. No, that is September, it is out of sequence. You can take it for a moment.

A. Fine.

Q. 39. This is the day before the presentation?

A. Yes.

Q. The 11th September, 1995.

A. We are back to the morning letter, yeah.

Q. And Mr. Haga wrote to you.

"Dear Mr. O'Brien,

As a financial advisor to Digifone and Telenor Invest

AS" I will come back and deal with all of IIU's

involvement in due course, I just want to keep this

matter in sequence.

A. He wasn't a financial advisor.

Q. Who?

A. This fella, Haga, Mr. Haga.

Q. Right.

A. Not to us, he wasn't.

Q. All right.

"As a financial advisor to Digifone and Telenor Invest

AS, I would like to raise some of my concerns related

to the content of a letter from Advent International

to Mr. Martin Brennan dated the 10th July, 1995.

"Based on the contents in Section 3 of this letter I

have drawn the following conclusions:

"Advent has not committed itself as an equity partner.

"Secondly, Advent's underlying statement is that they

regard their position as having an option to

participate with a 5% equity stake (without any

premium or obligation).

"There has not been made any formal or legal binding

agreements between Digifone and Advent, (correct me if

I am wrong).

"On this basis I would like to stress that Digifone

must not enter into a position where it is obliged to

bring in Advent as an equity partner.

"In any case, the terms and conditions for any other

equity partner must, based on commercial issues, be

determined between Esat and Telenor.

"Based on this fact, I would like to stress that

Advent's letter to Martin Brennan does not add any

value to Digifone. Please take this fact into

consideration when you are discussing alternative

equity partners."

Now, the final paragraph or sentence is the one I want

to you to concentrate on in the first instance if you

would.

Whether you agree or disagree, this is what he is

saying to you, this is the Telenor view as I

understand it; maybe I am wrong?

A. It is his view. I wouldn't say I am not so sure

this climbed the ranks of Telenor, this letter, you

would have to ask them.

Q. All right. It is written on their behalf at least

anyway. He says he is

A. He is advising Telenor, not us.

Q. He has signed himself as assistant director. You are

not suggesting that he is not writing this on behalf

of Telenor, are you?

A. Well he says there he is a financial advisor to us. I

don't know where he got that one from.

Q. To Digifone and Telenor Invest AS. To Digifone, not

to Communicorp, not to you?

A. No, but he wasn't an advisor to Digifone.

Q. All right.

A. He would have gone in the bid document otherwise.

Q. Yes. But what he is saying here is that the letter to

Martin Brennan doesn't add any value to Digifone. In

other words, am I correct in understanding or would

you understand it to mean that they are not entitled

to 5%?

A. I don't know where he is coming from on this.

Q. But that is what I am trying to get, your

understanding. We will get him in due course. I am

trying to

A. I think it is a load of nonsense, to be honest with you, this letter.

Q. You may be right. I am just trying to get your view so that

A. Like, how he can say that Advent has not committed itself to participate as an equity partner my God!

And, "Advent's underlying statement is that they regard their position as having an option." Any value to I mean, I don't know where he is coming from don't forget their position all along is that they are still not happy, so they are he is probably getting frustrated as well and getting upset.

Q. Well, the first bullet point there is a bullet point which your own solicitor has agreed with, I think, "Advent hasn't committed itself to participate as an equity partner"?

A. In which?

Q. Well, in either Digifone or Communicorp. In any event, Advent's underlying statement is that they regard their position as having an option to participate, that is right, as an equity partner, with a 5% equity stake. That is that they have, a 5% equity stake?

A. The same as the other three institutions; that is what they are.

Q. His third point is that there isn't any formal agreement between Digifone and Advent. That is



correct, I think, isn't it?

A. Absolutely.

Q. "On this basis I would like to stress that Digifone does not enter into a position where it is obliged to bring in Advent as an equity partner." That's the 5%?

A. Is that not schizo? Because on the other hand they want us to get them in and to confirm and to, you know, satisfy their financial guaranteeing, and then he says, you know

Q. What he goes on then to say is that, he wants to stress that the letter to Martin Brennan doesn't add any value to Digifone. I suppose what he is saying there is, if it, if there is any value in it at all, it may be to Communicorp but it is not to Digifone?

A. That is his isolated opinion.

Q. Right.

A. And certainly

Q. I am trying to get your view on it.

A. I would be totally against that view.

Q. Do you remember any discussion about it because you spent a couple of days together preparing for the presentation, isn't that right?

A. I tell you I wasn't looking at this letter the day before the presentation, Mr. Coughlan.

Q. I was wondering was there any discussion about this?

A. No, there wasn't. I mean, we were in we were in closed session rehearsing for our oral presentation.

I actually don't remember this, seeing this letter at that time.

Q. All right.

A. But it is slightly it's illogical in many respects, the letter.

Q. Now, on the 12th September, 1995, there was the oral presentation, isn't that right?

A. D-Day, yeah.

Q. And the format was initially a brief, an introduction by Mr. Martin Brennan, I think, where he set out what was going to happen at the presentation. You made, you introduced everybody on your side, I think, and you stated that Mr. Johansen would deal with some matters, Mr. Thygesen with others, Mr. Moloney and the technical people and this sort of thing. And then there was a questions-and-answers portion of the presentation as well, where you were being asked questions by the evaluators; that was the format?

A. Yes.

Q. It was the same for everybody?

A. Yeah.

Q. Now, I was just wondering if you have got Book 51 there please? It is the transcript of the presentation.

A. Which Book?

Q. It is in Book that is a good question, Book 51. Do you have it?

A. I have an extract from it.

Q. Yes.

A. Where will I go to?

Q. Okay. I will refer you to a number of parts, and just in case we need, Mr. O'Brien, I can indicate to you because you did say this morning you'd need a tape recording or something we do, this is the one thing we do have, a tape recording.

A. Fantastic. Are we going to role it?

CHAIRMAN: Not three hours of it.

MR. COUGHLAN: Not three hours of it.

A. Thank God for that, Mr. Chairman.

Q. We have it, I hope, isolated if necessary, but we will deal with the transcript in the first instance, all right?

A. Okay.

Q. Now, if you go to I am sorry my page numbers are a bit blurred. Page 8, please, in the first

A. Can I just say that I haven't, I didn't think we were getting this far today.

Q. All right.

A. But sure we will give it a if I can't help on certain items, Chairman.

Q. In fact, I think all we'll have time to do is just open up the document

CHAIRMAN: If it is something as you would rather reflect, as I said to you two days ago, by all

means...

Q. MR. COUGHLAN: Is that fair enough?

A. Thank you, Chairman.

Q. You can see that on page 8, this is you speaking on page 8, all right? I wonder do you have that?

A. I am just looking, okay.

Q. It is just a little point, but if I could just do you see the paragraph which commences, "The critical success factors as, we have seen it, above all else is the right ownership structure." Do you see that? Do you see that? Sorry, I beg your pardon it is page 7, page 7, I am sorry. My numbers are a bit blurred here.

A. You are okay.

Q. Do you see the sentence which begins it is the fourth paragraph, "The critical success factors as we see it, above all else, is the right ownership structure, and the right operating partnership, and the person that we have asked to deal with this is Arve Johansen, who is Chairman of Telenor International."

You have been introducing the various members of the consortium, do you see that?

A. Yes.

Q. I just want to bring that you are introducing Mr. Johansen to deal with that, he is going to deal with this part of the presentation. Then you go on that Mr. Moloney is going to deal with marketing and

other people to deal with other things.

Now, if you go to page 9, then: Mr. Arve Johansen, now. Now, we have been informed by Telenor that Mr. Johansen arrived perhaps the previous day for this presentation and he would have been attending this presentation not having been an active participant in matters prior to that?

A. I think he would have been at the dress rehearsal the night before.

Q. And that he would have been presented with effectively a speaking note or a document that he would use at the presentation?

A. Well, he would have known a bit more than that now because he knew all about the bid, he would have been informed by his people the A to Z, so it wasn't up to do a cameo role, it was to play a significant role here.

Q. Right. I can understand that. But do you agree, and I would understand that when you are going into a serious presentation like this, that people wouldn't go in on a wing and a prayer and that they would have documents with them which would enable them to give a best account of themselves?

A. As good as possible, yeah.

Q. And do you know if Mr. Johansen was presented with such a speaking note?

A. I actually don't remember.

Q. Or some form of draft?

A. I would say some of his team would have helped him there. I actually don't remember now.

Q. All right. Now, Mr. Johansen commences:

"Ladies and gentlemen, Esat Digifone has the right partnership," etc.. "Esat Digifone is an Irish company. We have sufficient financial capacity to meet and even exceed the funding requirements. The partners have complimentary skills and experiences and we have a very high level of commitment and we have the freedom to choose the best quality infrastructure.

"Esat Digifone is an Irish company. It is evidenced, first of all, by the Communicorp group holding 40% as we get going and we have institutional investors holding 20% and they are: the Allied Irish Bank, the Investment Bank of Ireland, Standard Life Ireland and Advent International. In addition, we have Telenor, through its subsidiary Telenor Invest, and Telenor is the major telecommunications operating company in Norway, having last year an operating revenue of  $\text{€}1.8$  billion and a profit of  $\text{€}190$  million.

"We already have the funding in place. The total funding requirements seen from the business plan is  $\text{€}124$  million. We base the capitalisation on 40% equity and 60% debt and therefore we are certain we can achieve that in the project in Ireland on the GSM.

"The available funding exceeds those requirements

considerably. Telenor has a firm commitment. It's even already approved by the Board of Directors at the top level of the Corporation i;½30 million and even that would not be a hard limit even if you think later that we would benefit from having more equity. The Communicorp Group has committed i;½30 million and the institutions have committed i;½11 million, meaning we have available 71.1 million in equity and we have the banks like Natwest Markets and ABN-AMRO who have submitted i;½90 million meaning we have available funds of i;½160 million which is 37 million above the current requirements of the business plan."

Now, is all of that correct?

A. Yes.

Q. Right. Now

A. The only thing that changed is that we swapped Natwest for AIB.

Q. As debt

A. Yeah.

Q. Not a big issue?

A. But it is amazing as you read that because everybody lived up to their obligations in what you have just outlined.

Q. Is that right?

A. We all ended up investing our money. AMRO involved, the debt providers came through on their letters.

Q. Mm-hmm. And the institutions were excluded?

A. Well, we had to strengthen that.

Q. I will come to that. I will now go to page 43, sorry

I beg your pardon, it is only a little point

A. I am sure it's a big one now if you're pointing it out.

Q. Ah it's not, Mr. O'Brien, no, I wouldn't do that to you. If you go to page 41?

A. Sorry.

Q. Do you see the second paragraph, if you go down to the middle of it.

A. Who is saying this now?

Q. This is you?

A. Okay.

Q. This is you again.

A. Right.

Q. You are informing the group: "We have two operating partners. We have been associated with a couple of other people in this race but when we actually sat down with them, we found that they couldn't agree amongst themselves. When we sat down with Telenor, our own Irish experience, they felt, was very valuable. It was a compete 50:50 relationship. It was a joint venture and there was no quarrelling and there was no indecisiveness because we had one mobile partner of outstanding credentials and we had one local partner, Esat Telecom, that has knowledge of the Irish telecommunications market, so you have a



fantastic and effective marriage. So we have only two cooks in the kitchen."

Now, I accept one is entitled to put your best foot forward in relation to matters but, in fact, that was a little bit of there was a little bit of tension by this time, would it be fair to say?

A. It wasn't a quarrel, though. It was a bit of a tiff.

Q. All right.

A. Business is like that, you know.

Q. Yes

A. People get a bit angsty and say things.

Q. Very good...

A. But everybody ends up happy.

Q. I only pointed this out to you as being a small point, I told you that.

A. Sure they went on to make  $\frac{1}{2}$  billion out of it, so it was a start of something big.

Q. Now, you then go on to page 43. Again this is you speaking?

A. Yeah.

Q. You see that long second paragraph, you are talking about the business plan and if you go down you see where the sentence begins: "It is a business plan that makes sense. And as Arve has mentioned, both Communicorp and the financial institutions are going to share in this investment and I think this is important, because it's the first time a utility will

make available shares to financial institutions.

There is a hell a lot of money, pension money leaving this country and this a way of tapping that vast resource. So we have two operating partners and financing institutions. So that's done."

A. Yeah.

Q. All right.

Then there follows a fair amount of fairly interesting technical debate between a lot of the technical people and I don't think we need concern ourselves with that?

A. It wouldn't be worth reading, no.

Q. Now, if you come on to, and it really commences, I think, the whole matter commences the whole matter commences

A. At our stuff, is it?

Q. Yes. This is the financial stuff, now?

A. What page is that?

Q. I think about page 98.

A. Okay. "So now you will have a financial question," is that where

Q. Yes. You can see that. And then a question about solvency is raised, you begin to answer and Mr. O'Donoghue takes over and starts informs the questioner, Mr. Andersen I think at that time, that there is a technical matter here as regards company law and that whilst the company might be technically in breach of that, it is going to be, the two parents,

Telenor and yourself, were going to solve that problem by so we needn't concern ourselves about that.

But if you go then, to page 100.

A. It starts with Arve, doesn't it, the previous page?

Q. Yes.

A. Billy Riordan, okay.

Q. Yes, Mr. Billy Riordan. Yes, that's Mr. Johansen on the previous page really. Then we come on to

Mr. Riordan I think. And that technical matter has been dealt with. And then Mr. Riordan, you see in the middle then, "Mr. Billy Riordan: Sorry, this question relates really to the letters of financial support and particularly the ones from Advent. Advent, in that letter, say that they have Invested  $\text{€}10$  million for 25% of the company and then at some stage in the proposal it says that they have 19.5 million Invested for 34%."

A. I think he is confused there.

Q. Yes. And I think that's clarified?

A. Well I would hope it is, but...

Q. "I just want to clarify, have they in the interim invested an extra 9.5 million for the extra 9% equity?"

A. Yes.

Q. "Mr. Denis O'Brien: They have invested a total of  $\text{€}19.5$  million since last October which is completely apart from this new investment which will come in and

is guaranteed if we receive this licence."

A. Yes. Do you want to know how the 19.5 comes out of it, do you?

Q. No.

A. Okay.

Q. I want to know where is the guarantee for the new money coming in?

A. That's the that is the comfort and the agreement that I had with Massimo. I can see we are not going to agree with this one.

Q. It is not for me to agree or disagree, Mr. O'Brien.

A. This is the point we made earlier, so...

Q. This is precisely I told you earlier

A. You are coming to it.

Q. I was coming to this.

A. This is the big kahuna.

Q. "Mr. Billy Riordan: Okay. The reason that was throwing me off was the letter said something different. This was a letter that was addressed to Martin on the 10th July, and it says that certainly the funds managed by Advent International invested a total approximately of  $\text{€}10$  million in Communicorp and it leaves it at that. They are committed to investing an extra  $\text{€}9.5$  million.

"Denis O'Brien: They have actually done it?"

Is that correct?

A. We drew the 5 and then we had the extra 4 from 1994 in

the bag.

Q. The 5 was debt, isn't that right?

A. Yes.

Q. At a 30% premium?

A. Yes.

Q. I don't know about the 4.

A. And it was convertible and then the 4 was what they had already said if we won the licence they would give us another 4 which was the redeemable preferred.

Q. Fair enough. I am not making a big point about it and you said they have already done it, I am not making a big point about it.

"Mr. Billy Riordan: That is the clarification I was looking for really. Then really a follow-up on that was that Advent has said they are providing up to 30 million to Communicorp."

Perhaps it is a little bit of a loose language there, the word used was "offered," isn't that correct?

A. He is saying providing. I don't

Q. All right

A. I don't know if anything hangs on it.

Q. I am not making an issue about it.

"Mr. Denis O'Brien: I think it is pounds" so he obviously said dollars and you are correcting him.

A. Yeah.

Q. "Mr. Billy Riordan: Sorry, you are right, it's 1/230 million.

I am wondering in what form will that funding be put

into Communicorp? Will be it be loans or will it be equity?

"Mr. Denis O'Brien: It will be equity. That's what we have negotiated on. So in other words at the moment, Advent will probably go up to about 47, 48% if we win the licence so the business will be remain Irish controlled. There is also a second thing and there is a 3-to-1 voting ratio to the Irish investors.

"Mr. Billy Riordan: So every one of their shares is worth three of yours

"Mr. Denis O'Brien: No. In fact the Irish content, we have three times their votes. It's a 3-to-1 so, and that really protects the Irish content and that has been from the very, very beginning of the relationship with Advent.

"Mr. Martin Brennan: I'd just like to ask, in the sense of Advent having 47% of Communicorp, and if I remember correctly also one of the constitutional (sic)" that is "institutional investors for the 20% "?

A. Where do you get the 20? Is that a typo?

Q. It says "constitutional."

A. No, 47. Where would he have got 47?

Q. From you.

A. Did I say 47?

Q. Yes, you said that on a previous page.

A. On a previous page?

Q. Yes, on a previous page. I was going to ask you about all of that when I finished all of that, where that came from?

A. Well, I was trying to estimate at the time what the projected equity allotment would be when we take in the twine.

Q. I will come back and deal with it so.

A. Okay.

Q. "I'd just like to" Mr. Martin Brennan and then the 20 percent. "That still doesn't give them anything like leverage.

"Mr. Denis O'Brien: No absolutely not. Because that's one of things that that we have raised the finance on. In other words, like as in Irish indigenous companies, you cannot raise that kind of capital in this country. It is extremely difficult unless you go to the public markets. So we have raised it privately and indeed all of the money has come from European pension funds. So what we have tried to do all along, and it has been our goal, is that the company would remain Irish and that's the reason why, you know, we have insisted on these voting requirements for the Irish investors, that they have three times the number of votes Advent have. It's also likely that the Irish institutions will probably go into a vehicle together just for simplicity that there would be that 20% block so the Irish

institutions again would control that block

effectively in terms of equity terms."

Where did that come from?

A. Well what was suggested there is that the four of them would get into one vehicle instead of all holding shares on their own.

Q. Who suggested it?

A. That was what we were talking about at the time between us, that.

Q. Who?

A. That basically in Communicorp, Paul Connolly advised us that we keep them all in one block and let them have one board seat.

Q. What did the institutions say about that?

A. We didn't get that far because we didn't bring them in ultimately to the table but that is what we were going to propose to them.

Q. Well, how can you say it is likely if you hadn't spoken to them? How do you know

A. Well that's likely what we well, it is not unusual when institutions go into a private company that they would have one person representing them and that they would go into one vehicle as a block.

Q. But

A. That is how placings work. You know, they set up a special purpose vehicle, everybody goes into it, puts in their money and they have one director or two



directors, depending on the scale of the investment.

Q. I can understand that, and Mr. Connolly will be somebody who would

A. He would be good with that.

Q. He would have familiarity with that kind of thing, but of course by this time, the 12th September, 1995, you have been in discussions with Mr. Desmond as and from the 10th August of 1995 and those discussions centred around excluding the institutions, isn't that right?

A. It was swapping one third party investor for another.

Q. No, it was excluding the institutions who had given the letters?

A. It was swap.

Q. Sorry, well let's use your word, it was swapping Mr. Desmond for the institutions?

A. Yeah. Well within what we said in our application because we said we were 50:50 and we are going to bring in third party investors. We just exchanged one group of third party investors for one investor.

Q. Yes. I understand the point you are making, Mr. O'Brien. But that is what you were discussing with Mr. Dermot Desmond from August and what you are trying to do?

A. Plan B.

Q. Plan B?

A. Yeah.

Q. And it is what you and Mr. Desmond and Mr. Walsh were

discussing and negotiating to give effect to?

A. And Telenor.

Q. He was coming in?

A. And Telenor were there as well.

Q. So did Telenor know about Mr. Desmond as of the 12th September of 1995 at the presentation?

A. I believe they did, yeah. I couldn't be totally certain of that, but I may have mentioned it to them, I don't know.

Q. All right.

A. I would have to go back and see if there is any documentation.

Q. All right. All right. But certainly you were on Plan B and yourself, Mr. Desmond and Mr. Walsh were just figuring out the way to do it, would that be a fair way to say it?

A. We hadn't moved to Plan B. It was an option. We were where we were and we were saying quite rightly to the Department, Hey, we have four investors, they are in, and they are third party investors. And I explained my relationship with

Q. Did you tell the Department that, in fact, I at the moment, or did you tell your other partners that, I am at the moment in negotiations to take them out?

A. No, to swap them, not take them out.

Q. Well, to swap them, to swap them.

A. I wouldn't have said

Q. Sorry, can I ask you a question: Doesn't swapping involve taking them out? Take one out and substitute the other?

A. Well if you take an apple out of a basket and put another apple back in, it's a swap.

Q. But you are taking those institutions out, isn't that right, the institutions you were talking about?

A. We always looked at it as a swap. We always said we are going to bring third parties in, it doesn't matter who they are.

Q. Mr. O'Brien, let's be careful about this here now.

This is the real public element of this, this is a presentation in a competition for the licence. This isn't just ordinary business manoeuvring.

A. Well, I don't see

Q. You were talking to the evaluators here, Mr. O'Brien?

A. We were telling them, frankly, where we were right then.

Q. You were telling them, I suggest to you, you were not telling them frankly where you were right then?

A. Of course I was.

Q. Where you were right then is you were engaged in negotiations to take them out?

A. But we were I told you we always had a Plan B, Mr. Coughlan, which was part of satisfying Telenor, so I don't see anything hanging on this because we always said we are bringing in third party investors, which

ultimately would be approved when we had been given the right to negotiate the licence and then we had to satisfy the Department that they were happy with those investors.

Q. I will come back to it I will come back to it in due course because in fairness to you, you didn't anticipate that we would get this particularly far.

CHAIRMAN: Well it is an aspect that has to be examined with care. It is 4 o'clock now

A. It is interesting.

CHAIRMAN: And I think, Mr. O'Brien, you have indicated that you have difficulties with significant commitments next week and that

A. I mean I could sit tomorrow, if that is helpful?

CHAIRMAN: No, the Tribunal has a problem tomorrow.

A. Okay.

MR. COUGHLAN: There is just one or two final matters maybe just to get it complete and it will only take five or ten minutes.

A. It is not going to a big crescendo now, is it?

Q. No.

A. Okay, all right.

CHAIRMAN: Only five minutes, Mr. Coughlan.

Q. MR. COUGHLAN: If you just go over the page then sorry, "Mr. Denis O'Brien: It's going to be up to 70% equity in terms of voting. The other 53 percent "

A. Where is that?

Q. Do you see that type of discussion that is taking place. I am sorry, I beg your pardon.

A. Yeah, can I just explain that. They had 25%, they were going to lift that to 33% votes, and then basically the votes were weighted, if I can remember rightly, but I have to go through the rest of the stuff on this, but that's what I think.

Q. I am sorry, I beg your pardon. I should bring you to page I will commence it on page to the top of page 104.

"Mr. Billy Riordan: You will drop each of your interest by 6% to 34%? Very magnanimous of you. So basically Advent essentially ends up with roughly 20 percent of the licence taking the 5 ballpark percent that they have through their " then it ends.

"Mr. Denis O'Brien: Yeah, 20 percent would be right.

"Mr. Billy Riordan: Plus the 47 percent.

"Mr. Denis O'Brien: As I stressed, the main thing from our point of view is that the company maintains is an Irish company. Okay.

"Mr. Michael Andersen: I'd just like you to repeat for me the Advent's interest in Communicorp. You said that it was going to be up to, was it 47% voting power-wise or

"Mr. Denis O'Brien: Equity. It is going to be up to 47 percent equity but in terms of voting, so the other 53 percent has three times the votes of Advent. So

we, you know, the Irish shareholders in Communicorp will always have control of Communicorp.

"Mr. Michael andersen: Okay, but that also means that if you have what they have right now up to 46 and that escalates up to  $\frac{1}{2}$ 30 million, then you have to have some other capital in from some other side as far as I can see.

"Mr. Denis O'Brien: No, no, because the full capital requirement for the investment is initially 21.6, I think it is, plus a line up to 30. So they have said day one, they are guaranteeing  $\frac{1}{2}$ 30 million.

"Mr. Billy Riordan: So you have a little bit of fat in that. You have, in fact, from the point of view you have about  $\frac{1}{2}$ 8.5 million of fat in that particular commitment.

"Mr. Denis O'Brien: Yes, but it is an irrevocable commitment of fat, if you know what I mean."

A. That's the 30 million, the 30 million.

Q. Irrevocable?

A. Yes.

Q. Right.

"Mr. Billy Riordan: I used the term first.

"Speaker" this is Mr. Sean McMahon: "Sorry, just one question on that, Denis, do I understand there is already an agreement in place between Communicorp and Advent on that?" That is on the irrevocable commitment.

"Mr. Denis O'Brien: Yes.

"Mr. Martin Brennan:" in fact that should also be

Mr. Sean McMahon: "That is not the same as the letter of the commitment we have seen in the application?"

"Mr. Denis O'Brien: Well, we thought that you'd want to hear that directly from Advent, hence they wrote you a letter to say that.

"Mr. Michael Andersen: Okay. I think that's all for the financial part, okay."

Then they move on to some other questions.

Can you point the Tribunal to any document which shows that there was an irrevocable commitment from Advent to invest  $\frac{1}{2}$ 30 million in Communicorp?

A. Well, this is the two-step agreement; there is the 30 million comfort letter and then there is the

Q. That is what you are talking about?

A. Then there is the big guarantee to tell me then that

Q. That is what you are talking about?

A. That is really what I am referring to.

MR. McGONIGAL: Mr. Chairman, it will be a long time before I get to ask Mr. O'Brien any questions, but could I just draw your attention to a matter in Mr. O'Connell's evidence which relates to the 4th August which wasn't a matter touched on by Mr. Coughlan today, at answers 101 and 102. I think they are material to consideration of all those

issues.

CHAIRMAN: Just give me that again, Mr. McGonigal.

MR. MCGONIGAL: 101 and 102 of Day 243, Chairman.

CHAIRMAN: Very good, I will look at that.

I think you have discussed, Mr. Coughlan, with  
Mr. McGonigal a slightly unusual hour of commencement.

MR. COUGHLAN: I think that Mr. O'Brien would be  
available on Monday week in the afternoon.

A. If that's okay, Chairman?

CHAIRMAN: I will fix that. Obviously I am anxious  
about time going by. I had considered having one or  
two other of the less lengthy Esat witnesses, but in  
all the circumstances I think that may be unfair to  
Mr. O'Brien, so we will resume at 2 o'clock on Monday  
week.

MR. MCGONIGAL: Mr. Chairman, I would check with  
Mr. O'Brien after you have risen but in his eagerness  
to get the entire matter completed, if there were  
other witnesses available for next week, we would have  
no difficulty, in principle, in having them called,  
but I will discuss it with Mr. O'Brien and let  
Mr. Coughlan know.

CHAIRMAN: I will leave that option open then,  
Mr. McGonigal.

A. Thank you, Chairman.

THE TRIBUNAL THEN ADJOURNED UNTIL FURTHER NOTICE