

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 - 410

THE TRIBUNAL RESUMED AS FOLLOWS ON THE 24TH OF  
NOVEMBER, 2003, AT 2:00 P.M.:

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

CHAIRMAN: Thanks for coming back, Mr. O'Brien. With  
a view to maximising the available time, what I would  
propose is that we proceed until shortly after half  
past 3:00; that we then take a break in ease of  
Mr. O'Brien, of the lawyers and of the technical  
people who so provide support, and then resume at  
4:00, and end the sitting at or close to half past  
5:00. Is that all right, Mr. O'Brien?

MR. COUGHLAN: Thanks, Mr. O'Brien.

Q. I think on the last day you were here, Mr. O'Brien, we  
had considered the presentation on the 12th of  
September, of 1995, isn't that correct?

A. That's correct, yes.

Q. And just two matters initially. First of all, I think  
Mr. Arve Johansen had indicated who the eventual  
owners of the licence would be, by indicating how  
that Esat Digifone was an Irish company, that it would  
be going forward, it would be 40% Communicorp, 40%  
Telenor, and 20% institutional investors and he  
outlined those, isn't that correct?

A. He did, yes.

Q. And I think that in fairness, I think you very kindly, or your solicitors very kindly furnished to the Tribunal a document which you said was a hard copy of a document you brought along to the presentation. All it does is highlight certain aspects of the bid, isn't that right?

A. That's right, yes.

Q. And I think if we just look at that  
(Document handed to counsel and witness.)

A. Thank you.

Q. And the sixth page of that, it just says that Esat Digifone will be an Irish company, and then it sets out ownership structure: Esat Digifone, and then it has Telenor Invest AS 40%, Communicorp Group 40%, and 20% institutional investors. And they are named there, isn't that right?

A. Correct, yes.

Q. I just want to ask you one thing for the moment. Mr. Johansen, I think has informed the Tribunal, that he would have been briefed or given some sort of briefing documentation before he attended the presentation to enable him to make his pitch?

A. Along with everybody else.

Q. Along with everybody else. Now, do you know if it was from this document evidence briefed, just reading through what he said at the presentation, it seems to

follow the format of this document.

A. I am not sure whether he was scripted or if he was speaking off-the-cuff, so I couldn't say for sure.

Q. It is just that it is similar, what he said at the presentation.

A. Yeah.

Q. But you are just not sure at the moment. Nothing just turns on it at the moment, it is just that

Mr. Johansen has informed the Tribunal that he did receive some sort of a briefing document or a script.

A. Yeah, he would have been prepared like the rest of us.

Q. All right. Now, I think that is dealing with the ownership side.

Then dealing with the financial sorry. This document, for the purpose of the record, is a how would you describe it? It was

A. I would have thought we left this I suppose it is effectively a summary of the two-and-a-half thousand pages

Q. The main points you wished to emphasise for the bid for the purpose of the presentation, would that be a fair description of it?

A. Probably, yes.

Q. I think we then dealt with the question of the financial position of Communicorp and the position of Advent, isn't that right, on the last day

A. We did, yes.

Q. as was given at the presentation? And you informed the assessors that there was an irrevocable commitment from Advent, is that correct?

A. I think that is the word I used.

Q. In relation to irrevocable commitment of fat?

A. In terms of fat.

Q. But it was in the context of the 30 million?

A. Yeah, we had overfunded.

Q. Yes?

A. And the overall project was overfunded by 37 million, and then I think, individually then, both Telenor and ourselves, Telenor in their case had gone to their board and they got overfunding of about 8.5 million.

I think we were also overfunded on the basis of the Advent agreements.

Q. To the tune of about 8.5 million?

A. That's correct.

Q. And then you were asked, when you made that statement, that there was an irrevocable commitment, I think you were asked by a speaker it happened to be Mr. Sean McMahon, who we now know, and this was at page 105?

A. Just let me go there, if you don't mind.

Q. Yes.

A. Billy Riordan, is it?

Q. Yes. Do you see under "Billy Riordan" then it says:

"SPEAKER: Sorry, just one question on that, Denis."

Do you see that?

A. Yes.

Q. "I used the term first." Do you see that?

A. Yes.

Q. Then: "SPEAKER: Sorry, just one question on that, Denis. Do I understand that there is already an agreement in place between Communicorp and Advent?"

And on that: "MR. DENIS O'BRIEN: Yes."

That was Mr. Sean McMahon who, in fact, asked that question?

A. We know that, do we?

Q. We know that from listening to the tape. If you continue on in the transcript this is attributed to Mr. Martin Brennan; in fact, it is Mr. Sean McMahon continuing to speak.

"Not the same as the Letter of the Commitment we have seen in the application."

"MR. DENIS O'BRIEN: Well, we thought you would want to hear that directly from Advent. Hence, they wrote you a letter to say that."

And that is then moved on to technical matters.

Now, on the last day you were here I asked you could you indicate in the documentation where there was this irrevocable commitment and you referred me back to the agreement of the 12th of July, and the letter of comfort, which accompanied that particular agreement, isn't that right?

A. That's right. In reading this, just over the weekend

again, there is certainly a disparity between the question and the answer. I think he asked me one question, but I may have answered a different question because if it is McMahon and not Brennan, it says he says, "That is not the same letter of the commitment."

I was talking about the Letter of Commitment.

Q. Well, in fact, it does read as if you are talking about that letter because you say, as you can see, "We thought you would want to hear that from Advent yourselves."

A. Yeah. I think I answered a question that I misunderstood what he was asking for.

Q. Right.

A. So I think I answered a question that he wasn't asking. It is complicated.

Q. All right.

A. But I was trying to figure it out.

Q. Well, is it the case that you did inform the team that you had an irrevocable commitment from Advent, would that be fair to say?

A. I am just reading the transcript here.

Q. All right.

A. Well, you know, I say there is an irrevocable commitment here in line 15, 14, 15, so and that may link us back to what we were talking about earlier.

Q. Yes. Right. Well, just so we are clear, you had been talking about the 30 million, you had been

talking in due course about you and Telenor going down

to 34% in due course?

A. 32.

Q. 32?

A. Yeah. If we are doing an offering.

Q. There was a discussion as to whether that was 8% or

6%?

A. Yeah.

Q. You had informed the team that you had  $\frac{1}{2}$ 30 million

from Advent, that that would result in Advent's

shareholding in Communicorp going up to 47%, but that

the weighted voting would remain in your favour, isn't

that right?

A. Yes, equity would be

Q. On a 3-to-1 basis?

A. On a no, an economic basis would be 47, 48 and then

the voting would be weighted towards me, you are

absolutely right.

Q. And it was in that context, then, that Mr. Billy

Riordan asked the question that you had on that basis,

you then talked about what the actual equity

requirement might be, it would be about 20, 20, 21

million, 21.5 million I think, and the question then

arose as to this question of that, that you had money

over and that was the fat. You see, if you go to the

top of page 1

A. I think the question



Q. 105.

A. I think the reason for that

Q. 105. You see: "MR. DENIS O'BRIEN: No, no, because the full capital requirement for the investment is initially 21.6. I think it is a plus a line up to 30, so they have said day one, they are guaranteeing  $\frac{1}{2}$  30 million."

A. That's right.

Q. Right. And that is then where the question, Mr. Riordan says: "You seem to have about 8.5 million pounds worth of fat in that particular commitment." Then you go on to say, "Yes, but it is an irrevocable commitment."

A. If you look at the capital structure of the business, I think the project needed 58 million of equity, and we increased that substantially, so with a project of this nature, it can actually go off the rails; in other words, you can underestimate what capital expenditure you have to put in.

Q. I understand that.

A. So we were trying to demonstrate that we had effectively nearly a third or 28% more money than we actually needed.

Q. I understand that point.

A. In fact, we actually needed that money when we got the project going because the project costs went up by, I think, another 20, 25% on top of that.

Q. All right, but there is no doubt that you informed the Project Team that you had a guarantee from Advent for 30 million and that this was an irrevocable commitment, isn't that right?

A. Well, I think we discussed this last week or two weeks ago.

Q. Yes.

A. This is they have the letter and then they have the agreement and I am taking it on a commercial basis, other people will interpret it in a legal basis.

Q. And again, if you look at the what do we call this document again, the bullet point?

A. The presentation.

Q. The main points for the presentation. I think we were at page 6. If you go to page 7, we are just dealing with headline points.

"Funding in place," and then you have the equity peak funding required, funding available and then guaranteed by whoever. Then it is underneath, Telenor Invest 40% and there 20.8 million, funding available 30 million, guaranteed by Telenor. Communicorp Group 20.8 million, funding available 30 million, guaranteed by Advent International. So that is stated here as well, isn't that right?

A. That's correct.

Q. Now, I think what I did then, was on the last day, just at the very end, asked you if you could point me

to documentation to show this guarantee or this irrevocable commitment, and you referred me back to the agreement of the 12th of July and the letter of comfort, the Advent letter dated the 10th?

A. And my verbal understanding with Mr. Prelz.

Q. All right.

A. Plus, I mean, I think there is discussion of all of this in Tab 35, Tab 31 and Tab 28 as well, where we do discuss, I think, in correspondence

Q. Of Book 48, is it?

A. 48. Where basically there are other people discussing the fact that there was a second agreement in place with Advent.

Q. Well, that is why I just want to be clear about, because I want to go to

A. Are we on 48 then?

Q. Book 48, I beg your pardon.

A. Will I give you those tabs again?

Q. Yes, please. I will just get a note of them.

A. There is Tab 28.

Q. Yes.

A. Which is a memo, I think, of the 3rd of November.

Tab 31, which is a Peter O'Donoghue reference.

Q. Tab 31, is it?

A. Yes, what we called the rant, if you remember that.

Q. Yes, I do indeed, of course. Then 35, Tab 35, which is Owen O'Connell. I think he is writing notes

himself that there was a verbal agreement?

A. Or an agreement, I am not sure of the word he used, I think he did use the word "verbal". Do you want to do 28 first?

Q. Well, I will come to those now, yes. But I want to, first of all, if I could, and I will come to those, go to Tab 21. This is the letter.

Now, this is a letter dated the 10th of July, 1995.

And in fact, just in fairness, I think the agreement was probably that date as well, but may not have just executed because we think that maybe the 0 on the 10th was turned into the 12th, that is just

A. I don't think there is any argument on that.

Q. Nothing turns on it.

A. I have only got the second page of that, but it is probably

Q. It is the only relevant one.

A. The only interesting part.

Q. On page 1 there is an introduction to Advent International. That is just telling Mr. Brennan who they are. Page 2 is Advent's investment in Communicorp Group to date; that they made a total of 10 million available in return for just over 25% of the voting share capital.

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

And then it goes on over the page: "These funds have

committed to invest an additional 9.5 million to further develop the group's activities."

I think that you explained to me, was it, involved a 4.5 million pound investment, was it, in relation to radio matters and the 5 million or sorry, the \$5 million?

A. 5, and then the Item 4, the we had a redeemable preferred instrument which was for the if we won the licence, they committed themselves in '94 on that.

Q. Okay. Then, the significant one then is the Section 3, I think it comes to be referred to, when Mr. Haga writes to you in due course.

"We have reviewed the business plan proposed by Digifone in connection with this application for the second GSM Licence, and consider its operation of a second GSM cellular system in Ireland to be an attractive and viable project. The application to you by Communicorp sets out how it intends to inject new equity into Digifone on the licence being granted to it, and shows the Advent fund as 5% shareholder participating in the 20% holding which has been allocated to institutional investors."

Then it goes on: "We are delighted to have the opportunity of investing directly in Digifone, as well as our indirect investment in the company through Communicorp and Esat Telecom.

"The said application also shows Communicorp Group

remaining as a 40% shareholder in Digifone and being required to provide up to IRi½34 million to fund that 40% equity participation. We can confirm that we have offered that amount to Communicorp to enable it to fund its obligations.

"Please do not hesitate to contact Massimo Prelz."

So that is the significant portion of that letter.

Now, if you go to the next tab then, which is the agreement, and you can see the first portion of it recites certain things, isn't that right?

A. Yes. A to D or A to E.

Q. A to D or A to E, whatever it is.

A. E, yes.

Q. Yes. And C, recital C: "In connection with the application, AIC on behalf of the Advent funds has written to the Minister and to Telenor confirming its offer to provide financing of up to 34 million to enable Communicorp to fund its equity participation in Digifone which will be required should the GSM Licence be granted to Digifone."

And this was referred to as the "comfort letter", copies of which were attached to the agreement.

The next recital was: "In consideration of the issue of the comfort letter by AIC, Communicorp has agreed, subject to fulfillment of the conditions hereinafter set out, to procure that certain of the Advent funds will be entitled to such number of shares in Digifone

as is equal to 5% of its fully diluted share capital and to give the Advent fund the right to participate in the funding of Digifone in connection with the GSM Licence as more specifically set out herein."

Then, what the agreement provides for is two matters really, isn't that right? One is at Clause 2. I am not going to go through the

A. The

Q. But what Clause 2 provides that in consideration of the issue of the comfort letter by Advent

International, which was that letter dated the 10th of

July to Mr. Martin Brennan, and to Telenor, and

subject to fulfilling the condition in Clause 4 of the

agreement, that was Telenor's satisfaction with the

letter, Advent would be entitled to receive 5% of the

fully diluted share capital of Esat Digifone, isn't

that correct, that is what that was about?

A. They would get the right to invest up to 5.

Q. Yes, that was for issuing the comfort letter to the

Department and to Advent and to Telenor?

A. I suppose you could look at it as a sweetener, an incentive.

Q. But that is that was what was provided for in the agreement, isn't that right?

A. Yes, they are in on the ground floor, they are not paying any costs of the bid application costs, and they are buying equity at par, which, if we win the

licence it is worth a significant amount of money.

Q. It is for furnishing a comfort letter to the Department and to Telenor, subject to Telenor being satisfied with the letter, Clause 4?

A. I think I would put it in the other order. I think the most important thing here was to satisfy Telenor, and the second thing was the creation of the comfort letter and the second obviously, it went a stage further with the second part of the agreement.

Q. Clause 2 is dealing with 5% for the comfort letter?

A. Yeah.

Q. Right. You go to Clause 3 then.

A. Right of first refusal, is it?

Q. Right of first refusal. Now, what did that provide for?

A. If we didn't put up they would put up.

Q. Well, what it provided for was that Advent had the right to participate in financing raised by the Communicorp Group for the purpose of subscription of or loan for the purpose of subscription or loan to Digifone and there was an obligation on Communicorp to afford Advent that right in the terms set out in the agreement, again Clause 4 becomes operable here as well. But that there was no obligation on Advent to participate in the financing. They had a right. You had an obligation to afford them that right, but they had no obligation to do it. In other words, it was a



right they had which was not enforceable by you?

A. As per that agreement.

Q. Yes.

A. If you isolate that agreement you are reading it absolutely right.

Q. Yes. All right.

Now, again, it seems to be my reading of the agreement, at least, if you go to Clause 4, forget about Clause 4.1, that is to do with a time-scaled, that could be that is not really a significant one?

A. It was conditions.

Q. But Clause 4.2, that: "The obligation of Communicorp under Clause 3 of this agreement are conditional upon Telenor having been satisfied with the comfort letter issued to it and on the basis thereof, having resolved to proceed with the participation in Digifone and the application, provided that Communicorp will use all reasonable endeavours to ensure fulfillment of this condition."

So, Advent's right to participate in the subscription or loan was subject to the comfort letter being acceptable to Telenor, isn't that right, according to this particular

A. Yeah. Well, I mean, the whole the main reason why we went to Advent was to satisfy to get that financial guarantee that we had been talking about, out of the JV agreement, satisfied. We thought we had

it satisfied, but within a short period of time they communicated that they were not happy with us, on this aspect.

Q. So, just looking at that agreement now. We seem to be in agreement, at least about the agreement, that what it provided for was, in the first instance, that in consideration providing the comfort letters Advent would be entitled to 5% equity participation in Esat Digifone?

A. Yes.

Q. Subject to?

A. Yes.

Q. And secondly, that Advent had the right to subscribe or to loan in respect of Communicorp's subscriptions or loans?

A. If we didn't have the ability to put them up.

Q. No, they had the right, they had the right to participate, they had the right to participate under this agreement?

A. Yeah.

Q. They had no obligation to do it, you couldn't force them to do it if they didn't want to do it, but that right was subject to Telenor being satisfied with the comfort letter, would that be

A. It would be a world-first for an institution like Advent to make a commitment, then win a licence and then not come up with the money.

Q. The point I am trying to get clear from this, Mr. O'Brien, is that, just looking at the agreement and looking at the letter of the 10th, we will call them both the same day because that was what it was intended and they are all part of the same thing, I cannot see there any commitment, irrevocable commitment or guarantee by Advent in those documents?

A. No, I think we agreed that the other day.

Q. All right.

A. But the second part is the clincher.

Q. What is that?

A. From my point of view anyway, in a commercial sense.

Q. All right. Because the second part is that you say that there was a commerciality to it rather than a legality to it, is that what you are saying?

A. Well, as you have already done, you have given this to somebody and asked them their opinion, well, is this a legally binding agreement? They said no. But that is a very isolationist view of the world in August 1995 or July 1995, because I had a second part to this and that was that I had a shake hands with Massimo Prelz that he would put up the money and he was guaranteeing the money that I had enough confidence to go forward with the application, and secondly, say the things that I did say in the oral hearing, and ultimately Advent did put up more money when we when you washed all these transactions through to

Q. December?

A. Well, even further than that.

Q. Into January?

A. Even June, I think the 7th of June. I mean, Advent funded, again, and participated in the Credit Suisse First Boston offering.

Q. You are saying that you had a shake hands agreement with Massimo Prelz?

A. We had a verbal agreement and a shake hands.

Q. All right. We know and we will come to the tabs you have referred to now, Mr. O'Donoghue and what transpired between himself and Massimo Prelz in a moment. But if that was so, why was the letter of the 14th of July written by you, and that letter, it was a shake hands what you say in the letter of the 14th of July, which is at Tab 23?

A. I will tell you exactly why. Within a very short period of time of us signing that agreement, Telenor told us they were still unhappy, so I said, well, listen, if I accept their offer because they were saying, well, if you don't accept their offer or what happens if you need the funding and you don't draw it down, I said I will accept the offer, but this letter along with everything else, evaporated under Condition 4.2 I think it is, when Telenor kept coming back and saying we are still not happy, we are still not happy we want better letters. And then as I explained to

you in evidence, that there was just a huge amount of frustration for Peter O'Donoghue, myself, Telenor; Massimo Prelz in particular became irritable, his lawyer became irritable, and we didn't we could not persuade Advent to give them any more letters. I would say they wouldn't have got, you know, a one-line letter at that stage. They just said they throw their hands up and said we are not writing anymore letters.

Q. I understand what you are saying, Mr. O'Brien, and we can see, say, around the period the 29th sorry, the 29th, 31st of July, into early August, before the bid is submitted, there is a lot of toing and froing around that time, there's no doubt about that.

A. Apart from the other, like this is a small piece of the wheel that was moving its way forward towards the Department because this was only one of a number of major issues that we were dealing with. I know it is your big issue but it certainly wasn't it was one of maybe ten big issues that I had on my mind.

Q. I think a point you made there is one that I would just like to ask you about.

A. Sure.

Q. Because there doesn't appear to be any documentation between the 12th of July and the 14th of July where in Telenor are expressing any misgivings about the Advent letter. I don't know if they even had it at that time. You see, it was only two days?

A. Well, my understanding I wasn't in doing the negotiations directly with Knut Haga, but I my understanding is that we were quite transparent with Telenor as to what we were getting from Advent. Now, I could be corrected on this, but I believe that we discussed with them even the wording that we were getting from Advent and I think we even showed them the document, they may not have kept a copy of it, but I think that Peter O'Donoghue may have opened it and showed it to them.

Q. To whom?

A. It would have been to Knut Haga.

Q. Knut Haga?

A. Or Amund Bugge, probably Knut Haga.

Q. All right.

A. So they would have known what we got and they still weren't happy now up until we had this and then explained what we had, he had thought that we had satisfied it. This then became clear that this was not what they were looking for.

Q. You see, if you look at your letter of the 14th of July, 1995, and it is addressed to Mr. Prelz, and the first paragraph you say:

"I refer to our agreement dated the 12th of July in regards to the GSM bid to be made by Esat Digifone Limited."

Right, just look at that. Leave out the second

paragraph for a moment now. And go to the final paragraph.

"We would like to confirm acceptance of our agreement dated the 12th of July."

Now, you had already executed the agreement dated the 12th of July?

A. Yeah, it is completely moot.

Q. Well, if you look at the middle paragraph then, which is, in fact, effectively a recital:

"As you are aware, you have written to the Minister for Transport Energy and Communications and to Telenor Invest AS stating that you have offered Communicorp Group Limited  $\text{€}1/230$  million in respect of their equity participation in the bid."

Why was that included in this letter?

A. Because if I remember rightly, Telenor were saying you have an offer but you haven't accepted it. So, this is I mean, there are other examples of other bits of correspondence, they are not important, but we are trying to go and satisfy them and this was a just a letter that we thought would satisfy them even further to show that they had accepted it even though we had executed the agreement.

Q. But Mr. O'Brien, and I tell you what it looks like and let you comment on it. That letter looks like it is conveying the impression that the agreement of the 12th of July is an agreement for  $\text{€}1/230$  million, that is

what the letter looks like. And it looks like that the purpose for writing this letter was to attach it to the associated with the letter written to Mr. Martin Brennan dated the 10th of July, enclose it with the bid to convey an impression that there was an agreement for  $\frac{1}{2}$ 30 million funding, that is what it looks like. What do you say to that?

A. Well, I don't know where this letter went to Massimo Prelz. I don't know whether it was included in the bid documents or not.

Q. It went with the bid?

A. Yeah.

Q. Definitely. The agreement of the 12th of July did not go with the bid. The two letters went with the bid, that is Massimo Prelz's letter of the 10th, and this letter went with the bid?

A. I don't see anything unusual in that, to be honest with you.

Q. Well

A. No.

Q. Doesn't it look, Mr. O'Brien, that it was to convey the impression to the

A. To the assessors, yeah.

Q. to the assessors that there was an agreement for 30 million, and that that agreement was the agreement of the 12th of July, when that was not the case?

A. But there is nothing untoward in actually somebody



makes an offer, accepting an offer, that part of the documentation.

Q. But you have just told me there, we have been through the agreement of the 12th of July, we have agreed, I think, what the agreement means?

A. Yeah.

Q. And you then told me that there was a verbal and shake of the hands, so whatever the 30 million was about, it wasn't to do with the agreement of the 12th of July.

And I must suggest to you that that letter conveys the impression that the agreement of the 12th of July was to do with the 30 million funding and the purpose of writing the letter was to give that impression?

A. Can I just roll it back a little bit, back a little bit and explain to you.

Q. Yes.

A. First of all, this is in the binder here. I did not know it was in the bid document and I immediately thought when I saw this document, I thought it because it was it was addressed to Mr. Prelz, that this was an extension of trying to satisfy Telenor.

If you are saying to me that this was definitely in the bid.

Q. Definitely.

A. I still don't have a problem with it.

Q. Yes.

A. Because it confirms what we wanted to show the

assessors, that this was an offer and that we accepted the offer. Now, dramatically things changed because we were placing our third party investment under Plan B and ultimately Plan C. But we were being we were telling the assessors that there is an offer and we are accepting it, which is to give them an assurance.

Q. Where does that letter say that?

A. "I refer to our agreement..." okay "...we would like to confirm acceptance of the agreement of the 12th."

Q. Yes, the agreement of the 12th is not an agreement for the funding of the 34 million. It confers a right on Advent to subscribe if they so wish, but no obligation. So there was no agreement for 30 million?

A. You have got to take it in the context of the letter of comfort and roll that into the agreement.

Q. But it is in the agreement?

A. Plus the third agreement, the third my agreement with Mr. Prelz.

Q. Well, if the agreement was verbal, shouldn't the Department have been informed of that, if that was the true situation?

A. No, because, I mean, we went in fact, in some ways this has come back to bite us because we went too far with the Department in trying to satisfy the fact of financial capability, which was one in the RFP. And

capability is like having the capability on a certain day to pay up money for a licence, and then to fund the project. I would have thought that probably we overdid it, in a sense. Because not alone did we put up equity, we overfunded by 8.5 and then subsequently and we are going to get into this evidence we then went on and got the whole thing underwritten as well, which was never a requirement, so I don't know what hangs on this.

Q. Because what I must suggest to you, Mr. O'Brien, that when you use the expression you went too far with the Department

A. Or the assessors.

Q. The assessors.

A. I should have said assessors.

Q. We can use it interchangeably.

A. Yeah.

Q. That you went too far with them when you stated that you had an irrevocable commitment, you didn't have an irrevocable commitment?

A. We did have an irrevocable commitment. I don't think we are going to agree on this. I am saying we did. I am looking at it purely from a commercial point of view. You are looking at a piece of paper eight years later which probably in your mind isn't a guarantee.

Q. All right. If there was this verbal agreement, not just an offer, but an agreement you say, shouldn't

that have been conveyed to the assessors rather than

leaving them with the impression

A. Well, I actually did.

Q. Well, in fact

A. Because I told them about the weighted voting. I told them what their equity

Q. When Mr. McMahon asked the question, when Mr. McMahon asked the question on page 106:

"SPEAKER

A. No, 105.

Q. 105, I beg your pardon. Yes.

"SPEAKER: Sorry, just one question on that, Denis.

Do I understand that there is already an agreement in place between Communicorp and Advent on that?

"MR. DENIS O'BRIEN: Yes.

"MR. MARTIN BRENNAN: We will leave it like that at the moment that is not the same as the letter of commitment we see in the application.

"MR. DENIS O'BRIEN: Well, we thought that you would want to hear that directly from Advent, hence they wrote you a letter to say that."

A. That is not the answer to the question he was asking.

Q. Well, what question was he asking you or what question do you think he was asking you?

A. I thought it was Brennan, but say it is McMahon.

Q. It is immaterial who it was really?

A. Well, it isn't because if you have two different

people asking you questions, you are your train of thought can

Q. I can tell you that we have listened to the taping, it was Mr. McMahon in fact.

A. I take it

Q. You can take it, that is an error in the transcript there. But isn't aren't you being asked there, is there an agreement over and above the letter? They refer to it as a letter of commitment, not a letter of comfort there. But leave that aside for the moment. And you say that you want you believed that they would want to hear that from Advent themselves, hence they wrote that. Isn't that conveying the impression, Mr. O'Brien, that the letter of the 10th is an agreement, and wasn't the letter of the 14th to continue to convey that impression?

A. I think that this it was a misunderstanding on the question on my part because I thought he was talking about the letter and I was answering about the letter, but he was asking me about something else. And I don't see him asking me the next question is by Mr. Andersen.

Q. Yes, you go on to technical matters then. But, it was the wind-up of all the or the period of discussion about finances, wasn't it?

A. Yeah, it was speaker and now it is McMahon. It is saying: "Sorry, just one question, Denis. Do you

understand there is already an agreement in place?" I am saying yes.

Q. What is that?

A. That is my obviously the letters, the underwriting agreement and the verbal.

Q. There was no underwriting agreement.

A. Well, sorry, not underwriting, the 12th of July.

Q. The 12th of July agreement?

A. The 12th of July agreement.

Q. I am not trying to catch you out there.

A. No, my mistake.

Q. The agreement of the 12th of July, there was the letter and you say there was the shake of the hand?

A. Yes. But, I did, you know, I would have I don't think you could say, Mr. Coughlan, that I was hiding anything. I told him about the voting, I told him about the equity percentage, so I was referring to the second agreement.

Q. Well, if there was this verbal agreement, or even let's take it a little bit less than that, a verbal just for the moment for the purpose of questioning, even a verbal offer?

A. Agreement is a better description of it.

Q. Agreement accepted. The offer was accepted. That was never conveyed?

A. I didn't tell the assessors, well, that I had also another agreement but I did I was full and frank

with them when I said the other aspects to the second verbal agreement because I told them about it.

Q. Now, you say that you said to them that you had that they are guaranteeing  $\frac{1}{2}$ 30 million, that it is irrevocable, which is the same thing, guaranteeing and irrevocable?

A. Well, sometimes yeah, well yeah okay. We won't go

Q. Okay. Then you were asked by Mr. McMahon: "Do I understand that there is already agreement in place between Communicorp and Advent on that?" And you say yes?

A. Yes.

Q. And you say to your mind that means three things, it means the agreement of the 12th of July, the letter and the verbal agreement?

A. Yes.

Q. But when you were then asked the question that that is not the same as the letter of the commitment we have seen in the application you say: "Well, we thought that you'd want to hear that directly from Advent, hence they wrote you a letter to say that."

A. But I am saying to you, like at the very outset here, when I read that, you know, I thought he was talking about the Letter of Commitment and I probably at that stage I mean, I was chairing on our side, so it was fairly fast and furious, the questions were coming and

I was passing them off to people, and then it came to the financial sector which Peter answered, then I asked (sic) as well in relation to Communicorp. So maybe I didn't listen to the question properly. But the reply that I gave him probably didn't answer his question, definitely not on purpose though.

Q. Now, after this presentation, was there any displeasure expressed by anybody on the Esat Digifone side about what you had said at the presentation?

A. I don't remember anybody being unhappy about my aspects of the presentation.

Q. Mr. Owen O'Connell, whilst he wasn't at the presentation, remembers generally that there was some disquiet on the Telenor side, he believes, about what you had said about the finances of Communicorp, do you remember anything like that?

A. You see, they weren't satisfied by the July 12th agreement, so they would have had some disquiet about that. But I don't believe they had a disquiet about the presentation. Anyway, Mr. O'Connell was not involved in the post-mortem.

Q. Sorry, I prefaced the question by saying that. Do you know whether there was a post-mortem and whether Mr. O'Connell was present at the post-mortem?

A. I was just about to say that, he wasn't there.

Q. He wasn't at the post-mortem?

A. I believe he was not there. Now it is eight years ago.



Q. Yes, that is a fair point. I am not do you know where the post-mortem was held by any chance, it was held in William Fry?

A. I would say it was probably in a bar.

Q. In a bar?

A. Or a hotel. I am being facetious. We probably went across the road somewhere and sat down and said how did we do. In that case, it is more moral building with your team because you can't even if they made mistakes you can't tell them they made mistakes .

Q. Yes. But you were

A. But nobody told me I made a mistake.

Q. But you were the lead in terms

A. That is the point, they may have dropped the ball in some area of the presentation, a small little thing or whatever, but I suppose the key reason was the what were the key, if you were to summarise the two or three points out of the presentation, that we thought the assessors had concerns about, you know, they would have been easily identified to certainly the more senior figures in the group.

Q. Did you discern any question-mark on the part of the assessors?

A. We always, you know, from day one, you know it had been drilled into us from the very outset, you know, people were always asking us about our financial capability.

Q. Yes.

A. You know, maybe we were too focused on that, but that was one of the three things that we took away from the oral presentation.

Q. Well, just having read the oral presentation there, I know you were asked questions, there was the technical question about solvency which Mr. Peter O'Donoghue dealt with, that seemed to move on unremarkably, both Communicorp and Telenor were going to guarantee the position of Digifone. The next question you were then asked about was had Communicorp already put in the 10 million and the 9.5 million. That was answered and it seemed to moved on and nothing remarkable seemed to have arisen at the presentation. And the third question then was about the investment, sorry, the money for equity, the 30 million. And answers were given to that. It seems relaxed. Even a joke there with Mr. Billy Riordan about the use of the term who used the term "fat" in the first instance. There doesn't seem to be anything remarkable from listening to the tapes or looking at the transcript of it. So what in particular at the presentation jumped up?

A. Maybe it was so focused I was getting the questions on Communicorp as one of the principals, so maybe I took away from that. Also, my partner telling me, you know, we need you need to strengthen up your finances, so I was getting it from my partner. I was getting

it, you know rightly or wrongly, my impression of the assessors was they had question-marks about our funding capability. So, sometimes these things become bigger in your own mind than the reality of the situation.

Q. Did you have any conversation with anybody which was a feedback of how you had performed at the presentation?

A. Well, I explained, I think in my statement, that we involved Padraig O'hUiginn in helping us to sort of get the tone of our presentation.

Q. Yes.

A. And I did have a meeting with him afterwards and also PJ Mara and we discussed and they felt that it was desirable that we would try and strengthen up the Communicorp financing side of things.

Q. The Communicorp financing side?

A. Yes.

Q. Can you remember when that was? Was it immediately after the presentation?

A. Within a day or so, it could have been a couple of days. It was, you know, you are right, it was a friendly it was a friendly dialogue. On the one hand we are having World War III with the Department on auto dialers, so we were quite surprised with

Q. Oh no, we have listened to the tape, it has been played here. It seemed fairly relaxed.

A. Friendly, relaxed, yeah.

Q. A lot of the technical stuff difficult enough

A. To understand.

Q. For lay people to have an understanding or be indifferent about. But there was no tension?

A. There wasn't a sharpness.

Q. Yes. But within a day or so, day or two after the presentation, you had this discussion with Mr. O'hUiginn and Mr. PJ Mara, and you were advised by one or other, or both of them, that you needed to strengthen under the finances of Communicorp, is that right?

A. That's right, yes.

Q. Do you remember which one in particular may have advised you?

A. Both of them. We would have had a discussion about it and they would have said how did you get on. We had gone through some of the key questions that we had been asked. And then we would have discussed the funding side, what questions were asked on that, and I explained. And then we, you know, we discussed well, do we do something or do we not do anything about it? And I suppose, eight years later you look at this and you say, this wasn't a big thing.

Q. Mmm.

A. Eight years later one would say this is not a big deal, but at the time living with it, it was one of the key things for me was to make sure that I could

satisfy the perception that we were funded and well-funded.

Q. The perception or the reality?

A. Well, sorry, people perceived us in the media to being a junior player and we had to show that we had the capability.

Q. Right. So, you make the point that am I correct, that at the time this was a matter which was exercising your mind?

A. Yes.

Q. And you would have been anxious about it?

A. Yes, because mainly because of Telenor saying that this was this is a big issue.

Q. Yes.

A. And of course, ultimately, it was never going to be a big issue, but if you took if you isolated those few days or few weeks, it was an issue.

Q. Yes. Of course it would be an issue for the assessors as well, perhaps? That was one of the matters they had to take into consideration in the competition, the financial capability, isn't that right?

A. Yes. If I remember, it wasn't that, in reading the documents, it is some months ago, it didn't exercise them too much I don't think.

Q. We will look at that in due course.

A. Sure.

Q. What appears in the final report. But so, one way or another, it was something that was exercising your mind?

A. Mainly because Telenor were prodding me.

Q. Yes, but it was a significant yes, for whatever reason it was exercised?

A. Every day I was getting phone calls about where is the financial guarantee.

Q. All right. All right. And where were you getting those from, from Telenor?

A. I was getting them from Peter, he was ringing me and saying the lads are still not happy.

Q. Mm-hmm. I just want to and we will look at the tabs that you refer to because Tab 28 this is Peter O'Donoghue's

A. He is saying remind him that he had outline terms to Denis.

Q. He makes the point that they weren't acceptable to yourselves, as far as Peter O'Donoghue was concerned?

A. They were rich, yeah.

Q. Yes. All right. And Massimo Prelz said to him he wouldn't be signing any letter, according to this letter?

A. This is where he says get lost. I would say he used stronger words than what was

Q. Probably. Then he goes on, "The letter requires the approval of the Investment Committee," and no letter

would be forthcoming.

A. He was embarrassed going back to his Investment Committee all the time.

Q. Wasn't it becoming clear to him, if the agreement now I know there was some argument subsequently between Baker McKenzie and Owen O'Connell about the interpretation of the agreement, but if Clause 4, as you say, was wisely inserted by your lawyers into the agreement, that it was subject to Telenor's satisfaction, what he was doing here was biting off his nose to spite his face, wasn't he, because what he was doing by if he had this agreement with you, he was cutting himself out of 5%, or he was cutting his company out of 5% of something that they obviously might have liked to get their hands on?

A. I don't think he was focused on that. He wasn't focused.

Q. He wasn't?

A. I don't think so. He wasn't considering the implications of not satisfying Telenor under 4.2.

Q. What I have heard about Massimo Prezz, primarily from Peter O'Donoghue, I suppose, who had dealings with him, he was a tough, fairly cold sort of fellow?

A. Oh, he has a good side to him.

Q. I am not saying there wasn't a good side to him, but when it came to business he was tough and fairly cold and acted in the interests of Advent?

A. Of his funds, yeah.

Q. Of his funds, to the extent that even as a shareholder and a director of Communicorp, imposed fairly strong terms on the \$5 million, the 30% ?

A. Yeah, he had us well saddled.

Q. Yes. But surely, if he was going to if he was putting his funds in a position where they were going to lose an opportunity to have 5% of the mobile phone company, he would be focused on that, surely?

A. I don't think people were waving the claws at them. I think he knew he had to satisfy Telenor, he thought ultimately they would be satisfied by the 12th of July agreement, but he certainly wasn't writing anymore letters and that was loud and clear. In fact

Q. That is what I suppose looking at it appears surprising, that he was cutting off his nose to spite his face here. He may have been annoyed, he may have been very annoyed with you and Peter O'Donoghue as well, I accept all that, you describe it as a rant, he may have been

A. We were the messengers. He was more annoyed with Telenor.

Q. He may have been annoyed with Telenor. At the end of the day in the interests of his funds, he was getting in cheaply at 5% at par, wasn't he, like?

A. He was. They were all getting in cheaply.

Q. But surely, for providing a letter of comfort, it



seems incredible, doesn't it, that he wouldn't provide

it, if there was such an agreement, Mr. O'Brien?

A. That's correct, but business is about give and take.

Ultimately when we settled at the time up with Massimo in December

Q. Yes.

A. you know, that was part of the mix of things. I mean, okay, he lost out on his 5%, but we certainly weren't hard on him, even though we had the whip hand when there was the de-merger taking place, that we were probably more than generous in trying to recompense him for it because we knew that he suffered embarrassment with his own colleagues in London about this.

Q. You refer me to Tab 31. This is the day the bid went in.

A. Yeah.

Q. This is Owen O'Connell's note.

A. Yeah.

Q. "Opinion re Advent offer to be provided. Asked Denis O'Brien for Advent offer agreement that is legally binding on Advent.

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

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

A. This is the what I am really referring to there is the verbal offer, the second part of that memorandum.

Q. Yes. This is Owen O'Connell's note. He has never

seen it?

A. That's right.

Q. He has never

A. He knows, he knows that there is a verbal agreement or an agreement, a second part of it between myself and

Massimo. This is I am just giving this as an

example, that people did, one or two people, not

everybody, knew that there was a second part to the

agreement. Then if you look at Tab 35

Q. Well, if Owen O'Connell is maybe Owen O'Connell

is saying he has not seen the Advent offer, clearly he

has the impression at that time that it was written,

but there was no letter written to Communicorp

offering anything?

A. I explained that to you, no. And then the other one

that I was just referring to was 35.

Q. Yes.

A. And it is: "The offer is verbal. It is not possible for me to give any such opinion."

Q. Now

CHAIRMAN: Just one point, Mr. O'Brien, apropos to what you said to Mr. Coughlan a few minutes ago, that

Mr. Prelz had Esat fairly well-saddled, he had been

pretty tough on the 5 million. 30% was a pretty

fierce coupon to have to pick up and reflected the

difficulty of getting money and the nature of his

venture capital business. But on what you believe to

have been your verbal agreement with Mr. Prelz and the handshake in relation to the 30 million, had you gone into things I know this was equity, not a loan, but had you gone into things, that he could have been very scathing about, by the same token, such as exit mechanisms or the like?

A. You see, he had a 1994 agreement so they would have been covered, Chairman, in that. So this was an extension of maybe the first agreement in October 1994, the agreement of the 12th of July, the letter and now his the verbal agreement. That he he he put money into a company, it looked a terrific opportunity, we then ran into severe difficulties with the Department and we came out of those difficulties. So he was probably sending in reports to his Investment Committee that may have been one out of three reports, monthly reports, would have been good, the other two would have been bad. So, when we we actually even things out with him because we were he would have lost out on the 5%, because he hadn't satisfied, but we knew that to maintain a relationship with him, and also to reflect the bravery of putting money up, a lot of money, 90 million, that we would have to make sure that we would keep him happy and reward him, and that is what we did.

Q. MR. COUGHLAN: If you just go to Tab 29 for a moment. We know that on the previous day, the 3rd of August,

Peter O'Donoghue had sent the draft guarantee to Massimo Prelz and that resulted in what you describe as the rant from Massimo?

A. You are on 29, sorry?

Q. Well, Tab 27, I suppose, is where Peter O'Donoghue sends him the guarantee. It is not going he didn't get that. And that resulted in the conversation where he said that you used the term "commitment". To use the term "commitment" was misleading, isn't that right?

A. That's right. Even though the word "commitment" is used in the letter.

Q. Now, going over the next tab, then, to the 4th of August, this is where Peter O'Donoghue is trying to get something less than a guarantee but some form of financial assurance which seemed to be something which would satisfy Telenor. And all that is asked for there is that Advent International, on behalf of his fund and the management, confirm that it has offered  $\frac{1}{2}$ 30 million to Communicorp Group Limited for the necessary equity in Communicorp Group Limited to establish and operate a GSM network in Ireland.

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

So he had this irrevocable agreement with you and he wasn't prepared to sign a letter to say that the offer

was true and valid, and that it would remain so for 60 days, which was less than you say existed?

A. I think this comes back to the circumstances here, he wasn't prepared to sign anything anymore. He just I mean, this letter, it looks a fairly easy letter for him to write.

Q. Yes?

A. Maybe he should have, but he didn't.

Q. Because doesn't it look to us that going back to the note that Mr. John Callaghan made originally, what Massimo Prelz was prepared to do was to write a strong letter of comfort but never give a commitment and that was all that you ever had, was a strong letter of comfort but never a commitment from Massimo Prelz?

A. I wouldn't accept that.

Q. All right. Now, if you I just want to make a few references to Mr. Owen O'Connell's sorry, before I do that, Mr. O'Donoghue's note of the which is at Tab 24, sorry. I beg your pardon, Tab 28.

A. Tab 28, okay.

Q. This is the note of the conversation with Massimo Prelz, where Peter O'Donoghue reminded him that "he had put outline terms to Denis and even though these terms were not acceptable to ourselves, they were in themselves terms."

Now, Mr. O'Donoghue seemed to be of the view that they weren't of the view that they weren't accepted by you?

A. Well, they were rich terms, as I explained.

Q. I understand that. And he may have, he may have had you in a position where that was what he wished to dictate and that is a business matter for yourselves to sort out. But whatever terms, even if they were outline terms, it looks as if he didn't accept them and therefore there was no agreement?

A. Well, Peter would not have known the terms, so I don't know why he may have used those words.

Q. All right. Now, Mr. Owen O'Connell, when he gave evidence here on Day 243, and I will see if I can get you the transcript. I will get you

A. If you want to read it and see how we will go.

Q. I will read it. It is, I think, I am asking questions of Mr. O'Connell at this stage. And it is page 34, question 112. And I ask the question:

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

This is a reference to that note, Massimo Prelz said no offer, he was signing no letters?

A. I think that is a different thing, isn't it?

Q. Well, just listen now.

"MR. O'CONNELL: Yes, but Mr. O'Brien maintained all along that he had a verbal offer from Massimo Prelz, but that it was in terms so unfavourable that he

didn't want to accept it, and he maintained that what Advent were doing with these sessions as to the absence of any offer was to try to push him into accepting the offer they had made on the terms they had put forward, and I simply accepted Mr. O'Brien's instructions in that respect.

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

"Answer: I think that's correct, yes."

Now, I continue.

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

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

I will get you it is page 35.

(Transcript handed to witness.)

A. Can you break this up into bits for me because I won't be able to remember all

Q. I will bring it back now.

A. Okay.

Q. I will break it up.

A. Thank you.

Q. If you go to on to page 35 I will just continue.

Question 115.

"Question: Yes, as far as you were concerned, there was no agreement in respect of which you could furnish an opinion?

"Answer: I think that's fair, yes.

"Question: And you very clearly point out that to Telenor, that you are not in a position to furnish an opinion?

"Answer: Yes.

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

"Answer: Yes, it has that effect, yes."

Now, whatever the position was there, as far as Mr. O'Connell was concerned, you were asserting that you had an offer?

A. Sorry, he is speaking, he is giving his evidence

Q. Yes.



A. of what he knew at the time. So, I can't speculate what was on his mind or how much he even knew what was going on.

Q. Very good. Taking his instructions to you as his client, he was aware that he must have been informed, that you always asserted that Massimo Prelz had made a verbal offer, and he accepted that, but he had no knowledge that you had accepted that offer, in other words, that there was no agreement? Do you understand the distinction?

A. Yeah, but I think I explained to you that the agreement that I had with Mr. Prelz and the outline terms that we agreed

Q. Yes.

A. I didn't I don't believe I discussed them with Mr. O'Connell, so I don't know, you know, how he can he really can't discuss them because he doesn't know anything about them.

Q. Well, Mr. O'Connell did give evidence and I can find but he did say that and he didn't say this in a disparaging way.

A. I know.

Q. He said that you were a typical entrepreneur, that you were ducking and weaving, is how he described it; that you were trying to get him to write an opinion, but he couldn't be furnished with any information which would enable him to form that opinion, that there was an

agreement?

A. All he knew was that there was a verbal agreement, but he couldn't outline it.

Q. He knew there was a verbal offer, he didn't know there was a verbal agreement?

A. Let's look at his letter at Tab 35 because I think he says there is a verbal offer.

Q. Verbal offer, yes.

A. Okay.

Q. Yes. You see, it is very significant, Mr. O'Brien

A. Well, I am saying I had a verbal agreement and I outline to you, I think in Day 2, you know, the outline terms of that agreement about getting sort of a price for the fixed line value on the licence, putting the two together, to get an overall valuation and what would be the dilution for new capital.

Q. Yes. Now, I just go to Mr. Fitzsimons on behalf of Telenor asked Mr. O'Connell some questions as well and I want to go to that portion of the transcript.

A. Okay, no problem.

Q. Sorry, it is in a different book. I am getting it now.

Just while it is being got, Mr. O'Brien, if you just go to Tab 25, you can see there that Mr. Peter O'Donoghue, on the 31st of July, of 1995, is speaking to Mr. Owen O'Connell. And he is talking about the Telenor agreement. "Initial 50:50, then 40:20:40,

ultimately 33:33:33 in public domain per quote.

Not keen to be obliged to pay large amount of money,

too early. Only as required. Dependant on First

Boston funding."

You see, doesn't it look there that really your

interest, if Advent had ceased at this stage, that

this was all dependant on the First Boston, the CS

First Boston funding?

A. Definitely not. I don't believe so.

Q. Right.

A. But certainly we were pushing every button to try to

get Advent to satisfy Telenor.

Q. Just while I am waiting for it I will deal with it in

broad terms for the moment because I can remember that

Mr. Fitzsimons and I will get the transcript in a

moment was asking Mr. O'Connell about this

particular offer. I will get the transcript now.

And I think we have it.

I will read it for you and I will get you a copy and

you can look at it when we break in due course.

It might even come up on the computer as I read it.

It is Day 246. And I think I might commence at about

page 118 just to start off.

Question 560, Mr. Fitzsimons asked Mr. O'Connell.

"We also discussed at our meeting this morning what

steps should be taken with Advent regarding the

funding of the GSM company. As you will recall, Owen

O'Connell strongly is of the view" he is reading one of the notes there "that the condition of Clause 4.2" this is Mr. Halpenny's note of the agreement, dated the 12th of July, 1995 "has not, in fact, been satisfied and that you should very strongly consider sending a letter along these lines to Advent stating as that agreement was not satisfied, the agreement of the 12th of July is of no further effect.

"I trust this is in order. Kind regards."

Mr. Fitzsimons says: "So you were of the view this letter indicates that you were involved at this time and you had this strong view?"

"Answer: It records that I was consulted in relation to the agreement with Advent of the 12th of July, 1995, and gave a view in relation to it.

"Question: Were you aware that Telenor was never given a copy of that agreement?"

"Answer: I have no idea whether they were or not.

"Question: Well, how would that gel with the duty of good faith, if Telenor were not given a copy of that agreement?"

"Answer:" sorry page 119.

"The agreement was between Communicorp and Advent.

"Question: Yes. But it related to the joint venture, it was a critical element of Communicorp's funding plans.

"Answer: Well, as to whether they got a copy of the agreement, I can't say, but and I take your word for it, that they didn't, but I think they were aware, were they not, that the I think they were sorry, I am slightly lost in the time line now. But I think they were aware that Advent were to get 5% of yes, they were aware that Advent were to get 5% of Esat Digifone, they were certainly made aware of that because

"Question: They were told of an agreement, but they were never given a copy of the actual document, the agreement itself.

Answer: Again, as I say, I take your word for that, Mr. Fitzsimons.

"Question: Well, that will be the evidence.

"Answer: Yes, okay, okay. I accept what you say.

"Question: Now, you have referred, on a number of occasions, to Denis O'Brien having told you that he had communicated to Telenor an offer that had been made by Advent, and I am not correct me if I am doing him an injustice, but you do indicate that Telenor were told of an offer over and above what ever was in the agreement.

"Answer: Yes, that is correct.

"Question: Well, could you please tell me the terms of such offer that you were told had been communicated to Telenor, because Telenor have no recollection of

hearing anything of the sort?

"Answer: Could I tell you the terms of the offer?

"Question: Yes, please.

"Answer: No, I couldn't. I wasn't told the terms of the offer.

"Question: Well, why not? Why didn't you find them out, if you were acting as the solicitor for Esat Digifone at the relevant time, or perhaps for Communicorp, if it occurred at an earlier point in time?

"Answer: Because as I understood it, the offer hadn't been accepted.

"Question: I know, but you were the solicitor acting in the matter and you would need this information to assist you to advise your client.

"Answer: I am sorry, I don't follow, Mr. Fitzsimons. I wasn't consulted as to the implementation of the offer because the offer wasn't accepted. Had the offer been accepted and gone for implementation, clearly either Gerry Halpenny or myself would have to have been told what the terms of the offer were, either in order to draft a formal agreement implementing it or to respond to such an agreement, if drafted by Baker McKenzie. But the matter never went to that point.

"I was told there had been an offer. It hasn't been accepted. I am afraid I don't regard it as the case

that, where a client tells me he has received an offer but hasn't accepted it, I should quiz him as to what his terms were. I wouldn't see my duty as a solicitor going remotely that far. It's my client's business.

If he wants to tell me, perhaps because he wants to accept and implement the offer, fine. But if he has already rejected it, why should he waste time telling me about it?"

So, there Mr. O'Connell seems to be or is informing Mr. Fitzsimons that whatever the offer was, it wasn't accepted, isn't that right?

A. Well

Q. Objected, in other words.

A. He is saying that, if you look at it another way, he is saying that he wasn't informed of what the terms of the agreement were.

Q. Because?

A. Or the offer.

Q. Because it hadn't been accepted, he said the offer hadn't been accepted, it had been rejected, that is why he wouldn't bother himself?

A. Can I describe how where we were at that time. There were many different people doing different roles within the working on this bid, okay. I didn't tell everybody the same information. Mr. O'Connell was my solicitor. I didn't go out I was also using Mr. Halpenny. I did not explain everything to him,

what was going on at any one time. He was dealing with aspects of the legal work in relation to Communicorp and Esat Digifone. So but what confuses me here on what you have just read out, is that if Telenor weren't satisfied with what we had from Advent, well then they must have known what was in the Advent agreement.

Q. Mm-hmm. Well

A. It is illogical to say we are unhappy, but what are they unhappy about when they have never seen it?

Q. They definitely had the letter of the 10th of July, and that is commented upon by Mr. Knut Haga in his letter of the 11th of September.

A. Well, it is interesting you say this because look, in the 12th of July agreement, the Articles of Association had to be changed. Now, we couldn't agree to the changes of the Articles of Association without the consent of Telenor, so either they went through the whole agreement or certainly they were shown aspects of the agreement or indeed maybe they may have been given a copy and maybe somebody can't remember getting a copy, but let's be very clear, we were full and frank and transparent with Telenor in relation to the 12th of July agreement and what we were entering into at that time. So that is my you know, that is my firm belief.

Q. That is a matter I will take up with Telenor, yes.



What I was drawing your attention to there, is leave aside the agreement of the 12th of July now, in relation to a verbal offer, Mr. O'Connell has informed Mr. Fitzsimons that when he was asked did he go into the terms, he says no, because it had been rejected and what was the point, if a client wanted to tell him about things, that is fine, but if the offer hadn't been accepted or, as he says, had been rejected, there was no agreement, that is the point I am trying to bring across to you. There may have been an offer but no agreement.

A. That may be his evidence. My evidence is in contrast to that and I am saying that I had a handshake and an agreement of outline terms with Mr. Prelz for 30 million.

Q. Well, if you were asked

A. We will never agree on this.

Q. I know. Mr. O'Connell was being asked to furnish an opinion.

A. But he is one cog in a huge big series of wheels and a very capable one at that.

Q. A very important one.

A. And a very important person.

Q. Yes.

A. But he didn't know everything that was going on at any one time. How could he? Unless he was standing beside me.

Q. This was an area of his expertise, that you were asking him to become involved in it. What you were asking Mr. O'Connell was to furnish an opinion to Telenor about the legal enforceability of something, isn't that correct? A matter peculiarly for the lawyer?

A. Yeah, and he is saying, I can't give an opinion

Q. Yes, said to Mr. Fitzsimons that he said to Mr. Fitzsimons that he knew that there had been an offer but that it hadn't been accepted.

A. In other words, it hadn't been executed on. Accepted and executing, they are virtually the same things.

In other words, if I accepted an offer of money from you for an investment then we executed on it. We immediately execute on it.

Q. Well, Mr. O'Brien, I think you are mistaken there, in that

A. I think you are. But you are inquiring, you know, you are inquiring of me you can't say I am mistaken because I was there.

Q. You are mistaken in understanding what Mr. O'Connell was saying, I think. What Mr. O'Connell was saying was that the offer hadn't been accepted, so therefore there was no need to discuss terms to enable it be implemented or executed.

A. But what hangs on that?

Q. Well, you see, Mr. O'Brien, you have said that there

was an irrevocable commitment, that there was a

guarantee, that there was an agreement?

A. Following my second part.

Q. I am bringing to your attention all of the documents

and the evidence of various people and I am asking you

where, where was this conveyed to anybody that there

was an agreement? The only place that it was ever

stated was at the presentation?

A. No, you are wrong.

Q. That there was an agreement?

A. If you look at the three tabs I referred to earlier

on.

Q. Yes.

A. People talk about the verbal offer.

Q. Offer.

A. Okay.

Q. I know he talks about the verbal offer.

A. I have said in my evidence clearly from day one, that

I also had terms on that offer and an agreement with

him that he would put 30 million under those terms.

Now, I can't people I can only give my evidence.

Q. Yes.

A. Really what he says may be conflicting but it doesn't

really matter as far as I am concerned.

Q. Very good.

A. I was there.

Q. Very good.

CHAIRMAN: I think we will take our break now until

4 o'clock if that is suitable.

THE TRIBUNAL THEN ADJOURNED FOR A SHORT RECESS AND

RESUMED AS FOLLOWS:

CHAIRMAN: During the break the Registrar conveyed to

me the predicament of our stenographer, which it need

scarcely be formally minuted. She is heavily

pregnant, she has no assistance from any colleague in

the office, and if we finish at shortly after 5, she

is going to be here until 8:00 I think it is a bit

oppressive to keep her here until 9:00. So while I am

sorry, I think we will confine this sitting to an hour

and make up the time tomorrow.

Q. MR. COUGHLAN: Thank you, Mr. O'Brien. I just want to

draw something to your attention. I don't necessarily

want you to respond to it immediately. It is not

necessarily consistent with the evidence you have

given, but it may be in ease of you and may offer an

explanation as to why Massimo Prelz wouldn't sign the

Letter of Guarantee and the next letter on the 4th of

August, 1995, that was the letter seeking financial

sorry, I will continue. They will get the transcript.

A. I will tell them what went on.

Q. If you just, what I would like you to do, do you have

Book 49 there by any chance?

A. Yes, I do.

Q. Would you just get Book 49 out for me.

Mr. O'Sullivan is going to get Mr. Fitzsimons.

A. Which tab?

Q. And it is Tab 97. Now, this is Miss Helen Stroud of Baker McKenzie writing to your solicitors about the whole matter. This is before the compromise of the whole position.

A. This is the 13th of December.

Q. The 13th of December, 1995. And she thanks Mr. O'Connell for his letter of the 12th of December and she says she has discussed it with her clients.

Then she continues: "We completely disagree with the points raised by you in this letter. However, we see no value in repeating the points in our letter of the 23rd of November." This was where they were arguing over and back.

"Suffice to say, that we are at a loss to understand how, when Clause 4.2 is expressly limited in its application to the obligations of your client under Clause 3, you can somehow interpret it as extending to limit the rights of our clients under Clause 2."

Clause 3 is the clause allowing for

A. Right of first refusal.

Q. right of first refusal.

"You can somehow interpret it as extending it to limit the rights of our clients under Clause 2." That is the 5% for the letter of comfort.

"You state that your clients do not accept the version

of events set out in our letter of the 23rd of November, and that the written correspondence which you sent with your last letter gives an entirely contrary view. With respect, it is all too easy to select extracts from correspondence to support a particular view. It is, however, much more relevant to understand the chronology of the transaction in total. We are therefore setting out the background, all of which is supported by the correspondence or contemporaneous notes, copies of which we would be happy to supply you with."

Then she says:

"1. On the 26th of June, 1995 we wrote to you enclosing a revised draft facility agreement containing a new clause (Clause 2.5) which extended the period of the loan to be made by the Advent funds." This is the loan.

"We described the reason for this clause as being to cover the position in which Telenor refused to accept the comfort letter at a time when Advent had already made the facility available to RINV. Thus, for the first time in the drafting, the RINV facility and the Digifone deal became linked.

"2. On the 27th of June, Owen O'Connell of your office had a telephone conversation with Helen Stroud of this office, in which she stated that Communicorp did not want to link the two deals in this way and the

lawyers agreed that this was a commercial point for their respective clients to decide.

"3. On the 28th of June, Denis O'Brien sent a fax to Massimo Prelz in which he refused to accept that the term of the loan facility was contingent on Telenor's satisfaction with the comfort letter. He attached a copy of the notes of the meeting of the 15th June as an illustration that no such link had been intended."

That is John Callanan's notes. And I have opened those.

"4. On the 28th of June, we wrote to you and your clients confirming our clients' instruction that the Esat deal and the RINV equity were to be regarded as one package, and that the funds under the latter would not be delivered until the two deals had been signed.

"5. On the 29th of June, Denis O'Brien responded to Massimo Prelz that it was not acceptable to interlink the two agreements.

"6. Later that day, Massimo Prelz responded to Denis O'Brien that (paraphrasing) Communicorp had itself changed the deal that had been agreed on a preliminary basis at the Board meeting on June 15th.

"At this stage, therefore, there was an absolute deadlock, at a time when your clients were extremely anxious to receive the Advent monies. The position is summed up in a fax from Baker McKenzie to Denis O'Brien dated 29th of June, 1995, in which it is made

clear that Advent would not provide the financing to RINV, only to be exposed on the Esat agreement. As we then described in our letter to you on of the 23rd of November, discussions took place between Helen Stroud of this office and Peter O'Donoghue of Communicorp, in which to resolve the deadlock and release the funds, it was agreed that as a compromise the 5% participation would be freed from Telenor's decision on the comfort letter and would be subject only to the GSM Licence being granted and the funding being made available."

I think what she is saying there is that there was a decoupling of the acceptance or the satisfaction of Telenor in respect of the 5%, and it was only in relation to Clause 3, the funding.

"We hope that the above explains more clearly how the two agreements became so interlinked and why the notes of the meeting on the 15th of June which you assert support the contrary view, were overtaken by events."

"Then to respond to the points in the final and penultimate paragraphs of your letter, please note that Telenor's satisfaction with the comfort letter was, of course, a condition to your client's obligations to grant the Advent funds the right to participate in the funding of Digifone, and for this reason (and also because at that stage it was not clear that alternative financing to secure the GSM



Licence would be available) further negotiations on the form of that letter followed.

"We did not accept that that agreement is based on the issue of a satisfactory comfort letter. Clause 2.1 states that's it is 'in consideration of the issue of the comfort letter,' that is the letter in the form attached to the agreement. Only the obligations of your client under Clause 3 are subject to Telenor being satisfied with the comfort letter issued to it (see Clause 4.2). We therefore do not agree with you that there is a failure of consideration.

"Finally, we take exception to the inference in the 5th paragraph of your letter that Baker McKenzie has in some way acted improperly in negotiating directly with Peter O'Donoghue or your clients. You will no doubt recall on checking your records that in a telephone conversation of 27th June, Owen O'Connell of your office explained to Helen Stroud that he was about to go on holiday and that there would be nobody at William Fry to work on the transaction with Communicorp since his absence unfortunately overlapped with that of Gerry Halpenny."

CHAIRMAN: I think that is more or less explaining that he has difficulties.

Q. MR. COUGHLAN: Do you see the point that she is making there?

A. I don't.

Q. She is making the point that Clause 4.2 of the agreement or the agreement in general, states that:  
"The obligation of Communicorp under Clause 3 of this agreement are conditional upon Telenor having been satisfied with the comfort letter issued to it and on a basis thereof have resolved to proceed with its participation in Digifone and the application, provided that Communicorp will use all reasonable endeavours to ensure fulfillment of the condition."

It may be something that you want to consider and we can return to it. I just bring it to your attention.

A. Can I make a general point?

Q. Yes.

A. She is scrambling to save her client's 5%. Like, she wrote these long convoluted letters and they accounted for nothing, in the end, because they breached and that was the end of it. She can argue and argue and argue but they had a breach. So coupling or uncoupling, it is not that material to ultimately what happened.

Q. I am just bringing it to your attention, as it may be offering an explanation as to why Massimo Prelz was refusing to sign the guarantee on the 3rd and the other letter of the 4th, that he was asserting there that the letter of comfort had nothing whatsoever to do sorry, Telenor's satisfaction with the letter of comfort had nothing to do with the 5%, but was only

related to Clause 3 and that related to their right of

first refusal.

A. Okay. I need to read this because this is I didn't

think we would get to

Q. I am just reading it because it seemed appropriate and

I agree you should consider it.

A. Yes.

Q. I am just bringing it to your attention on the basis

that when I asked you why was he biting off his nose

to spite his face, risking 5% for his funds, that may

be an explanation, but you might like to consider it?

A. I don't

Q. It is not what you are contending for anyway.

A. I don't understand the memorandum.

Q. It is not what you are contending for anyway. You

are saying there was an agreement, an irrevocable

commitment and that was it?

A. I would rather read what she is saying there if you

wouldn't mind and then I will answer the question for

you.

Q. Okay. Now, I think I just want to go into something

now for a moment.

On the 10th of August you went to a football match in

Glasgow?

A. That's right.

Q. Isn't that right?

A. 1/1, Liverpool and Celtic.

Q. And you were the guest of Mr. Dermot Desmond, isn't that right?

A. That's right.

Q. And I think in the statement which you have furnished just before you commenced evidence, at page 34 of that statement, you say that prior to the oral presentation you were seriously concerned that Telenor would use their financial muscle to take control of the consortium unless you could obtain a legally binding commitment that in their eyes satisfied them.

On the 10th of August, you found the possibility of an answer to your problem when you were invited to Glasgow by Dermot Desmond to watch a Celtic football match. On the way home, you discussed the prospect of his company, IIU, underwriting Communicorp's financial commitment in return for a stake of the consortium, a stake which IIU would pay full price, and in respect of which it would bear the share of the bid costs from the beginning, win or lose.

Then you go on, negotiating this agreement took time.

And you were still under pressure from Telenor to relieve the pressure, and to buy time you sought to have Owen O'Connell, of William Fry, issue an opinion to Telenor, to the effect that the commitments obtained from Mr. Prelz and Communicorp were legally binding. Not surprisingly, he declined to do so.

What is that? Why wasn't it not surprising?

A. As he has already said in his evidence, he didn't believe they were legally binding and he only knew of the verbal agreement that I had, so and you have to twist solicitors' arms to get an opinion out of them on any commercial arrangement.

Q. Anyway, I will continue.

He did, however, write a long letter to Mr. Bugge of Telenor on the 17th of August in which, firstly, he sought to persuade Telenor of the merits of Communicorp's guarantee, and secondly, as he set out the analysis of why Telenor were not at risk in the absence of Communicorp guarantee. You believe, in fact, that Mr. O'Connell's analysis was correct, and that indeed has since been borne out by events. Telenor would not relent though, and did not accept the analysis. Your concern about the perception regarding Communicorp's financial weakness and your wish to have 40% of the consortium underwritten lead you to seek the underwriting, although under the rules of the RFP no such underwriting was required. If anyone had to underwrite their bids, it would have greatly increased the width costs. Negotiation with IIU progressed after the 11th of August, 1995, with the main issue being the terms of the underwriting commitment which IIU would give. The percentage of Esat Digifone which it would aware, we offered 20%, they sought 30%. Its participation or otherwise in

Shareholders Agreement, Telenor's attitude to the investment and the basis upon which IIU would be able to syndicate its investment, if it so wished to do.

Numerous meetings took place with Dermot Desmond and Michael Walsh between the 11th of August and the 27th of September, culminating in an underwriting agreement. In return for the underwriting agreement covering Communicorp's 30% block, IIU would also have the right to replace the third party investors. IIU negotiated a 25% holding, but you did, however, believe that if Esat Digifone were ultimately successful in its bid, the Department could insist on the third party block remaining at 20%.

A letter that was written a letter was sent by IIU to the Department on the 29th of September confirming IIU's underwriting commitment, but was returned by the Department with a note to the effect that it would not be taken into account.

If I just pause there for a moment and ask you, what was the basis of your belief that if Esat Digifone was ultimately successful in its bid the Department could insist on the third party block remaining at 20% ?

A. Very simply we said in the application that it was a joint venture 50:50 between ourselves and Telenor and that we were bringing in third party investors for 20, and 20 was always the number. And if the Department wanted to make sure that third party investors owned

20, well then, they could insist on it when we went forward

Q. In other words, that it would accord with the bid, isn't that right?

A. Pardon?

Q. In other words, that it would accord with the bid?

A. Yes, it would. But obviously if they wanted to take a different view and say 25 or even 30%, well then they could have.

Q. You believed that if Esat Digifone were successful the Department could insist, in other words, that it would have to accord with the bid, isn't that right, that was why you believed it?

A. Well, we said 20% so they could say but I have seen in other situations other licences, where people have said numbers of percentages and they have been changed like fairly dramatically.

Q. That was after this particular this was your first licence bid, wasn't it?

A. No, it wasn't, no, no.

Q. What other licences had you

A. We were in for the Century licence, the Dublin licence, in for a licence in Cork.

Q. Were they radio licences?

A. Radio licences.

Q. I am talking about

A. They were Government licences.

Q. I am talking about the GSM Licence, this was the first one this was the first one you were interested in?

A. Licences are licences.

Q. Yes. Now, just going back, you say that when you on the way back from the match, you discussed the prospect of his company underwriting Communicorp's financial commitment because you were seriously concerned that Telenor would use their financial muscle to take control of the consortium. Is that right?

A. Yeah.

Q. Well, just tell me what discussion took place between Mr. Desmond and yourself?

A. Well, I described previously that I on the way back we had a discussion in the back of the aircraft.

Q. Yes.

A. And he was asking me how things were going, I explained to him about the bid and we got on to, you know, obviously my major concern at the time was making sure that we could demonstrate that the funding was there.

Q. Communicorp's funding?

A. And the fact that the Norwegians, well, primarily the Norwegian firm, Telenor wanted to make sure that we would have a sort of a financial guarantee in place.

Q. Just to be clear yes?

A. So the financial guarantee was the centre of the



discussion.

Q. The financial guarantee was the centre of the discussion. And that was because your concern, your twin concern was Communicorp's position and, as you said, Telenor's pressure?

A. More concerned about Telenor because at that time I had Massimo/Advent in the bag, but the main thing was trying to satisfy the Telenor side of the house.

Q. And what discussion that was the nature of the discussion, how to satisfy Telenor's side of the house, is it?

A. Yeah, how could I satisfy them on their 3rd June agreement.

Q. Because Massimo wouldn't give you the letter?

A. Well, basically, Advent's agreement was not acceptable to Telenor. I mean, that is how we got to IIU.

Q. You just said that you didn't have a letter from Massimo which satisfied them, am I right?

A. Well, we all know that. We have had that for six days, five days now. I am just you know, it was we went to Dermot because Telenor were still not happy or not satisfied on the 3rd of June.

Q. So you went to Mr. Desmond, this didn't arise just as a chance being invited to a match?

A. No, it was totally by chance.

Q. I see.

A. He invited me to go to a game and we started talking.

We started talking business on the way home.

Q. So you went to him?

A. I didn't go to him, he came to me.

Q. Well, explain that to me so. He came to you and he was having a chat with you, asking you how it was going, is that right?

A. Well, this was a social outing, there was no business discussed on the way over, that night over dinner, even at the game, nothing. And then on the way home, he said we would go down and have a chat at the back of the plane. At that stage he said how are things going, how is the licence going and we got discussing about the licence. I said we put in a very strong application.

Q. Yes?

A. We felt that it was going well. And we still had one problem, that was trying to satisfy Telenor.

Q. Right.

A. And he then said, well, maybe I can help you in that by underwriting your investment, which is what he ultimately did.

Q. You didn't ask him, he offered, is that it?

A. He offered, yeah. Then there was a period then, of negotiations which I think took 7 or 8 weeks, the guts of two months to nail down, and there was a couple of big ones, you know, that we had to overcome. One was what he would get in terms of percentage which was the

critical one.

Q. And for sorry, I beg your pardon.

Underwriting Communicorp Mr. Desmond asked for 30, you offered him 20?

A. Settled on 25.

Q. Settled on 25. And that was the main concern of yours satisfied in your own mind as regards Telenor, is that right?

A. He was playing his card, I was playing my cards, and he knew this was a good opportunity because Dermot would have seen this, you know, that mobile communication was something for the future, knew this was an opportunity. Either he was either going to agree to something somewhere in the middle or he was going to lose the opportunity, and from my point of view, I would have lost the opportunity of him underwriting Communicorp in the deal and satisfying Telenor. So, it wasn't that difficult to get there, it just took a little bit longer when you got into the nuts and bolts of it.

Q. Yes.

A. So the paperwork took a long time.

Q. So in effect what you did was, if I can use this phrase, you had a commercial agreement and then the nuts and bolts had to be worked on, he was going to underwrite

A. No, we didn't have a commercial agreement until we

actually agreed what he would the 25%, the night we agreed the 25% I felt then, hey, I have got a deal with Dermot.

Q. Yes. Did you ever think that he wasn't going to become involved from the time you had the discussion on the 10th of August?

A. No, because I think both us recognised that it was the right deal to do.

Q. That is what I mean, in terms of two businessmen coming together. And I am not talking about any locked down agreement, you were both of the view that it was the right deal to do?

A. Until I shook hands on the phone with him in Barbados.

Q. When was that?

A. That was later on in September. I didn't have a deal with him. Once we had shaken hands on the phone on his percentage, then I felt I had a deal with him, and it was a matter of the solicitors to tie up the detail on the letters, and also to get Telenor's ultimate approval that they were happy for this to happen, which was received.

Q. And you shook hands on the phone with Dermot Desmond, you think he was in Barbados?

A. I know he was. There was a witness there to the conversation.

Q. Who was that?

A. My father.

Q. Your father with Mr. Desmond?

A. No, with me.

Q. With you. And where were you, at home?

A. No, in my office.

Q. In your office?

A. Yes.

Q. And after that, the solicitors got to work or the solicitors and Mr. Walsh, I think, got to work?

A. They had started to get to work before that.

Q. When did they start to get to work?

A. Virtually immediately after I returned from Celtic.

Q. In August?

A. Yeah, I mean, I put a proposal you know, there was different proposals until we actually ended up on a meeting of minds, but my first proposal, I think, was sent in in a fax on the 11th or 12th, I am not sure, of August.

Q. So do I understand you that at the time of the discussion on the plane, you had both come to the view that this was

A. Something we should try.

Q. Something you should try?

A. Yes, try to do together.

Q. Yes. Now, I think on the yes, Tab 36, this is

A. This is 49 or

Q. Book 48.

A. Book 48.

Q. You jotted down, I think, a

A. Sorry, what tab was that?

Q. It is tab, II beg your pardon, Tab 36?

A. 36, okay.

Q. It is dated the 11th of August, it is from you to

Dermot Desmond.

A. I have it, yeah.

Q. You have that. And its re outline agreement on  $\text{€}1\frac{1}{2}$  million guarantee for Communicorp Group Limited.

"1. Esat Digifone Limited:

If Communicorp Group Limited will arrange for Dermot Desmond to have the right to take up at par 15% of the Ordinary Shares in Esat Digifone Limited replacing IBI Allied Irish Banks and standard chartered.

"2. GSM bid costs:

A total of 1.3 million to 1.5 million will be expended on the bid by award of the licence. It was agreed that DD will pay his portion of the costs win or lose.

"3. Bank guarantee:

"DD will provide a bank guarantee fee of  $\text{€}1\frac{1}{2}$  million in order for CGL to draw down a  $\text{€}1\frac{1}{2}$  million bank facility which will remain in place up to March 31, 1996.

"In exchange for this guarantee, DD will be paid a fee of  $\text{€}300,000$  no later than March 31, 1996. Should CGL be paid a fee of  $\text{€}300,000$  no later than March 31,

1996. Should CGL complete its placing of equity through CS First Boston before March 31, 1996, the fee will be paid within ten days after completion of the placing.

"Secure:

If the \$1/2 million facility, including interest, is not repaid by March 31, 1996, DD will have the right to purchase 33.3% of Radio 2000 Limited, Classic Hits 98 FM for \$1/21. Communicorp Group currently hold 76% of Radio 2000 Limited. Negative pledge. We understand that you will seek a negative pledge of the assets of Communicorp."

A. That is the start of negotiations. It bears little or no resemblance except for maybe one or two facets of it actually

Q. To what you had actually discussed?

A. No, no, to what we had ultimately agreed.

Q. I know that. Does it bear any relationship to what you had discussed the previous night?

A. Well, it does because we I was saying to him, look, if you come in for the 20 and help us out with a guarantee, well then, we will satisfy the Norwegians, but we then moved on from that.

Q. It says 15 there at the moment?

A. We ultimately did

Q. Sorry, the discussion, I want to hear about the discussion. This is negotiating the position you

say?

A. Well, you would never open with your opening best shot and this certainly wasn't my best shot.

Q. Yes. But the discussion had been along the lines you come in for the 20

A. Well, it could have been 15, 20, the conversation in the plane, I don't know.

Q. What was discussed on the plane the night before, was it 15% or 20%?

A. I can't remember.

Q. All right. Now, you say this is an outline agreement.

When I read this first I took it to be a synopsis of what had been discussed the previous night on the plane, it may not be 100% accurate because you probably weren't taking notes on the plane?

A. Well, there were two people negotiating, there were two people negotiating on their side.

Q. On?

A. On Dermot's side.

Q. On the night before?

A. No, Dermot was one person and then you would have to negotiate with Michael as well.

Q. I understand that.

A. So he might throw things in to the mix that Dermot might not have thought of.

Q. I understand. But Michael Walsh wasn't present on the plane?



A. No, he wasn't.

Q. Michael Walsh was going to take care of the nuts and bolts?

A. The detail.

Q. The nuts and bolts of matters?

A. The detail.

Q. The detail. Is this note here a reflection of what had been discussed on the plane the night before? It is headed "Outline Agreement". Now, that is why it occurred to me that it might be, but from what you tell me it may not be?

A. No, I think listen, I probably left it with Dermot on the lines, look, Dermot, I will put something on paper to you. We wouldn't have gone in this kind of detail.

Q. What was the 3 million about here? Was this to replace the Advent money or what?

A. I actually I don't know because we had the Advent money already, so it certainly wasn't 5 which would probably have satisfied Telenor. I actually

Q. It doesn't end up anywhere later either?

A. No, it doesn't, so I am not sure what I was thinking of at that time.

Q. All right. Now, I just notice that looking at this, there is no reference there to providing a guarantee for Telenor or a suggestion that there be underwriting, is there?

A. Well, the only thing that really you could deduce was underwriting was the firming up on the three institutions, apart from Advent.

Q. Well, they are replacing the three institutions, they are not

A. They are replacing it and he we viewed him as much more solid. He would have made a more solid commitment. I think this memorandum is the start of a whole series of different negotiations, so I wouldn't hold great stock into what is in the memorandum, apart from we pressed the button to start negotiating with him and his colleague, Mr. Walsh.

Q. Did it come as a surprise to you, that you went off to a football match and you found yourself involved in very serious business negotiation?

A. Well, they weren't really that serious. I mean

Q. Serious enough.

A. I wasn't surprised being invited to a match.

Q. No, no. I am not saying surprised at being invited to a match. Were you surprised

A. We didn't get down to the minute detail. He just said, listen, I would like to get let's see if I can work with you on this, and then we started and it went through a number of stages, where we ultimately got on to agreement with him, but it was slower than we thought.

Q. I think, would you agree, that there is nothing in

this particular note, at least anyway, about providing a guarantee for Telenor or underwriting to satisfy Telenor, or anything of that nature?

A. No, not yet.

Q. No, but that is what you had discussed the night before, that's what you had identified as being your problem?

A. I did, yes, and I am not sure of the context of the 3 million.

Q. Right.

A. I have read all this stuff and I don't know why I put in the 3 million instead of 5 million.

Q. All right.

A. Maybe I was going to use two of the five that had already been given to us by Advent and added to that and put it in a block account, but I am speculating.

Q. All right. Could it be I am just asking you for a comment on this; could it be that you were looking for the 3 million from Mr. Desmond or a bank guarantee to that effect to take Advent out of the equation; in other words, I know that you would have had to pay them interest, but you would have been able to repay Advent's 3 million advance at a high interest rate?

A. I would never have I didn't worry about the 30% at all.

Q. Sorry?

A. If they charged me 50 I would have paid it to have the

5. I know that is difficult to understand, but where I was at that time, you know, I had to solve a problem. I needed money. I didn't care what I paid for it.

Q. Yes.

A. And I got it.

Q. Of course it was the company that was getting the money, isn't it?

A. Well, I was phoning up as well because I was the force to put I was forced to put money in as well.

Q. Was there any consideration of taking legal advice as to whether the company should be borrowing at that rate of interest?

A. Not at all.

Q. I see.

A. I mean, a company, as long as it can meet its payments and solvency and everything, that is the key thing.

Q. Right. Now, there is no reference here to a letter being provided to anybody, is there?

A. Nothing, no.

Q. Now, you say that there would have been a number of discussions between yourself and Mr. Desmond and Mr. Walsh in August and into September of 1996, is that correct?

A. Meetings, mainly meetings with Michael and one or two meetings, certainly one with Dermot.

Q. Right.

A. And plenty of telephone conversations.

Q. And can you remember when the meeting with Mr. Desmond, was it in August or September?

A. I know I had a meeting with him in September. I may have met him in August, I would have to look at my diary. I know I met Mr. Walsh on a number of occasions.

Q. Now, whatever transpired, and we will deal with it in due course, if you go to Tab 42, please.

This is the 18th of September, 1995?

A. That's right.

Q. Have you got that. It is Owen O'Connell's note. And you and Leslie Buckley went to Mr. O'Connell and he notes:

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

"DD wants 30% of GSM. Allied Irish Banks standard and IBI to be excluded."

Then it has: "30 DD 5 Advent, 32.5 Esat, 32.5 Telenor."

Now, what was that about?

A. I had a meeting with Dermot on the 17th and I then knew that basically that the documentation should go into sort of its final form and I went up to see Owen O'Connell with Leslie and explained to him, I don't know whether this is the first time he knew about

it I think, it could be the first time he heard about it and he said, why are you doing this? I said, well, our finances, you know, in our view there is a perception there that they are weak, and we are bringing in Dermot for the lot, which was 40 plus 60 or 40 plus 25. And

Q. The financial institutions were out?

A. Yes, we were swapping them.

Q. Where did the concept of an underwriting letter for the Department come from?

A. I suppose when we got into the discussion with IIU as to what they could provide, the notion and the context of underwriting came out as the solution.

Q. Who is we?

A. Myself, Michael Walsh, Dermot, you know, as we got in more and more to the discussions in trying to find a way to satisfy the Norwegians but also then, strengthen our position by underwriting us.

Q. Yes.

A. But we knew that we were cutting the bridge behind us and that was the bridge that Advent had created, so we were now into Plan B. So there was basically Telenor were unhappy with Advent. We were now moving on to IIU to see if we could make Telenor happy by using them.

Q. In fairness to Telenor now and in fairness to yourself there, Advent is still there at this time, according

to this note at least?

A. They are, yeah.

Q. Yes. Now, I have read all the we have read all the documents over the last number of days. I haven't seen any document from Telenor saying that they were unhappy with Advent. What they were unhappy with was the letter from Advent, they weren't unhappy with Advent?

A. Oh well, they were unhappy with what we had given them which was produced by Advent. It is a splitting of the hairs. I mean, I don't think nothing will hold on that.

Q. Right. But the concept of what you wanted so, was something from somebody to satisfy Telenor, either in the form of a Letter of Guarantee, as had been sent to Advent on to sign on the 3rd of August, that they were guaranteeing you, or perhaps, alternatively, the type of letter which it appears that Telenor were prepared to accept on the 4th, that is that an offer was true and valid and remained open for a number of days. That was the sort of thing it looks from the documents, anyway, that might have satisfied Telenor?

A. Advent had never we had reached the end of the road with Advent. There was no more discussion on Advent, it was dead.

Q. Was that from the moment that you had commenced discussions with Mr. Desmond, that Advent

A. No, it wasn't, no. We still had not got an agreement with Mr. Desmond.

Q. Yes.

A. So we still tried in parallel to satisfy Advent.

Q. Yes.

A. Or satisfy Telenor.

Q. Yes.

A. And then in parallel we had Plan B, which was the germ of an idea to bring IIU in and ultimately we came up with this concept, or they did, or we did, I don't know, of them underwriting us but then underwriting the 20% and taking it.

Q. All right. I am interested, because I am interested as to where the idea of the underwriting, an underwriting letter from the Department came from?

A. It is on their letterhead. I am not being smart, but they are underwriting, that is their title of their business.

Q. I know that. I want to know if you can assist us did the idea for a letter, an underwriting letter for the Department, come from you or did it come from Mr. Desmond?

A. I think we would have explained exactly where we were to Dermot, and he would have come up with a concept, look, the way to do this is to underwrite it, create an underwriting agreement and you then satisfy Telenor and in exchange for that, we will put up the bid



costs, win or lose, and we will take the 20, 25%.

Q. I understand that. I understand your view of an underwriting letter that satisfies Telenor and they are going to take their cut for the underwriting and Telenor will be happy, and things will proceed and you will be happy in respect of the fears you had that Telenor might behave in a predatory fashion towards you. I understand that. Where did the idea of needing, needing, because it is needing an underwriting letter for the Department, where did that idea come from, that is what I am interested in?

A. We would have had a discussion with Dermot and said, look, we are not so sure the Department are happy with our finances after the oral hearing. So we would have said to him, how do you think we can satisfy that? He said, look, the way to handle this is to, 1, 2, 3, and No. 1 was underwrite it, and No. 2 was we will pay our part, we will become involved, we will pay our part of the costs; and 3 was we will take up and underwrite, which was very important to us, the four institutional investors.

Q. Now, in the course of this discussion, with Mr. Desmond, there was no question of underwriting the institutions, the institutions were out in everyone's mind; isn't that right?

A. Well, we thought that they needed underwriting as well because

Q. They were going out?

A. No, no, well, just bear with me.

Q. Very good.

A. I mean, we were getting underwritten which was going to satisfy Telenor which was the one big concern we had. But also, that when you really analysed it the four institutions, they were only they had written very loose letters to the assessors for the bid.

So

Q. Looser than Advent's?

A. Well, they just don't even compare with Advent's.

Q. I see. And?

A. And there was no other agreements with them other than what was written on the six lines in each of their letters. We then said, look, you know, as a reward we will tell let you take up, we started at 15 we ended up at 25, he was at 30, and then ultimately when we signed the licence we were at 20 again. We went around in a circle.

Q. The institutions were going out, isn't that right?

A. Only if we were going with Dermot.

Q. They were out, isn't that right?

A. No, they weren't out yet.

Q. If you were going with Mr. Desmond the institutions were out?

A. Yes. But we hadn't arrived at that yet because it hadn't been the documentation hadn't been executed.

Q. That is what you were working towards?

A. We were, of course we were, yeah.

Q. Telenor had expressed no dissatisfaction with the institutions or the letters from the institutions, had they?

A. Well, I can't remember precisely what they felt about the letters, but I believe they weren't that happy with the letters either in terms of the strength of them.

Q. The first time I have heard that. Mr. Arve Johansen at the presentation, expressed it in very strong terms, that these were the institutions?

A. Well, you have what you have, you play the cards you play.

Q. There wasn't one question asked at the presentation about the nature of the commitment from the institutions, isn't that right?

A. If you are saying

Q. You can take it that there wasn't?

A. Fine, yeah.

Q. So who is expressing any concern about these institutions?

A. Well, certainly I had a concern because I had expressed it in the very beginning, that basically the letters were not that strong because they were couched and there were different things like Investment Committee approval in the body of the letters.

Q. Yes.

A. So

Q. Who did you express that view to?

A. I would have told I expressed it to certainly John Callaghan, I would have said it probably to Davys as well, that could we not get something stronger, and they said you won't get anything stronger, run with it.

Q. Mm-hmm.

A. Apart from the fact that they weren't paying out the bid costs. And in that context, if we hadn't of won the licence, basically we would have been stuffed for most of the licence or the application costs.

Q. Did you ever tell the institutions that the licence fee had been capped at 15 million?

A. They would have known that.

Q. How would they have known that?

A. Through Davys.

Q. Through Davys?

A. Or else they would have read it in the newspaper.

Q. Why didn't you go to them in those circumstances, because this is, again, the first time that that I have heard it, that they would have known that the licence fee was capped in light of the letter that Mr. McLaughlin sent

A. Look, if you are an investment officer and you have just committed yourself to funding a company and you

don't read the newspapers to know, or else talk to the person that brought you the deal, that is highly unusual. The real world is that they would have known, unless they were away on an island with no telephone and no newspaper.

Q. Mm-hmm. I will come to it in due course, but in fact, what happened on the 29th of September of 1995, was that Mr. John Callaghan went to see Mr. Kyran McLaughlin in Davys and asked him to have the institutions step aside, isn't that right?

A. That's correct. It is all over the documentation. I mean, there is nothing unusual.

Q. Isn't that right? The institutions were expressing no dissatisfaction, Telenor were expressing no dissatisfaction and the Department were expressing no dissatisfaction with these institutions?

A. But we were running the bid, not them.

Q. Who was?

A. We were. We were the lead on

Q. Telenor were involved in the bid as well?

A. They were as well involved in it.

Q. They were 50:50.

A. On the one hand they were saying to us we are not happy with your financial capability or your financial sorry, financial the financial guarantee of the 3rd of June and on the other hand we were trying to satisfy that.

Q. Yes.

A. So they couldn't have it both ways, they either wanted it satisfied or not.

Q. Wasn't it as simple as this: For Mr. Desmond to come in, the institutions had to go out?

A. That's correct.

Q. It was the only way it could be done?

A. That's correct. Well, it is one of the ways that it could have been done. There were would have been other alternatives.

Q. It was the way it was done and

A. Ultimately, yes.

Q. So I appreciate we can have a lot of the discussion of the nature of the letters, from the letters the reality of the situation was for Mr. Desmond to come in the institutions had to go out?

A. They were swapped, and we were well within our rights in doing that.

Q. You were well within your rights and you felt confident in that everything was above board in doing that?

A. Absolutely.

Q. If that was the case, why on the 29th of September, when IIU sent a letter to the Department were the Department not informed of that?

A. Sorry?

Q. Why were the Department not informed of the swap?

A. Well, you need to look at the letter.

Q. I have. I am just asking you.

A. Let's open the letter because I haven't looked at it in a while. What tab is that?

Q. There are a number of drafts there as we will go on to 64.

A. Yes.

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

Incorrect, would you agree?

A. That that doesn't say that in the letter?

Q. Read it again, shall I?

A. Where is the where is the word "incorrect?"

Q. I said, "and a number of institutions", incorrect? It is a question. That was not stated at any presentation?

A. Sure it is all over the thing. Look, are we looking at the same documents?

Q. We are.

A. Look, look.

Q. Show me.

A. I will show it to you. 20% and the institutions.

Q. Where was there a detailed discussion about the equity finance from the institutions, at the oral presentation? Where was there a detailed discussion?

A. This was presented and discussed at the oral hearing.

Q. All right.

A. So somebody under this section had dealt with it, under "ownership", and Mr. Johansen I think, also referred to it. So it was discussed. I think it is not correct to say that it wasn't discussed. It was discussed.

Q. All right. So I will read it differently so.

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

Where was there a discussion at the oral presentation about the availability of equity finance from a number of institutions, a discussion?

A. Hold on now.

Q. Yes.

A. Well, it is, in Mr. Johansen's remarks.

Q. Mr. Johansen presents it?

A. Page 9, okay. It is evidenced, first of all, by



Communicorp holding 40% as we get going and have institutional investors holding 20% and they are Allied Irish Bank, IBI and Standard Life and Advent International. So there was a discussion.

Q. There wasn't a discussion. There was a presentation there. I take your point now because I want to come at this two ways, if I may, Mr. O'Brien just bear with me for a moment?

A. I will, but

Q. I want to come at this two ways now. There was no discussion there was no question-and-answer session between you and the presentation or the Project Team about the availability of equity finance from a number of institutions. You say there was, all right?

A. It says here: "During the course of the presentation there was details in relation to the availability of equity finance from Communicorp and a number of institutions."

Q. Right?

A. So we presented, it is all over our bid, it is all over this

Q. You presented Telenor, you presented yourselves, Communicorp, and you presented four institutions and you named them and you discussed them and you even mentioned the amounts of money?

A. You say that is incorrect?

Q. No, I said there was no first of all, I say there

was no discussion about the availability of equity finance, equity from institutions, you say there was, very good, I take you at your word there. So

A. No, no, but if somebody says in a preamble and addressing the assessors about four institutions, okay, he is explaining that they are there.

Q. All right, I will go onto the next sentence, the next paragraph.

"We confirm that we have arranged underwriting on behalf of the consortium for all of the equity (circa 60%) not intended to be subscribed for by Telenor.

In aggregate the consortium now has available equity finance in excess of 48 million pounds.

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

Now, where in that letter is the Department being informed that the institutions are out and a swap has taken place?

A. Well, if somebody underwrites, bear with me now.

Q. I am listening to you.

A. If somebody underwrites, if you go, for example, to an investment bank and you are doing an IPO, and somebody underwrites that they will give you the money for the sale of shares, there is a chance, okay, and sometimes this happens, that the underwriters are left with the

shares because they can't sell them in the market place. In this case they are being totally open to the fact that, No. 1, they are underwriting it; and secondly, by underwriting it, they are going to place the shares if the people don't come up with the money, if in this case Communicorp doesn't come up with the money.

Q. Yes, I understand that.

A. So

Q. Where was there any underwriting of the institutions?

A. Well, they are saying we are underwriting on behalf for all of the equity, which is 60%.

Q. The institutions were gone, they were swapped?

A. They were swapped, yeah.

Q. Why doesn't the letter say that? You say you were perfectly entitled to do it, perfectly within your rights, you were open about it, where does it say that?

A. Well, we first of all, we did the right thing to send this letter in, well, IIU did

Q. Could you answer the question first of all. Where does the letter say that the institutions are gone, they have been swapped?

A. It doesn't say.

Q. It doesn't say it?

A. But it is irrelevant.

Q. I see.

A. Do you know why it is irrelevant?

Q. Tell me.

A. Because it is all over the bid that we are bringing in financial institutions. The Department don't care whether it was, you know, any institution provided they met certain criteria.

Q. Yeah. What were the criteria?

A. That they were a reputable institution, reputable company and they had the money on the day to put up their equity.

CHAIRMAN: I think, Mr. Coughlan, it is five past 5.

MR. MCGONIGAL: Mr. Chairman, it seems to me in that small veniatte of an exchange between Mr. O'Brien and Mr. Coughlan that Mr. Coughlan should have regard to what Mr. Towey said was his understanding of this letter in relation to the institutions.

I am disappointed that it has not been raised in that little discussion with Mr. O'Brien because Mr. Towey was quite clear as to his interpretation of the letter. Whether he was correct to make that interpretation or not is a different matter, but he certainly made that interpretation and he was the only person in the world to make that interpretation because he was the only person in the world to see it.

CHAIRMAN: I have no doubt little regard

MR. COUGHLAN: I am asking Mr. O'Brien for his view of it. I am asking Mr. O'Brien what he understands it to

mean.

MR. McGONIGAL: Professor Walsh's would be more

relevant.

CHAIRMAN: 11 o'clock. Thank you.

THE TRIBUNAL THEN ADJOURNED TO THE FOLLOWING DAY,

TUESDAY, 28TH NOVEMBER, 2003, AT 11:00 A.M