

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan, SC

Mr. Jerry Healy, SC

Ms. Jacqueline O'Brien, SC

Instructed by: Michael Heneghan

Solicitor

FOR THE DEPARTMENT OF

COMMUNICATIONS, MARINE &

NATURAL RESOURCES:

Mr. Richard Nesbitt, SC

Mr. John O'Donnell, SC

Mr. Conleth Bradley, BL,

Mr. Diarmuid Rossa Phelan, BL.

Instructed by Matthew Shaw

Chief State Solicitors Office

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

Mr. Gerry Kelly, SC

Mr. James O'Callaghan, BL

Instructed by: Owen O'Sullivan

William Fry Solicitors

FOR TELENOR: Mr. Eoghan Fitzsimons, SC

Ms. Blathna Ruane, BL

Instructed by: Kilroy Solicitors

For Michael Lowry: Mr. Rossa Fanning, BL.

Instructed by: Kelly Noone & Co.,

Solicitors

OFFICIAL REPORTERS: Viola Doyle & Anna Papa.

I N D E X

Witness: Examination: Question No.:

Denis O'Brien Mr. Coughlan 1 - 625

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY, 25TH

NOVEMBER, 2003, AT 11:00 A.M:

CHAIRMAN: Good morning.

CONTINUATION OF EXAMINATION OF DENIS O'BRIEN BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Mr. O'Brien, dealing with the letter of the 29th of September from IIU Invest to Mr. Martin Brennan, we were discussing that yesterday evening.

A. That's correct. I just want to take that out, if you don't mind.

Q. Right.

A. What tab did you have that on?

Q. I think it's Tab 60 I'll get it now. 64 is the actual letter. We have some drafts before that, which we can come back to in due course. I think 64 is the letter.

Now, I think yesterday you said that the institutions had been swapped, fair enough. And I asked you why doesn't the letter say that, because you say you were perfectly entitled to do that and you were perfectly within your rights, and you were open about it. And then I asked you where does it say it in the letter, that they were swapped. And I think you said that,

"well we first of all we did the right thing to send this letter in. Well, IIU did." It was IIU sent the letter in?

A. That's right.

Q. Can I just ask you about that for a moment. Who decided that the letter should be sent to the Department? Remember, you had gone to if we take it back a moment. You had gone to Owen O'Connell with Mr. Leslie Buckley on the 18th of September, the day after the All-Ireland Final, on the Monday morning. And you had said to Mr. O'Connell, "Need underwriting letter for the Department"?

A. For the assessors, that's the way

Q. Well

A. Same thing. It wasn't for the Department.

Q. The assessors and the Department, I have no difficulty with that language.

A. Yeah.

Q. And I think you had informed us that the idea of an underwriting letter came from Mr. Desmond, is that right?

A. It was the business that he was in.

Q. I know, but I'm trying to understand. You said that the idea of how it would be done, that there would be a letter of underwriting, that that came from Mr. Desmond, that idea?

A. Originally he was going to underwrite the

institutions, and then it moved on to them satisfying Telenor, which is part of the whole thing, and our 40%. So

Q. I'll come back to that statement now in a moment. But that he was, first of all, going to underwrite the institutions and then satisfy Telenor. I was going to come back to you in due course. You see, and I'll look at exactly what Mr. Desmond informed the Tribunal and you previously informed the Tribunal in the statement we've opened already, that the concept of Mr. Desmond's involvement for the purpose of satisfying Telenor first arose as speculation in the evidence of Mr. O'Connell in this Tribunal. And the first time that evidence was given by anybody, that the whole purpose of this was to satisfy Telenor, was in the course of your evidence, the first time the Tribunal has heard that. But I'll come back to I'll park that for a moment and come back do it.

A. If you're going to introduce it I don't I'm trying to deal with pieces of questions you're asking. I'm not sure how relevant that is to the question you're going to ask me.

Q. If it is I'll bring it to your attention. I won't try to trick you.

A. That's fair.

Q. Now, you say that the idea of doing it by way of underwriting was one that came from Mr. Desmond, is

that right?

A. Well, what I was saying was that we started a dialogue on the 11th of August

Q. Yes.

A. I put something on paper to him on the 11th, and then I went to see him that afternoon, and then we had telephone conversations, meetings with Michael Walsh, and it went along, and we were finding a way to work something whereby we would get the institutions underwritten, and, of course, get Communicorp underwritten, which is the nature of the letter that was sent on the I think it was the 29th of

Q. 29th, yeah. All right. I want to ask about that the idea, you say, of underwriting came from Mr. Desmond's side?

A. Yes.

Q. That that's how it would be done?

A. Either we had to come up with a financial guarantee and whatever that is, okay, to satisfy Telenor, and, you know, we still had that outstanding issue with them, and we wanted to try to continue to try to satisfy that as per the 3rd of June agreement.

Q. The idea of an underwriting letter for the Department, where did that come from?

A. Well, it was the whole reason

Q. The need for one for the Department, the need for one for the Department.

A. I want to be quite clear about this and unequivocal.

We had a perception that we were weak financially, and

when we went into the oral hearing, we came out of it,

and that was one of the items that we discussed, maybe

we in the eyes of the Department and the assessors,

we were seen as financially weak. I discussed that

with Mr. O'hUiginn, I discussed that with Mr. Mara, I

discussed it with Mr. Johansen, I discussed it with

Mr. Nick French. And basically I was going to these

people apart from my partner and saying, look, this is

what happened, these are the kind of issues and

questions that arose in the oral presentation. And

all of them said, is there a way that you can

strengthen the Communicorp side? And basically that

led me to go to or it it didn't lead me to IIU,

but certainly in parallel, I started this conversation

with Mr. Desmond, started these discussions on the

11th of August, and that's where we ended up on the

29th, with this letter that went into the Department.

Q. I understand. I understand exactly what you're

saying.

A. It's also a very important point here, is that

Mr. Johansen acknowledges that basically it would be

very it would be better if we could strengthen the

financial backing of Communicorp. And this is in this

book

Q. Yes.

A. on Tab 68 on the 2nd of October.

Q. That is the letter of the 2nd of October?

A. Yes.

Q. I'm going to come to that.

A. It isn't something I was plucking out of the air.

These people were saying, Denis, strengthen things.

Q. I will come to that. At the moment what I'm trying to understand is this, and I have to tease this out.

A. Sure.

Q. The idea for underwriting let's separate it all.

The idea to do it by way of underwriting you say came from Mr. Desmond or Mr. Desmond's side?

A. It was part of the solution to the problem.

Q. The idea. It could have been done, as you say, a number of ways; it could have been a guarantee, it could have been cash, or whatever the situation was, but the idea of as being the way to do it came from Mr. Desmond's side?

A. Realistically in a transaction of this nature nobody is going to put up a bank guarantee because you have to go and rent that guarantee and pay a massive fee, and then you probably have to put assets to support that guarantee. So the best financial instrument that could have been put in place was an underwriting agreement, and that's exactly what we did.

Q. All right. I understand that. For whatever reason, I can see why a guarantee would be an expensive way to

do it and probably would be viewed as bad business or not the best

A. But more importantly, the RFP, in March of 1995, said nothing about bank guarantee or an underwriting agreement.

Q. Yes, I know that. So it could have been done by a guarantee. You've given the reasons why a guarantee wouldn't be a very astute way of doing it.

A. Wouldn't be a viable way of doing it.

Q. Could have been done by cash, again the same reasons might apply to that. Right, I understand that. But the idea of doing it by way first of all, the idea of doing it by way of underwriting, you say, came from Mr. Desmond's side in the first instance, is that right?

A. Well, that was his business. IIU is called International

Q. I know that.

A. International Investment and Underwriting.

Q. Just listen to the question: The idea of doing it by way of underwriting, you say, came from Mr. Desmond?

A. I believe so, yes.

Q. All right. All right. I understand.

Where did the idea that there was a need for this for the Department come from?

A. No, sorry, the assessors. A very important point. I mean, we were we were going into a team of people

made up of independent assessors who were running the competition, and they were supported by specialist people within the Department.

Q. Yes.

A. And ultimately it was the assessors who recommended us for the licence.

Q. Now, you went to Owen O'Connell and you used the words, "Need underwriting agreement for Department."

I take the Department to mean assessors as well?

A. Correct. We agree on that.

Q. Let's make no difficulty about the language. Where did the idea that there was a need for it, for the Department or assessors, come from? Where did that idea

A. From the oral hearing.

Q. What at the oral hearing can you point me to, and we've read the transcript and listened to the tapes, led to the idea that there was a need for an underwriting for the Department?

A. It didn't say, as far as I can recollect in the transcript, we can open it, "please go and get an underwriting agreement." But what was clearly evident to me, and I was in the hot seat that day, was that they didn't understand the arrangements with Advent, and they had a question-mark over it.

Q. But you had told them at the oral hearing that there was an irrevocable commitment, that there was an

agreement?

A. That's right.

Q. And matters proceeded from there?

A. Correct.

Q. Nobody said to you, I am sorry, you were asked specifically is there an agreement? And you said yes?

A. Yes.

Q. Unless what you had stated at the presentation wasn't believed, where could you and the

A. Sorry, I don't know whether they believed me or not, but I was in the hot seat sitting across the table

from people who were asking me questions. And you get an impression, rightly or wrongly, that basically you

haven't explained fully and you have not convinced the assessors that, you know, what you believe is a very

strong financial package, but you in my mind it

didn't do it. Now, that was my view, but it was also

Mr. Johansen's view. And when we had our postmortem

discussions with our advisors, we then said we need to

move and see if we can strengthen the position of

Communicorp and the institutions.

Q. With the Department or with the assessors?

A. How do you mean? Sorry, yes, obviously we would have to communicate with the assessors.

Q. Now, all right, let's now separate. You were in the hot seat while Communicorp

A. It's just exactly the same way I don't believe I'm

persuading you, hypothetically, in my evidence on this issue.

Q. It's nothing to do with me. You were representing Communicorp at the presentation, and Esat Digifone?

A. I was the Chair of Esat Digifone.

Q. You were the Chair of Esat Digifone. But the questions were directed towards Communicorp?

A. I was the most appropriate person to answer them, along with Peter O'Donoghue and some technical points.

Q. There was no question at the whole presentation directed towards the financial institutions, isn't that correct? Not one.

A. This is where I disagree with you in the letter. You are saying it was never discussed. Clearly on page 100, line 17 of the oral transcript, they were discussed.

Q. Just listen to the question I asked you. There was no question asked the final institutions at the oral presentation?

A. They came up in the dialogue between the assessors and us. In other words, there was Q&A, and they were mentioned in the Q&A. That's all I'll say.

Q. They were not, Mr. O'Brien. They were not mentioned in the Q&A.

A. Don't think so.

Q. There was no question asked about the financial institutions.

A. It came up in the Q&A. I just need to open this to refresh myself.

Q. If I can help you from my recollection of events, and it might help

A. Yes.

Q. Mr. Johansen made the you introduced everybody, and Mr. Johansen made the first presentation on the question of the ownership structure and that sort of thing.

A. That's right.

Q. And they were all mentioned there in detail.

A. That's right.

Q. On another occasion you informed the people conducting the assessment that this was a great opportunity, there was a lot of pension money leaving this country and it was the first time that a utility here in Ireland was going to make equity available for that type of institution, and you expressed the view that or you said that they were probably going to coalesce into a grouping themselves, the financial institutions?

A. Likely, yes. Well, you see, if you open up page 100, Mr. O'Riordan, if he's the person: "Sorry, this question really relates to the letters of financial support, and particularly the ones from Advent." Now, is that a question or discussion?

Q. It's about I'll read the whole thing.

"Sorry, this question relates really to the letters of financial support, and particularly the ones from Advent. Advent, in the letter, say that they've invested $\frac{1}{2}$ 10 million for 25% of the company, and then at some stage in the proposal it says that they have 19.5 million invested for 34%. I just want to clarify. Have they, in the interim, invested an extra 9.5 million for the extra 9% equity?"

And you answer: "They have invested a total of 19.5 million since last October, which is completely apart from the new investment which had come in and it guaranteed if we received the licence."

A. I'm no a lawyer, but is that a discussion

Q. About what there?

A. He raises the institutions. He talked about Advent.

He talks about the institutions.

Q. Hold on a second, Mr. O'Brien. Let's take this very slowly. Where does anybody raise a single question about Investment Bank of Ireland, Standard Life, or AIB, or Advent's 5%?

A. Well, Mr. Johansen then talks about

Q. No, no I'm asking you. No, Mr. O'Brien, please

A. I'm being helpful here.

Q. Please. Let's go back

A. Don't get angry with me. I'm trying to help you.

Q. I'm asking you to go back to where you pointed me.

Where is there one single question raised in the whole

of the discussion about Investment Bank of Ireland,

Standard Life, AIB, or Advent's 5%? Where is that?

A. I'll tell you now. Line 17, "Billy Riordan: Sorry,

this question relates to the letters of support, and

particularly the ones from Advent."

Q. Yes. Go on. No, no, no, go on and read the whole

thing. He then goes on to deal with Communicorp and

Advent's shareholdings.

A. You've read it.

Q. Where is there one question raised about Advent's 5%?

A. He says: "Sorry, this question relates really to the

letters." You're saying yesterday, and this is where

I disagree and we'll end up disagreeing on this point.

In this letter you said there was no discussion. It

was you used the words "incorrect".

Q. Yes.

A. That was the word you used, and I thought "incorrect"

was part of the letter, but it wasn't.

Q. Yes.

A. So I'm confused, maybe you are as well, but

Q. I'm totally confused at the moment, Mr. O'Brien. I

want you to clarify.

A. Maybe we should move on.

Q. No, we won't, Mr. O'Brien. We will not move on

because we need this clarified.

A. What is the clarification?

MR. MCGONIGAL: Sorry to interrupt, but I actually

don't understand what My Learned Friend is asking.

The question that Mr. Riordan prefaces his full question with is: "This question relates really to the letters of financial support, and particularly the ones from Advent." It seems to me straightforward, that that question is relating to the letters of financial support and Advent. English usually should be interpreted as English and not as some strange language.

Furthermore, if one goes to page 103, one will see in responses from Mr. O'Brien, that he refers to the institution on three occasions on page 103; in the first paragraph and the second paragraph and the fourth paragraph. So I'm a little puzzled as to where we are going with this, in the sense that the language is in the documents, the language speaks for itself, and that is a fact. And if this inquiry is to find facts, then the facts are in the language of the document. And all the evidence, oral evidence from whatever source, is not going to change what is said on the occasion that it was said. And asking people to interpret now what may or may not have been said on the 12th of September, seems to me a fundamentally flawed process in trying to reinvent what one would like to have been said or what one would like to think wasn't said, which seems to me what Mr. Coughlan is about.

Now, a lot of the material in this Tribunal, whether we like it or not, is based on documents, and the documents speak for themselves. And time and again we have seen the Tribunal attempting to run away from the plain spoken word in the documents. And I actually don't understand whether one is talking in terms of allegations or criticisms, where we're going with that, because whether we like it or not, or whether we agree or not, it is absolutely not within the Terms of Reference.

Mr. O'Brien has been giving evidence here for a number of days and not one question has so far been directed to what I would call the "Terms of Reference" and the input or output or any part of Mr. Lowry. And this Tribunal should remember that its Terms of Reference were not directed towards looking at the Esat Digifone licence, they were directed towards the acts and decisions of Michael Lowry. Nothing more and nothing less. And we have wasted a huge amount of time about things which this Tribunal, in my humble opinion, will not be able to report on because they are not within the Terms of Reference. And if this needs to be articulated and debated at a later stage, so be it, and indeed elsewhere, so be it. But some reality needs to be put on where we're going before we get too many further years down the road in this long protracted unnecessary exercise.

CHAIRMAN: These matters have been more than amply agitated in correspondence by Mr. O'Brien's solicitors, and I'm certainly far from unaware of the arguments that are being advanced in that context. At the essence of the examination of Mr. O'Brien, plainly are the matters relating to membership or ownership of the consortium that was in due course to be awarded the licence, and the question of financial means of the consortium. Of course, it is correct to say that the Terms of Reference necessarily involve inherently a degree of input or involvement on the part of Mr. Lowry as Minister. And I have no doubt that Mr. Coughlan's subsequent questioning will address that aspect with a view to enabling the Tribunal to draw conclusions. Ultimately I will rely on the record of what was said at the presentation and on the record of what was said in documents and on the evidence that I hear. And I am disposed to while I will undoubtedly intervene if matters appear to me to be taking a turn that is not advancing the fact-finding task of the Tribunal. But I do propose to afford Tribunal counsel an appropriate degree of latitude in probing matters, as are being probed today, which are at the heart of the matters which in due course the Tribunal will be required to report on.

A. Chairman, can I just make a comment here? It was the previous point that Mr. McGonigal was raising about,

that there was a discussion like it's plain in English in the transcript, and really the point is that he, Mr. McGonigal, is saying there is this discussion, it was discussed, and counsel for the Tribunal are saying the opposite. Now, what I from my point of view, having given evidence for I don't know how many days at this Tribunal, I've never seen once a situation where my counsel has got up on his feet and made an objection or made a comment where his, in sort of normal court terms, was sustained.

And in this case, like it's clear that there was a discussion. And we're arguing about pointless things in the overall context of this.

Yes, there's a lot of things, nuggets in this letter, but whether it was discussed or not I say it was discussed. He's not accepting that evidence.

CHAIRMAN: Well, let's not get into semantics. There was an exchange and I must act on the record. And I will act on the record.

Q. MR. COUGHLAN: Mr. O'Brien, can you point to me one place where it was indicated, and I'll take it this way so that we can be clear, that there was a weakness on the part a weakness on the part of the financial institutions at the financial presentation? Can you point me to one place?

A. I'm going to say what I said again.

Q. No, point me to it.

A. I've already said that there was no nobody was saying you've got a weakness. The assessors were not saying that you've got a weakness. But I was in the hot seat and I was reading the tea leaves, Mr. Coughlan, and it was me and the rest of my team who came away and said we think we have a problem with the Communicorp backing.

Q. I understand that.

A. Mr. Johansen said it, who was a 50% partner, I said it, my two advisors, plus PA, who were involved in numerous licence applications worldwide.

Q. I understand what you say about Communicorp. I'm asking you where was there any suggestion that there was a weakness on the part of the financial institutions?

A. That's a different question you're asking me now.

Q. That's what I've been asking you all the time, Mr. O'Brien. Can you point me to one place where that

A. Again, my answer applies to that.

Q. What is the answer?

A. It was my perception, Mr. Johansen's perception, and my advisors.

CHAIRMAN: Well, can we agree on this much, Mr. O'Brien, that you accept, as clearly is the fact from the transcripts, that the members of the project team were not inquiring into the solidity of the very

substantial institutions that we've heard mentioned time and again, but you had surmised from the totality of what took place and as a result of your subsequent discussions with your two consultants and with Mr. Johansen, and from Mr. French, from your other London-based consultants, that you apprehended there might be some degree of weakness over the Communicorp end of the financing, and you sought to address that?

A. I felt their questions were very probing at the time, Chairman. It doesn't look very probing here today, but it was my impression, having walked out the door after three hours, that maybe they were going deeper than we ever expected them that they would.

Q. MR. COUGHLAN: When you discussed the matter MR. McGONIGAL: Just one more matter arising, Mr. Chairman, in what you said just a moment ago. You talked about the solidity of the institutions. No one is questioning the solidity of the institutions, and indeed, it would be a major step if anyone was. What they're questioning and what is of concern, is the letters which the institutions gave. Nobody worries about the solidity of IBI or anyone else.

MR. COUGHLAN: I wish My Friend could now point out to me one place

CHAIRMAN: Now, please

MR. COUGHLAN: where there is a questioning of the letters anywhere, and he can bring that to my

attention.

MR. McGONIGAL: I missed your question, John.

Q. MR. COUGHLAN: Mr. O'Brien, you had a meeting with Mr. O'hUiginn and Mr. PJ Mara and, you say, Mr. Johansen?

A. Mr. French. I spoke to Mr. French either on the phone or at a meeting with him.

Q. Did you or anybody on your behalf have any discussions with anybody in the Department or with the Minister about the presentation?

A. No.

Q. No. Now, the week of the presentation was the week of the 12th of September?

A. That's correct.

Q. You have informed us that after the presentation there were two matters which were of concern to you, your perception of a financial weakness sorry, the Department's perception of your perception that the Department understood there was a financial weakness of Communicorp

A. The assessors.

Q. And you were worried, you told us before, about Telenor?

A. Well, we still had the outstanding requirement from Telenor to satisfy them.

Q. You told us yesterday, I think yesterday, that you were worried, it was in your mind, you were worried

about Telenor?

A. It was one of many worries that I had at the time, but it was a worry.

Q. You said today it mightn't look like much, but on the day it was acting on your mind?

A. Correct.

Q. So you had worries?

A. That's the nature of business, you have worries.

Q. And you had a meeting with Mr. Michael Walsh on Friday, the 15th of September, 1995, isn't that correct? It's in your diary.

A. That's correct.

Q. What happened at that meeting?

A. We discussed I mean, this was part of the negotiations that we were having on the underwriting of Communicorp and the institutions. I mean, you're asking me eight years later what happened at the meeting? I can't remember anything that significantly happened at that meeting, other than it was a continuance of the negotiations started sometime previously.

Q. Whose idea was it to send the letter to Mr. Martin Brennan of the 29th?

A. Well, we had negotiated with IIU an underwriting agreement. There was no point in putting it in a drawer. Somebody had to send it down to him. And I believe that it was a joint decision to send it to

Mr. Brennan.

Q. Right. And that was because you wanted to strengthen the position of Communicorp primarily, is that right?

A. And the institutions. And to underwrite the four institutions.

Q. You wanted to strengthen the position, isn't that right?

A. We wanted to strengthen the Irish content, which was 60%.

Q. And that is to strengthen them vis-a-vis the position as you understood

A. From the oral hearing.

Q. from the oral hearing?

A. But also the concerns that we had carried from June to that date.

Q. Right. Now, you knew that you were not entitled to communicate with the assessors, isn't that right?

A. That's correct.

Q. It had been clearly stated to you at the oral presentation.

A. That's correct.

Q. And, in fact, you, in a discussion with Mr. Martin Brennan, clearly indicated that you understood this?

A. That's right.

Q. Isn't that right?

A. That's correct.

Q. In other words, it didn't conform with the rules of

the competition, isn't that correct?

A. Well, I'm not sure it was not in the rules, the original rules, but we had a verbal from one of the key people in the assessment team, but it wasn't in the RFP.

Q. I know it wasn't in the RFP. You were told by Mr. Martin Brennan.

A. But it wasn't part of the rules. It's there's a separation here. There's the rules of the competition and then what the assessors told us.

Q. Let's just clear this up now and look at the transcript.

On page 114 of the transcript Mr. Brennan says to you at the end: "Thank you very much"

A. Can you just hold on until I get to that page.

Q. Yes.

A. Thank you. I have 106.

Q. 114.

A. Could I have

Q. Sorry, I beg your pardon. It's Book 51, Book 51, the transcript of the presentation.

A. Can I just get it

Q. It's on the screen. It's only a small portion.

"Thank you very much. I have consulted with my colleagues."

Now, he already stated at the beginning of the presentation what the ground rules were also, how it

was to be set out. He says:

"Thank you very much. I have consulted with my colleagues. The time is more than up, but they have no critical questions that crucially need to be addressed now. We have had, I believe, quite a good exchange. Thank you for coming along.

"As I think I said at the beginning, any future communications should be at our initiative, rather than yours, in the sense that if we need further information we'll ask for it in writing and that's the way we'd like to leave it.

"Mr. Denis O'Brien: Do you think that the process, I mean, what is the process between now and when you make your decision? I know we are not communicating with you. So well sorry, we are not going to send in any further material for you to review. So...

"Mr. Martin Brennan: Simply we will complete the evaluation and the Minister has a political commitment to produce a result by the end of November, and I can't say any more.

"Mr. Denis O'Brien: Okay. All right. Thank you."

You knew that what the assessors had said was communication was to be at their initiative.

A. That's correct.

Q. And you wanted to get something to the assessors to show a strengthening of Communicorp, and, you say, the financial institutions. Did you bring that to the

attention of Mr. Walsh or Mr. Desmond, that it was not for you to make any communication to the assessors?

A. I don't know whether I actually told them that or not.

I can't recall.

Q. I'm just trying to

A. Of course.

Q. Why was it so perhaps they can help us as well,

that they were the ones to write the letter to Martin

Brennan rather or to the assessors, rather than to

give you a letter to enable you to give to the

assessors or the Department, as the case may be? How

did that come about, that they sent it?

A. Well, I it's quite simple. They drafted the

agreement with lawyers. They were the people who were

underwriting us, and that was the instrument, and that

they should communicate it directly with the

assessors.

Q. Now, all of the other institutional involvement, if I

can put it that way, in terms of the letters,

including, I think, the debt financing letters of

comfort, had all been put in by you with the bid.

Isn't that right?

A. Into the bid box, yeah.

Q. This was the only occasion where there was

communication being sent by somebody straight to the

Department, is that right?

A. As far as I know.

Q. Didn't you know that that shouldn't have been done, at that time? You'd been told by Martin Brennan.

A. Well, we were between a rock and a hard place. On the other hand we had an underwriting agreement, which was binding, from IIU, and we were changing the swapping the institutions, and we felt that it was probably better in the circumstances to actually get that communicated between IIU and the assessors. I think we would have been criticised if we had not have done it.

Q. Doesn't it look, Mr. O'Brien, that to take such a risk

A. There's no risk really.

Q. that you must have had some communication, or somebody on your behalf, with somebody in the Department or the Minister, to enable you to calculate that this was not a risk, as you've just said?

A. That is absolutely incorrect.

Q. All right. Now, let's go back. You had the presentation on the 12th, you had your concerns, you had a meeting with Michael Walsh on the 15th. You were continuing the discussion of the investigation into how the business deal would be dealt with?

A. From the 11th of August.

Q. You went to the All-Ireland Final on

A. You're missing one point though.

Q. Yes.

A. And that is, if you look at the communication between IIU and ourselves, after the oral hearing things speeded up in terms of finalising the documentation.

Q. I noticed that.

A. So we immediately, when we came out of the oral hearing, we said, well, I think we're going to go with Plan B, that we had been negotiating with IIU up to that point, but it took on a much more serious sort of activity from my point of view.

Q. But you had to take a step now to strengthen

A. From the 12th of September.

Q. and to try to get this information across?

A. From the 12th of September.

Q. Now, you had a meeting with Michael Walsh on the 15th, which is the Friday? It's in your diary, I think.

A. 15th, yeah. Meeting with Dermot on the 11th.

Q. That's Mr. Desmond on the 11th?

A. Yes.

Q. That was the day before the presentation?

A. Then there was a communication on the 5th of September from Peter O'Donoghue.

Q. Sorry, a meeting with Dermot on the 11th of August?

A. Yes.

Q. Communication with Peter O'Donoghue on the 5th of September?

A. Yes.

Q. A meeting with Michael Walsh on the 15th of September?

A. That's right. And then a meeting on the 17th with

Dermot Desmond

Q. I want

A. The 21st

Q. I want to stop there for a moment. On the 17th, you attended the All-Ireland Final on the 17th, isn't that correct?

A. That's correct, yes.

Q. You had I think you told us you were seated a few rows behind Minister Lowry at the final. You were there with Mr. Pdraig O'hUiginn, isn't that right?

A. That's right.

Q. You bumped into the Minister at half-time in the hospitality area, isn't that correct?

A. That's correct.

Q. You had a few words with him, is that right?

A. I did, yes.

Q. Who else was there inside the hospitality area when you had a few words with him?

A. I'd say half the Cabinet. Maybe the

Q. In the company?

A. There's a hundred people in the hospitality room.

Q. In the company?

A. I can't remember.

Q. What was this hospitality area?

A. In behind the box.

Q. Right.

A. On the halfway line.

Q. All right.

A. People rush in there, have a drink, cup of tea, and then they try to get back out before the start of the next half.

Q. Normally have a chat about the first half?

A. By the time you get a drink you don't have much time to do that.

Q. Nevertheless, you had a chat with the Minister. Was Mr. Pádraig Ó hUiginn present when you were talking to him?

A. I don't recall.

Q. All right. And you asked him where he was going after the match, is that right?

A. I asked him, "Are you going for a drink after the match?" Simple as that.

Q. And?

A. He said yes. And I said, "Where "Where are you going?" Or where I can't remember word for word .

Q. Right.

A. I'm paraphrasing. Eight years later.

Q. Yes.

A. And we arranged to meet in Hourican's.

Q. In Leeson Street?

A. In Leeson street.

Q. Apart from the meeting that you had with the Minister in the earlier part of the year, which had been

arranged by Mr. Jim Mitchell, that's around February, had you met the Minister much in the intervening period?

A. I would have bumped into him at social occasions. I'd say quite a few times at various things.

Q. Were you friendly with him?

A. No, I mean, I wasn't friendly with him, but I you know

Q. I just want to ask you because any of us

A. When you say "friendly", certainly he he wanted to pursue a liberalisation agenda.

Q. Yes.

A. Okay. So I knew that he was a minister that was going to open things up. And I had plenty of opportunities to say, particularly on the fixed-line business, about the problems that we were having with Eircom or Telecom Eireann at that time. And every time I would have met him I would have raised the issue about DDI/DDO.

Q. Fair enough.

A. And he was always friendly, chatty. We might even talk about we'd talk about DDI/DDO, but other things. I'm interested in sport. He's interested in sport. We just had conversations.

Q. I can understand all of that. But

A. But I knew one thing, Mr. Coughlan.

Q. Yes.

A. That GSM was taboo because the process had started in March.

Q. I just want to ask you I suppose any of us who have attended any sort of sporting function and had a drink with somebody afterwards, it's normally with people you'd you might bump into people at half-time at a match, but if you were arranging to have a drink with somebody afterwards, it would normally be people you had some form of friendship or association with. It wouldn't be that you'd walk up to, necessarily, a government minister and ask him

A. I didn't walk up to him.

Q. You met him?

A. I met him, yeah. I didn't go up to him and say

Q. "Sorry, Government Minister, where are you going for a drink afterwards? I might join you there."

A. I think you're wrong on that.

Q. I see.

A. The real world is, if you're in business and you can talk to a minister, particularly on what's really on your line, and that was the fixed-line business, you take every opportunity to talk to him, to put your case forward. So there's nothing unusual about I've gone for loads of drinks with ministers over the years, in company, not in company, brief conversations.

Q. All right.

A. Plus dinners, plus lunches.

Q. In any event, the second half of the match took place, and after the match you had a meeting with Mr. Dermot Desmond, isn't that right?

A. That's correct.

Q. How was that meeting arranged?

A. It was arranged because we were negotiating on the one hand with Michael Walsh, but there were sort of parts of the things that only Dermot could agree.

Q. What were they?

A. I actually don't remember the full specifics, but you'd always go to Dermot if you were trying to get something over the line.

Q. What were they that only Dermot Desmond could agree?

A. I suppose the fundamentals of the underwriting agreement, that was fees, because there was a discussion about fees, the structure of the underwriting, the bigger issues around that agreement.

Q. How much IIU were going to get?

A. How much IIU were going to get, but I think I already agreed that at that time.

Q. I don't think so, Mr. O'Brien.

A. I think so.

Q. Maybe you had, maybe you're right, but looking at the documents and I won't hold you to that for the moment and we'll look at the documents.

A. Maybe I'm wrong.

Q. I won't hold you to that.

A. Maybe the sequence is wrong.

Q. Where did you meet Dermot Desmond?

A. I actually don't remember, but I would have met him frequently in his office. He is only he was only in Ireland on the weekends at that time anyway. My only chance to meet him was on the weekend.

Q. When was it arranged?

A. I don't remember precisely when it was arranged, but I would believe that it was set up the previous week.

Q. You believe that it was set up the previous week.

When the previous week?

A. I have no idea. You are asking me about eight years ago, Mr. Coughlan, I don't know.

Q. Was it an appointment?

A. I had an appointment with him, yes.

Q. So this was not an entry that was put into your diary subsequent to events?

A. No, it was put in subsequent to the events. Can I explain that?

Q. Yes.

A. I had a diary, a pocket diary that every few days I would try and fill in as best as I could, where I went and what I did, and in this case I filled in Mr. Desmond's entry and the entry of meeting Mr. Lowry for a drink subsequent to the

Q. All right.

A. If you look at I'm sure you've seen my diaries, sometimes you see in the same pen a whole pile of entries written in all together.

Q. Yes, you do?

A. Which would not be normal, unless you were doing it after the event.

Q. Right. But you say that this was a prearranged appointment, was it?

A. I would have phoned Dermot on his mobile or in his office, and they would have transferred me where he was, and I said Dermot, listen, can we get together?

There are a couple of issues that I want to nail down.

Q. Could that not have been done on the telephone? After all, you say that you agreed a handshake on the telephone on the final I'm just trying to understand. Michael Walsh was the man, in effect, giving the nuts and bolts?

A. Yes, but it's always better, if there was just a single issue you try and do it on the phone. But I think there were two or three things that needed to be nailed down at that time.

Q. Was it just yourself and Mr. Desmond who were at the meeting?

A. I believe so, yes.

Q. And you think that it was in his office?

A. I was trying to remember where I met him. I believe it was in his office, but I could be wrong.

Q. If it wasn't the office, where would you have met him?

A. It would have been at his home. But Dermot is the kind of guy who at that time would have gone into his office on a Saturday and Sunday, so it could have been there.

Q. And that meeting was at 6:00 on Sunday evening?

A. That's right, yeah.

Q. And you then have here in your diary, a meeting, this is the arranged drink, with Michael Lowry, at about 6:30 or thereabouts?

A. I think it was a bit later.

Q. Maybe 6:45. 6:45. What discussion had you got with Mr. Desmond before you met Mr. Lowry?

A. As I said already, we discussed the underwriting agreement, some of the bigger issues.

Q. You then went to Leeson Street, is that right?

A. That's correct.

Q. And I think you informed us in your statement that perhaps I should get it, in fairness to you.

A. It's page 38.

Q. Page 38. You say: "Subsequently we met in Leeson Street outside Hourican's. Mr. Lowry was with the late Sean Murray and other people." Sean Murray was an accountant and a well-known figure in Fine Gael circuits, isn't that right?

A. Yes, he was, and he was also a bidder.

Q. "Mr. Murray was involved with one of the other

applicants for the second GSM licence, namely Eurofone. Since Hourican's was extremely business Mr. Lowry and myself went across the street to Hourican's, where we discussed a number of matters, mainly the match. I also took the opportunity to advise Mr. Lowry of the serious Telecom capacity issues then affecting Esat's fixed-line business, which at the time was of considerable concern to the company.

"I do not recollect any other matters concerning Esat were discussed."

Now

A. I'm referring to the licence.

Q. And I'm interested in the language used in the statement as well, and I'll ask you about that in a moment. But this was an after-match drink situation, isn't that right? That many people would be familiar with.

A. Most people who go to a game go for a jar afterwards.

Q. And Mr. Lowry had told you that he was meeting some people in Hourican's?

A. I said, "Are you going for a drink afterwards?" He said, "Yeah." I said, "Where are you going?" He said, "Hourican's."

Q. Normal type of exchange. And you anticipated he would be there with other people?

A. He would be with company, unless he was going for a

drink on his own, which would be unlikely.

Q. You didn't bring anyone with you?

A. No, I was on my own.

Q. And when you got there you said it was outside

Hourican's

A. I met him on the way in. Literally as we were going in he was there.

Q. At the door?

A. As we were going, and there was a whole pile

Q. And you recognised Mr. Sean Murray, and you knew it was Sean Murray, of course you would, and you knew he had some involvement with some other consortium?

A. Absolutely, yeah.

Q. You didn't stay you didn't go into Hourican's?

A. Place was jammers, so we went across to Hartigan's is a rugby bar, college bar, so we went across the road. Normally empty on a Sunday, so we went across the road.

Q. Just you and the Minister?

A. That's right.

Q. Is that not unusual?

A. No.

Q. You went across and you talked mainly about the match.

Isn't it more usual that fellows all stand around and perhaps give a replay of the match and have better views than fellows on the pitch as to how the game might have been played? Isn't that the normal flavour

of what happens in these

A. Certainly George Hook wasn't with us, so yeah, you normally talk about the match, but maybe sometimes big crowd, small crowd, could be one on one.

Q. And if so and so had done such and such a thing?

A. Yeah.

Q. And that's a normal sort of atmosphere after a match?

A. That's correct.

Q. And that's the type of discussion you had mainly with the Minister in Hartigan's?

A. And part of the discussion, and importantly, in my mind, was about our fixed-line business.

Q. What did you say to him?

A. I said, we're growing our business and running out of capacity. And if you take on a customer, you need more and more capacity at your switches, and we were expanding our business rapidly all over the country and we were having capacity problems. And, in fact, we had blocked calls on our network, which is whereby at peak hours your network was blocked, where your customers couldn't get through in using the service.

Now, that, to me, was a crisis in its own mind because if your key corporate customers can't get through at certain hours of the day, they'll cancel. So a big customer could be giving 15, 20 grand a month, and that's straight out of our revenues if they were to cancel. So we'd service issues that were very, very

serious. And that was the key thing that I wanted to talk to him about.

Q. So you recollect talking about the match, and you recollect talking about fixed-line?

A. DDI/DDO.

Q. You can clearly recollect that?

A. Absolutely.

Q. But you say that you have you do not recollect that any other matters concerning Esat were discussed? You don't recollect?

A. That's correct. I mean, I believed that would have been a taboo subject to raise the GSM competition and would have been wrong and inappropriate.

Q. Well, can I just, before I come to dealing with other matters, and just point out to you so that you know, Mr. Per Simonsen

A. I'm well aware of his memorandum, I don't have a problem with it.

Q. I'm going to come to it in due course. Can I just now ask you to reflect on the circumstances surrounding this meeting on the 17th.

You had a concern, rightly or wrongly, but you say you had a concern that there was a view amongst the assessors that there was a weakness in your financing, isn't that right?

A. That was our perception.

Q. And that was worrying you?

A. It was worrying me way beyond the oral hearing, way before that. Plus, my partner was reminding me every other second about it.

Q. It was also on your mind, and you were concerned about what you understood to be the pressure coming from Telenor, isn't that right?

A. Which I didn't need at the time.

Q. Am I correct that those were two matters which were weighing on your mind?

A. Yes.

Q. You have told us

A. The third one being the DDI.

Q. The third one being the DDI. You remember that and you remember discussing it.

You have told us that in sending first of all, in obtaining the underwriting and doing the swap, if you understand me, that you were perfectly within your rights to do it

A. As per the RFP.

Q. I just want to get yesterday's transcript because I don't want to misquote you.

That you were perfectly entitled to do it, perfectly within your rights, you were open about it and that you were open about it. Isn't that right? Isn't that what you say?

A. Yes.

Q. Now, if it was something which was weighing on your

mind, it was a worry for you, if what you were doing

with IIU

A. Which part of it? There were three things that were

worrying me, and a lot more, but which one are you

referring to in this case?

Q. Talking about the assessors your perception of the

assessors' view about you.

A. Yes, Telenor.

Q. Telenor. And your perception of Telenor's pressure.

A. Yes.

Q. Right. They were weighing on your mind.

The solution that you had for those two was what you

were negotiating with Mr. Desmond and Mr. Walsh, isn't

that right, as you saw it?

A. Solve Telenor, solve the institutions, yes.

Q. And solve the Department?

A. Yes. To strengthen things.

Q. And you believed that the solution was something you

were perfectly entitled to do, perfectly within your

rights to do, and you were open about it, isn't that

correct?

A. In swapping, yes. And we were open about it, correct.

Q. Now, if you felt that you were perfectly within your

rights and perfectly entitled to do it and it was

something that was worrying you, why isn't it

something that you would have discussed with Minister

Lowry?

A. It would have been entirely inappropriate.

Q. Why?

A. Because the competition had started.

Q. Yes.

A. And it was not something that you would raise with the Minister.

Q. Why?

A. Because it was it would be a taboo subject because the assessors had started their assessment, the competition had begun, had not ended, and had no finality to it, and if I had raised it with him, he may have thought and misconstrued it, that I was trying to canvass our application.

Q. Obviously at the meeting with Mr. Desmond at 6:00 that evening, Mr. Desmond had indicated that he was going ahead with the financing?

A. No, he hadn't.

Q. Well, you went to Owen O'Connell the very next morning and you told him

A. We didn't have anything until I shook hands with him and signed the agreement on the 29th. I knew I had a deal with him when we shook hands on the equity, which may have been the middle of the following week, I have to look at the diary, and then when we ultimately executed the documentation in the names of Communicorp and Esat Digifone on the 29th, I believe.

Q. Would you mind going to Tab 42, please.

A. I have it.

Q. This is the next day, the 18th of September, 1995.

Denis O'Brien and Leslie Buckley.

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

Now, I suggest to you that you could only have said that to Mr. O'Connell if Mr. Dermot Desmond had told you the previous evening that he was going ahead with the financing transaction?

A. I think Mr. O'Connell may have been saying that they were going ahead with the deal; in other words, they were going into the more serious stage of trying to execute the deal which had started to speed up post the 12th of September. But you'd need to direct the question to him.

Q. I did.

A. I can't answer what was on his mind.

Q. There was nothing on his mind. You were recording what he told you.

A. You're asking me to translate what somebody else has written.

Q. I'm not. Mr. O'Connell noted that you told him this, and I'm asking you; doesn't it seem likely that what had happened the previous evening at 6:00 was that Dermot Desmond had told you that he was going ahead with the financing transaction?

A. Mr. Owen O'Connell was already aware that I was in discussions, so if we were going to go to the documentation side, that would be a normal thing that a solicitor might write down, that we're going ahead; in other words, let's go ahead, get the documentation and close the deal.

Q. Now, there was a degree of urgency, you say, because of your concerns, but I now want to

A. Primarily from the 12th.

Q. I want to refer you to the Memorandum of Intended Evidence of Mr. Leslie Buckley, which is dated the 22nd of November of 2002. And it's to be found

A. I didn't know you were going to go to a different binder today.

Q. It's a Memorandum of Intended Evidence of Mr. Leslie Buckley, dated the 22nd of November, 2002. It's in Book 40.

A. I don't have that.

Q. Tab 16.

CHAIRMAN: As I said to you at the start, if you feel taken by surprise by this aspect, of course we'll put it back to after lunch, but I'll let Mr. Coughlan bring it to your attention.

Q. MR. COUGHLAN: I'll bring it to your attention because it may throw some light on this note of Mr. O'Connell. Mr. Buckley was asked at question 1 for his knowledge, direct or indirect, of the meeting of Mr. Desmond and

Mr. O'Brien at 6:00 p.m on 17th of November, 1995, and

including:

(A) the place of such meeting,

(B) the identity of all persons present,

(C) the purpose of such meeting,

(D) all matters under discussion.

And he was asked to please also indicate the source of

his knowledge.

It's up on the screen now.

And Mr. Buckley has informed the Tribunal: "I did not become aware of Mr. O'Brien's meeting with Mr. Desmond

until I was in the company of Mr. Denis O'Brien, when we were both in a car on our way to a meeting in

William Fry on the 18th September, 1995. I have no recollection of whether or not Mr. O'Brien mentioned

to me where the meeting took place, and I cannot now recall, and I still do not know where the meeting took

place or if there were other people present at it, or

what the purpose of such a meeting was, except to say

that following from the information that such a

meeting had taken place, Mr. O'Brien stated that

Dermot Desmond was going ahead with the financing transaction."

A. I don't know what hangs on that.

Q. Well, if we now go to Mr. O'Connell. That is

Mr. Leslie Buckley describing you and he in a car on

the way to this meeting with Owen O'Connell.

A. Yes.

Q. You told him that you had a meeting with Dermot Desmond. And he is saying that he didn't know where the meeting took place or who attended the meeting or what was discussed at the meeting, except to say that following from the information that such a meeting had taken place, you stated that Dermot Desmond was going ahead with the financing transaction, which is exactly what you stated to Mr. O'Connell when you went to the meeting with him.

A. Yes.

Q. Is that right?

A. That's correct, yes.

Q. So you informed Mr. Buckley and you informed Mr. O'Connell that Dermot Desmond was going ahead with the financing transaction?

A. That's right.

Q. And I'm asking you, doesn't that arise from the meeting you had with Dermot Desmond the previous evening at 6:00 before you met Minister Lowry?

A. We may have agreed things at that meeting which may have helped move it on to get to documentation, and that's probably the reason for the words "going ahead." Up to that there was probably discussions, and we may have agreed things on the Sunday that would have helped me say, okay, now we should spend the money and the lawyers and get them to draft up

documentation.

Q. Very good. And that was before you attended the meeting with Michael Lowry?

A. These are two very separate things, I might point out, Mr. Coughlan.

Q. Yes.

A. My discussions with Mr. Desmond are separate. You're trying to weave them all together.

Q. No.

A. Well, it looks to me as if you were.

Q. Was it at the meeting before you met Mr. Michael Lowry?

A. That's true, yes.

Q. And what you informed him, Mr. O'Connell that is, on the meeting of the 18th, that you needed an underwriting letter for the Department because finances are seen as the weakness. Can I take it, then, that that was what was agreed between yourself and Mr. Desmond, that should be done by way of underwriting?

A. I think you need to not mix the two things, because Mr. Desmond was giving us an underwriting agreement because it was our view, and only our view, the consortium and our advisors, that we were seen as having a weakness in the Communicorp and the institution, the funding of that. And that arose from the 12th.

Q. Now, I think you're aware, and I'm going to make reference now to Mr. Simonsen's Memorandum of Intended Evidence.

A. What tab are we on now?

Q. I'm just going to find it for you now. Book 36, Tab 3.

A. I actually don't need it, I have what page? I think it's 37.

Q. Page 37 of that.

A. Answer 70?

Q. Yes. He was asked for his knowledge, direct or indirect, of all meetings, discussions, dealings or contacts, of whatever nature, between Mr. Denis O'Brien or any other person on his behalf, and the Minister or the Department at any time from the first involvement of Telenor in the Esat Digifone Consortium to the date of issue of the licence on the 16th of May, 1996.

And the response is: "Per Simonsen has no actual knowledge, direct or indirect, of any meetings or discussions, dealings or contacts between Denis O'Brien, or any other person on his behalf, with the minister or the department other than the oral presentation on the 12th of September 1995 and the press conference on the 26th of October, 1995."

"Denis O'Brien informed Per Simonsen in or about the last two weeks of September, 1995, that Denis O'Brien

had happened to meet the Minister in a public house.

Per Simonsen has no knowledge as to whether a meeting actually took place. Denis O'Brien informed Per

Simonsen that the Minister suggested that IIU should be involved in the consortium."

Now, do you have any view or comment to make on that?

A. It's nonsense.

Q. Well, just let me explain to you now. When this information was first conveyed to the Tribunal, this particular information by Telenor's lawyers, at that time Telenor's lawyers were not aware of the content of your diary from the 17th, that is the meeting in Hartigan's?

A. Mm-hmm.

Q. Now, first of all, I have to ask you; do you have any recollection of saying this to Mr. Simonsen?

A. Categorically none.

Q. No recollection?

A. I never said it to him.

Q. You never said it. So Mr. Simonsen must be, at the very least, mistaken?

A. It's not the first time, and even in his answer there he's mistaken.

Q. Now

A. Do you know where he's mistaken?

Q. Yes, just tell me.

A. He said that the Minister was also, on the 12th of

September, at the oral hearing: So that's twice

Mr. Simonsen is incorrect. I have it here if you want

Q. Yes, I'll look at that. What he says is, "Per Simonsen has no actual knowledge, direct or indirect, of any meetings, discussions, dealings or contacts between Denis O'Brien, or any other person on his behalf, with the Minister or the Department, other than the oral

A. Other than the presentation.

Q. Oh, yes, but the way maybe you're right, but the way I'd read that is what he has is an omnibus situation, no recollection of meetings with the Minister or the Department, other than the oral hearings, and there were

A. That may suit your hypothesis, but in my mind he's saying that the Minister was there on the 12th of September and I was there at the same time. That's a very serious allegation. It's not true.

Q. Well, if that's how you read it, fine.

A. Surely you must read it that way as well? You're a lawyer.

Q. I'm sorry, I don't.

A. I'm a lay person. Chairman, does that look to you as if he's saying I met the Minister on the 12th of September?

CHAIRMAN: On the face of matters, Mr. O'Brien, he's

being asked can he inform the Tribunal of any dealings between or encounters between you and the Minister and/or his chief civil servants, the project team.

A. But he has no actual knowledge, other than the oral presentation of the 12th.

CHAIRMAN: I'll look at it further, Mr. O'Brien, because if your interpretation is realistic I'll certainly take it on board.

A. A lot of things hang on this and it's a very serious thing to say.

Q. MR. COUGHLAN: It's a very serious thing to say, as well, I suppose, that let me just go over the page.

A. I think that's the end of the Q&A, isn't it? No.

Q. Just go over the page; that you informed him in or about the last two weeks of September, 1995, that you had happened to meet the Minister in the public house; that you that Per Simonsen had no knowledge as to whether such a meeting actually took place, and you informed Per Simonsen that the Minister suggested that IIU should be involved in the consortium.

A. Can I tell you something, Mr. Coughlan, this is absolute nonsense. I've dealt with six Ministers, Minister Brennan, Geoghegan, Quinn, Mr. Lowry, Mr. Dukes, Mr. Cowen, Mrs. O'Rourke. Never once has any Minister suggested to me to do anything in terms of bringing somebody in, doing business or favouring or anything like that. And this allegation is not

true. And it's a very serious allegation.

Q. Yes. He's not saying that it happened now. He says that you told him that this happened.

A. I'm telling you that I didn't.

Q. You didn't?

A. I did not tell him that the Minister told me to bring in IIU or what other words should be involved in the consortium.

Q. All right. But you do have a recollection of discussing the match and DDI/DDO with the Minister in Hartigan's?

A. I fully told you about that, yes.

Q. But you have no recollection of discussing other matters of Esat with the Minister?

A. For the fourth time, no.

Q. You have no recollection?

A. I definitely did not discuss it.

Q. So now it's you definitely did not discuss it.

A. Sorry, let's roll the transcript back again. I'm not going to have someone put words in my mouth. I'm unequivocal that I did not discuss the GSM licence with Mr. Lowry on the 17th of September.

Q. All right. Do you have anything that you can point to, to assist the Tribunal, as to how Mr. Per Simonsen could have

A. That's a question that should

Q. could have formed a view that you said this to

him?

A. That's a question you should direct to Mr. Simonsen.

If he thinks that I met the Minister on the 12th as well, he's certainly confused on this point.

Q. It's not it doesn't as it reads, anyway, it's not a question of confusion. He's saying that you told him.

A. I'm saying he's confused that I he thinks I met him on the 12th. He's doubly confused in fact, confused squared, in my view.

Q. Can you, and I just want to be clear about this; can you think of any reason why Mr. Simonsen should have informed the Tribunal that you had told him this?

A. Well, we wrote back a letter, my lawyers did, I think to answer some question, I can't remember what the question was. But the letter was incorrect because the diaries weren't consulted. I think this is the reason, and maybe my counsel can explain it better than I can. And basically Mr. Simonsen was at a meeting of the 22nd.

Q. He was. He joined the meeting at the end.

A. Yes. And it's in my diary, one of the people I met.

Q. You make reference to it in a letter you wrote in May, 1996, to Mr. Arve Johansen.

A. Yes. And May of it could have happened that Mr. Simonsen was confused or misinterpreted something that was discussed at that meeting, because the 22nd

of September was a very important meeting because we had a discussion about the underwriting. Now, he may have got mixed up, okay? So I'm giving him the benefit of the doubt on this, about the underwriting. But certainly never was it given as a reason why we wanted to get underwriting.

Q. Well, did you tell anybody at that meeting on the 22nd that you had met the Minister in a pub?

A. I may have mentioned it to Mr. Arve Johansen generally. He would have known about some of the concerns I had about Telecom Eireann at the time. So we may have talked about how are things going, and I probably would have told him, pretty bad, da, da, da, da, on the DDI front.

Q. And that you would have told him that you met the Minister in the pub?

A. I may have mentioned it to him, yes.

Q. You may?

A. I can't actually remember whether I did or not.

CHAIRMAN: But in the context of DDI is the essence of what you're saying?

A. Absolutely, Chairman.

Q. MR. COUGHLAN: Did you tell anybody else about the meeting with the Minister in the pub?

A. I may have mentioned it to Leslie Buckley.

Q. What did he say?

A. I don't remember what he said. He was primarily

involved with the Department on the DDI, so he would have been the most relevant person to mention it to. I mean, he spent most of his time, at that time, seeking capacity, writing letters with Jarlath Burke, and trying to move things on.

Q. In any event, after you attended Owen O'Connell on the 18th of September, 1995, with Leslie Buckley, there was the exchange of various documents, isn't that correct, between Michael Walsh and Owen O'Connell? I think, first of all, Michael Walsh sent some drafts to Owen O'Connell, isn't that right?

A. Yeah, there was the 19th, Tab 47; 20th, Tab 50; 21/9th. Then there was meetings, phone calls, Tab 46, which is another letter, 19th of September.

Q. Well, the first thing that is drafted or was sent by way of a draft was there was a draft prepared at Tab 43. This was a draft to be sent to Mr. McLaughlin of Davys, is that right?

A. Yeah, there were multiple drafts of that letter.

Q. And if you go then to I think it's Tab 46, you sent a letter to Michael Walsh dated the 9th of September, isn't that right?

A. That's correct.

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

following points are relevant."

And then you say:

"1. We do not agree that any underwriting for your reward for underwriting in any participation in Esat Digifone Limited.

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

"3. I have retained Owen O'Connell's format because I feel that it is more likely to achieve our common objective with the Department. I understand that points 1" they're fairly technical matters.

But at that stage, at least, there was the view that Advent were not out or that there was a problem with them, isn't that right? That was on the 19th of September, 1995.

A. Well, they hadn't met Clause 4.2.

Q. No, but it sorry, you're writing here to Michael Walsh and you're saying, look, I think I can get you 20% I know you were in the negotiating position as well, but you said, I can get you 20%. I have difficulties, because of third-party constraints,

doing anything more at the moment. However, I'm told by my solicitor that Advent's 5%

A. Is doubtful.

Q. is doubtful, but there could be a dispute about this. And you're asking them to take on the responsibility of any costs that would be involved in any challenge made by Advent, isn't that right?

A. That's right, yeah.

Q. There was a doubt about it.

A. There was a concern that they might they might have seen something my lawyers didn't see in the agreements.

Q. Now, on the same day, if you go to Tab 48, Owen O'Connell sent you a fax, and he said:

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

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

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

Now, is the information in the first paragraph there the information that you used to inform Mr. Walsh in the second paragraph that there could be a doubt about Advent's commitment or entitlement to the 5%?

A. It was my somebody said there was a condition precedent which was, if they don't satisfy Telenor, they don't get the 5%, and I can't remember reading this letter and saying that was the thing that drove me to that belief.

Q. Because it's a point, I think, on the 19th of September of 1995, you prepared a draft to be signed by Telenor, isn't that right?

A. Yeah. I mean, Mr. O'Connell or somebody in Frys was involved. I'm not sure if it was him or Gerry Halpenny said, look you should really try to get a letter. At that time I was saying, listen, we have a whole stream of letters, what do we need another letter for to prove that Telenor is not happy? So they were being quite legalistic. I would have said, you probably didn't need that letter.

Q. Why was that?

A. Because there was they've always said all the correspondence we opened, you know, in many most of them, anyway, it says that they're not happy. It doesn't do it.

Q. Well, there is one letter that has been referred to Owen O'Connell, and that's the letter of the 11th of September, isn't that right?

A. Can we just look at that?

Q. Yes.

A. Because there's a few letters of a similar nature. What tab is that, do you know?

Q. It's the 11th of September, so it would be it's Tab 39. This is the one which said where you disputed whether he was a financial advisor to you know that letter?

A. Okay. So the question again, sorry?

Q. Sorry, the question is; that is the letter, that letter of the 11th of September, is the one which has been referred to by Mr. O'Connell when he faxed you on the 19th of September, which is at Tab 48, when he said: "I refer to Knut Haga's letter to you of the 11th of September. While the letter may be of assistance in denying Advent's participation in Esat Digifone (if sent with an appropriate letter to Advent) it also contains some assertions by Telenor which should be challenged."

He's saying this is a letter which may be of some assistance, on the 19th of September?

A. It appears so, yes.

Q. Now, prior to that, I don't see any other letter from Telenor. I know there was the I know there was the

meeting on the 3rd and the 4th. I know there was the letter, I think, of the 31st of July when they had made contact with Helen Stroud. Do you remember that particular one, where they said that they had been told that there was no 1/230 million agreement, you remember that? And it was raising questions really.

A. Unless I'm not looking at this properly. We have gone through the ring binder and in evidence we've kind of gone through file notes and letters. And my interpretation of all those file notes concerning Advent is that Telenor were not happy. And, in fact, this is a legalistic view of the world from Owen O'Connell. The commercial view of the world was that I had enough evidence there to demonstrate to Advent, look, Condition 4.2 has not been met.

Q. Well, I think I can safely say from the documents that there's no other letter preceding that which is a letter which could be used

A. Certainly the 11th is one letter, but there was lots of conversations and notes that we've opened up.

Q. All right. With whom were the conversations?

A. I'll have to go through my evidence of the last four days, but there were numerous.

Q. Right, because there is a document this is the 19th of September now. Mr. O'Connell is saying to you the letter of the 11th is one which may be helpful. Now, he's your solicitor. I take it you're keeping him

informed of things as they go along, because these are legal matters?

A. I wouldn't say a hundred percent of the time. As issues arose, I can't say whether he knew everything about this particular matter.

Q. Because there's a document let me just find it now. It's a letter which has the date the 15th of September.

A. Where is that now?

Q. I'll just get it for you now. I'll tell you where you'll find it. If you go to Tab 61. You sent a letter to Massimo Prelz on the 26th of September, 1995. This is the one where you're sending a letter from Telenor. Do you remember that?

A. I think we're all confused because there's the letter of the 19th as well, which is unsigned.

Q. I'm not confused at the moment, if you just bear with me.

A. Well, I am because there seems to be two letters.

Q. You certainly got the letter of the 11th?

A. Yes.

Q. On the 19th Owen O'Connell wrote to you, sent you by fax a letter, saying that that letter of the 11th might be helpful in your dealings with Advent

A. Yeah, we discussed that, yes.

Q. in invoking Clause 4.2?

A. Mm-hmm.

Q. Now, on the 19th of September, that seems to be the only letter that Owen O'Connell is aware of, according to his letter anyway, and the evidence he gave.

A. There's so much other evidence to show that Telenor is still not happy, throughout the ring binder. We'd have to go through all that again.

Q. We can review all the evidence in relation to it, Mr. O'Brien, that's all right. I just want you to look now at the letter on Telenor notepaper, with Mr. Haga's signature on it, and it has the date the 15th of September, 1995, on it.

A. That's right. I have it.

Q. And it reads:

"Dear Mr. O'Brien,

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

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

"It is vital to our further cooperation that Communicorp Group immediately can provide another letter or agreement giving appropriate financial

assurances in a form more acceptable to Telenor.

"We look forward to your instant response.

"Yours faithfully, Knut Haga."

Now, where did this letter come from?

A. It came from Telenor.

Q. Do you know where the original of this letter is now?

A. I have no idea.

Q. Because wouldn't it seem likely that if you had received this letter from Mr. Haga on the 15th, 16th or that time, 16th/17th, whatever the time-frame around the time the letter was dated, that it was something you would have brought to the attention of Owen O'Connell, because it's certainly in much stronger terms than the letter of the 11th of September which you felt might be useful in dealing with Advent? This is very useful in dealing with Advent.

A. I actually don't know.

Q. Because as I understand the situation, Mr. Haga has no recollection of this particular letter.

A. Wouldn't be the first time.

Q. I want to draw certain things to your attention now, in fairness to Mr. Haga.

A. Sure.

Q. Mr. Haga certainly wrote the letter of the 11th of September of 1995, the one we have just been discussing, the one where he said that he was a

financial advisor, he wrote that.

A. He's saying he wrote it.

Q. Yes.

A. I believe him.

Q. Yes. He had received no response to it. In the documents there is no response to it. And one would wonder why he would then write the letter of the 15th of September, not having received a response from the letter of the 11th?

A. I think you need to ask that to Mr. Haga, I don't have a clue. I mean, if you're saying that this letter

never came from Telenor

Q. I'm not, I'm asking you.

A. I doubt it very much. It's on their type font, it's Oslo

Q. Yes, I agree with you.

A. It's his signature, I believe, maybe I'm wrong.

Q. I agree with you. There are other features yes, I

think that there he accepts that it's his

signature, he has no understanding of the letter.

A. Well, then, ask him

Q. I'm going to ask you about something in a minute now,

as to whether this might be a possible explanation.

But if you go to the letter of the 11th of September

again.

A. What tab?

Q. That's at tab

A. We were just at what tab?

Q. We were at Tab 61.

A. Okay. And now we're going back to the 11th?

Q. The 11th, yeah. 39, I'm told. You can see in the letter of the 11th of September it's for the attention of Mr. Denis O'Brien, with O'Brien spelt B -R-I-A-N, whereas the letter of the dated the 15th has your name spelt correctly.

A. Does anything hang on that?

Q. I'm just bringing it to your attention.

The english in the letter dated the 15th is more precise and appears to be more fluent. You see, I wonder could it be the situation that this letter, dated the 15th of September of 1995, was created after you visited Oslo on the 22nd?

A. For what?

Q. Because it wasn't sent to Advent until the 26th.

A. Actually I

Q. I'll tell you

A. I haven't a clue what this is all about.

Q. To get Advent out of the equation?

A. We knew that Advent hadn't met their condition precedent, so either we got a letter from Telenor, categoric letter, or we relied on the stuff that was already there, which could have been the 11th.

Q. This is a reasonably categoric letter, if I can put it that way.

A. It does the job.

Q. Yeah. Now, I'm just wondering was that created after you visited Oslo on the 22nd? Because it's not sent to Advent until the 26th.

A. I actually don't know, Mr. Coughlan. I mean, this is eight years down the road. How would I remember the sequence of letters?

Q. Because you had been, yourself, in the process, on the 19th, of preparing a draft which you would have liked Telenor to sign, which would have been useful for the purpose.

A. But what are you saying? Are you saying that this letter was backdated or

Q. I wonder was it one that was dictated to Telenor?

A. I don't know. I don't see the significance of it, but I can tell you I'm trying to be helpful, I don't know.

Q. Well, I suppose the significance is that from the 22nd of September, when you visited Mr. Arve Johansen at Oslo, you had a discussion with him about the involvement of IIU?

A. That's correct.

Q. And the significance might be then about removing Advent

A. I didn't need that letter.

Q. from the situation?

A. I didn't need that letter.

Q. But that is the one that you sent to Advent?

A. I know that, but I didn't need it. There was enough evidence there that they hadn't been satisfied. A phone call would have done it.

Q. You did send it?

A. Yes, it seems as if I did send it because there's an attachment. But I don't know what the context was, what you're saying. You're saying the 22nd, this is the 15th, he can't remember the letter. I actually don't know.

Q. When you sent that letter first of all, I'll deal with it probably after lunch, with the meeting in Oslo on the 22nd. But when you sent the letter to Mr. Prelz, Tab 61, and you say: "I attach the letter from Telenor, which is self-explanatory. It's fairly self-explanatory. They're not happy with the situation. I'm invoking Clause 4.2."

And then you go on to say:

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

A. That was my view of the world at the time.

Q. It was now clear that you would not be awarded the

licence with the existing financial arrangement, is

that right? Is that your view?

A. That was my view of the world, rightly or wrongly.

Q. And we need something much stronger to have any chance of success?

A. I was leaving the door open for him.

Q. He was your partner in Communicorp as well?

A. He was a partner, but also he was a fellow director, so I was just telling him

Q. He was both.

A. If you can resolve this, fantastic, then I won't go with Plan B.

Q. "I'm working on another avenue which could provide us with the answer and, at the same time, significantly strengthen our bid in other respects."

What were the other respects that the bid could be strengthened?

A. Financially.

Q. Sorry, you mentioned the financing arrangements. What other respects?

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

Q. Now, Mr. O'Brien, let's look at this letter:

"Regardless of Telenor's position, it is now clear

that we will not be awarded the GSM licence with the existing financing arrangement. We need something

much stronger to have any chance of success. I am

working on another avenue which could provide us with

the answer" that's the financial arrangements

"and, at the same time, significantly strengthen our bid in other respects. I will explain in further detail when we meet."

Now, what are the other respects, Mr. O'Brien?

A. I actually don't know. Unless I'm breaking up the two things between Communicorp's underwriting and the institutions.

CHAIRMAN: All right, it's just a minute or two to one. We'll resume at five past two. Thank you.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF MR. DENIS O'BRIEN BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Mr. O'Brien, I think I was asking you before lunch about that letter you sent to Mr. Prelz on the 26th of September, 1995, and what other respects you would explain to him which would significantly strengthen the bid, you can't help us with, can you?

A. No, I can't unfortunately.

Q. But you did say in the letter that regardless of the Telenor position you say: "It is now clear that we will not be awarded the GSM Licence."

A. Tab?

Q. I beg your pardon. Regardless of Telenor's position it was now clear. Who had made that clear to you?

A. Sorry, I just want to get the letter out.

Q. Yes, please do.

A. Which tab is that?

Q. It is Tab 61.

A. 61, great. If you just repeat the question, sorry.

Q. Yes. I've dealt with the first or the latter portion of the letter, you know this question of significantly strengthening the bid in other respects. You can't help us with that.

I am asking you now can you help us: "Regardless of Telenor's position," you stated, "it is now clear that we will not be awarded the GSM Licence with the existing financing arrangements."

A. Well, that was my view at the time.

Q. But doesn't it seem to convey that somebody had said something?

A. Absolutely not.

Q. All right.

A. That's my own view at that time.

Q. Right. Doesn't it look, Mr. O'Brien, that there was something over and above the presentation, that was a fear or a perception you had and you are saying it is now clear, that something had happened, somebody had brought something to your attention?

A. I wouldn't interpret it that way and I am the author of the letter.

Q. All right. Now, I will be coming back to the letter

of the 29th because we know that that was sent to you,

then it was sent

A. The 29th? The 19th?

Q. No, you know, the letter of the underwriting letter of the 29th?

A. Oh sorry, yeah.

Q. That was sent back to you?

A. Yeah.

Q. By the Department?

A. I believe so.

Q. Yes, I will come to that. But before I do that, what

I now want to do is just to go back again in time from

this letter of the 26th of September, and I want to

look at your visit to Oslo on the 22nd of September,

of 1995.

And in that regard, what I would like there are two

particular matters I would like to bring to your

attention. One will be Mr. Arve Johansen's letter of

the 2nd of October of 1995, where he deals with

certain matters, and the other is the first portion of

his memorandum dated the 1st of sorry

A. May '96.

Q. the 4th of May, 1996, which is at Book 49, Tab 130.

I suppose if we go to Tab 68 in Book 48 first because

it is the first in time in terms of its creation.

That is the letter of the 2nd of October of 1995,

Mr. Johansen's letter to you. And it reads:

"Dear Denis,

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

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

"Telenor has put substantial financial and human resources, including some of our best mobile expertise, in preparing the bid, as well as conducting the necessary follow-up work. Site work has explicitly been kept apart from our cooperation, as stated in the said JV agreement. All other bid costs were to be split on an equal basis (including a possible trade-off between advertising costs and Telenor mobile staff costs).

"At an early stage of our collaboration we made our concern clear regarding Communicorp's ability to fund Esat Digifone. After considerable pressure, Advent's comfort letter and your acceptance letter was presented to us and the Ministry. Even though the content of these letters were not very satisfactory,

we decided to submit the bid due to the time constraints.

"It was quite clear from our meeting with the Ministry, that both the lack of commitment from the institutions, as well as the uncertainty in the Advent/Communicorp relationship, created a lack of confidence in the Irish side of the consortium capacity to raise the necessary funding. In order to reassure the Ministry and give an even stronger signal to the Irish community in general, we are pleased with the plan to have another solid Irish underwriter.

"Apparently this requires us to accept a dilution of about 5% in total. For Telenor, it is definitely very hard to give up ownership stake at all on the basis of supporting Communicorp's and the Irish institutions' capabilities to raise the necessary funding. But on the basis of the JV and a draft Shareholders Agreement we feel obliged, and accept a pro rata dilution to 37.5%. Any further dilution would be in conflict with the principles of our participation and the Board resolution of AS Telenor AS.

"Having said this we still believe in the compatibility of our partnership. We sincerely appreciate the efforts that you have put in both on actual groundwork on sites, distributors and bid work, as well as your tremendous efforts in PR and lobbying. However, we believe that Telenor's substantial

efforts, mobile operating experience, and reputation is equally vital both for winning the licence and establishing the networking within the promised timeframe.

"You have indicated to me that bid costs are running much higher than anticipated when entering into the JV agreement. We believe that Telenor, based on the agreement, Will absorb its equitable share of these costs. If, however, you feel that Communicorp for some reason is not fully compensated, we are willing to discuss this problem in further detail.

"I once again want to thank you personally for the tremendous effort you and your Communicorp team have put in place to help Esat Digifone win the licence. I will also assure you that the whole Telenor team has enjoyed working with you all and promise support in any way we can as the" I think it must be

CHAIRMAN: "Race."

Q. MR. COUGHLAN: "the race moves into the finals.

"Looking forward to our common success.

"I remain yours sincerely, Arve Johansen."

Do you remember receiving that letter after the trip to Oslo?

A. I remember the letter, I am not sure when I received it, but it was a very nice letter.

Q. Yes. It didn't seem that there was any tension there, did it?

A. I think he recognised that we had absolutely done our best with Advent.

Q. Mm-hmm.

A. And even though we unfortunately weren't able to satisfy them with Advent, I think we remained, you know, that there was a good relationship there.

Q. Yes. But he does say in the letter, particularly in the fourth paragraph:

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

He doesn't seem to be signalling there's any problem once the bid went in, does he, about the they weren't happy with it?

A. It wasn't in his hand. He had Amund Bugge and Knut Haga doing the hard work, trying to push us to get us something better than Advent.

Q. Would it be fair, so, to say, as I understand the situation to be, I stand to be corrected on this, that this may have been a letter, as you say it mightn't have been in his hands, he wasn't in day-to-day involvement in it, and this letter may well have been

prepared for Mr. Johansen in its broad outline?

A. I wouldn't have thought so. I would have thought that is a letter that he would have written personally.

Q. But it would have been he would have been dependant on information he was receiving from Mr. Haga, Mr. Bugge and people like that?

A. He was the principal in Telenor in charge of the joint venture on their side, so he would have had a good flow of information, I would have thought, from his executives and there was maybe four or five executives feeding him information.

Q. Well, if that be the case, he is clearly indicating there that, look, we weren't happy and, you know, we weren't happy with what you were getting under the Joint Venture Agreement, but we decided to let the bid go in anyway and that was it?

A. Well, I mean, as I described, like he was pregnant because like they had gone so far, they had done all the work, and he was in a no-lose situation, he was only in a win situation.

Q. Mm-hmm.

A. So, they would have been mad not to put in the bid.

Q. Yes. That is why I will be coming back to this whole question of why there was this concern about satisfying Telenor so. As you use the expression, and you explained to me, I have forgotten what pregnant means in this business context, but they were in, as

you saw it, only a win-win situation and not a lose situation. The work was done, the bid goes in, they were committed?

A. Yes, and so this is a different contrasting point because your point in earlier days was the Advent agreement was not strong, was nothing, it wasn't legally binding; and then in this case, I think you are trying to say the reverse, that there was no problem in Advent with Telenor.

Q. No, no. I think if I understand what he is saying correctly there, he is saying we entered into a Joint Venture Agreement, we weren't happy with the way things at that time, we weren't happy with the way things developed, but nonetheless although we weren't happy we let the bid go in?

A. Yeah, but I think underlying all of this, there is still not they still wanted the thing strengthened up, that is my recollection of Telenor, that they still wanted that is why I think, you know, his paragraph, the second-last paragraph, you know, "We ensure an even stronger signal to the Irish community in general... we are pleased with the plan."

Q. I am going to come on to the next three paragraphs. I think these the paragraphs that are of any sort of interest in the letter.

A. Yeah.

Q. Well, of course they accept the dilution down to

37.5%. He says then in the next paragraph:

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

Now, this is coming back to something I asked you this morning. Nowhere, in listening to the tape of the presentation, or reviewing the transcript of the presentation, do I see any reference to a concern about a lack of commitment from the Irish institutions there. Do you know how this paragraph came to be inserted in this letter?

A. Well, first of all, I don't know what you mean by "inserted".

Q. Put into the letter, written.

A. Are you saying after the event?

Q. No, no. It was after the presentation, obviously.

A. But like, you see the reason why you can't see that is because Mr. Johansen and myself were actually at the oral presentation.

Q. Yes.

A. Listening to the questions, and basically we came away with the same view. He is just writing that letter to me to say that, but I already knew that.

Q. Then it goes on:

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

A. I think this is, I suppose, going from Norwegian to English, but I am not sure what he means about "a stronger signal to the Irish community." That could be lost in the translation.

Q. All right.

A. Of what he was trying to say.

Q. Well, what did you understand it to mean? You received the letter.

A. All I took out from this letter was that he was, you know, happy to go down to 37.5, a bit reluctant, and that he was also open to the suggestion of maybe looking at the costs again and revisiting that on the 3rd of June Joint Venture Agreement, but I think he is recognising the work that people did in Dublin, including his own team.

Q. Yes. The rest goes on about yes, I am not disputing that.

A. So....

Q. I suppose it might be useful then to go to Tab, I think it is Tab 130 of Book 49.

A. Yeah, a nice contrast.

Q. Yes. But I dealt with that first because it was created first.

A. Yes, absolutely right, yes. We call this the conspiracy memo.

Q. All right. Perhaps I will get to that in a moment.

All right. I want to show I only want to refer to a portion of this memo for the moment because some of it, or much of it, deals with what transpired from the 3rd of May on.

A. Yeah.

Q. Right.

A. Okay.

Q. I am now concentrating, if I can, on the 22nd of September, when you went to see Mr. Johansen. And

A. I will give you the background of this memo.

Q. Yes.

A. Would that be helpful?

Q. Yes, it would be.

A. Telenor were under pressure. He was under pressure with his Chief Executive and, in fact, his when things became a bit strained with us and IIU, their Chief Executive made a visit to Dublin.

Q. Who was that, do you know who it was? We can find out.

A. Tormot (?) Hermut. He was CEO of the whole shooting match, the whole of the group Telenor, and Arve was a senior, a very senior executive, maybe top four, top five. And he was under pressure at the time, Arve, because there was tension between us and them and IIU

and them, and I think what happened was that he was telling his Chief Executive what was going on.

Q. Yes.

A. I think the Chief Executive then became concerned and decided to make a visit on his own account. And came to Dublin, very short notice, in fact on the day, on the morning I got a phone call he wants to see me. I didn't even know he was coming to Dublin. He went to see the Department. I think he may have seen IIU.

Q. The Chief Executive saw you, you think he saw the Department and you think he may have seen IIU?

A. He seen IIU. And this memo may have been written in the context of that, either before or after that visit. And it was Arve's view of the world. And we called it a conspiracy because he I suppose in hindsight if he'd looked at all the documentation he would probably have come away and written something different to what is in this memo, and he may have written this in isolation. I am trying to be fair to him.

Q. All right. When you say "we" call it a conspiracy, who is "we"?

A. I do. And that's what we refer to it with my legal team.

Q. I see. That is a shorthand, that is just shorthand you use?

A. Yes, I am not accusing him of conspiracy but...

Q. And you say that if we just look at the some of the paragraphs of this now?

A. Yes.

Q. And it is a memo on the shareholding in Esat Digifone.

And he says that:

"I have below summarised a few points that have become clear to me over the last 24 hours as a consequence of the information acquired regarding Communicorp's attempt to buy back 12.5% of the IIU shares." We will deal with that in due course. I know what it is about. You know what it is about. It is in that context that he is making this memo.

"1. Denis O'Brien came personally over to see me in Oslo, probably sometime during September last year. He informed me that, based on information from various very important sources, it was necessary to strengthen the Irish profile of the bid and get on board people who would take a much more active role in fighting for Digifone than the neutral banks who basically would like to keep a good relation to all would like to keep a good relation to all consortia.

"I accepted Denis' word for the necessity for this new move. Note: Underwriting was never used as an explanation."

"2. IIU should apparently be the ideal choice for this function; the only string attached being that they had demanded a 30% equity participation 'for the

job.' Denis had managed to reduce this to 25%, but it was absolutely impossible to move them further down. This was a disappointment to us, since everything we had said and done up to then had been focused on at least 40% ownership for the principal shareholders at the time of the issuing of the licence. But not only that, Denis then pushed hard for Telenor to swallow 15% of this and Communicorp only 10% to which I never agreed but I accepted the principle of 'sharing the pain' and maintaining equal partnership 37.5/37.5. It was also said that a too high Telenor ownership stake could be seen as aggressive and could be inhibiting the award of the licence.

"This was the first time I experienced real hard and very unpleasant push from Denis.

"3. Some days later the nature of the agreement with IIU comes clearer into light, as an underwriting agreement to guarantee for Communicorp's timely payment of its share of the capital into Digifone, and including the right to place the shares with up to four nominees. This was unwillingly accepted by Telenor (since we understood it to be the right steps to be taken from an 'official Irish standpoint' to secure the licence).

"The agreement was drafted by Frys/OO'C and signed in a hurry (basically in draft form) by Denis O'Brien alone on behalf of Communicorp and Digifone (even

though we in the JV agreement have made it clear that two authorised signatures are required (one from each party.)

"4. The agreement was never signed by Telenor, neither as authorised Digifone signature nor as a shareholder and a party to the agreement. Sometime shortly after this the Advent commitment to invest $\text{€}1/230$ million into Communicorp disappears. As it was essentially not necessary anymore since the Communicorp liability to pay capital to Digifone was anyway underwritten by IIIU."

Then he says:

"In hindsight it is quite clear who benefitted from this arrangement.

"I have good reason to believe that the terms put forward by Advent for investing into Communicorp did not suit Denis O'Brien. With the above arrangement, that he orchestrated for all sorts of reasons, he has actually achieved to bolster his/Communicorp's balance sheet and paid for it with Digifone's shares at the cost of Telenor. He has done this in an atmosphere of trust, where Telenor even has agreed to bridge finance Communicorp while he raises funds through a private placement in the US."

Then he goes on to deal with the rest of it. The rest of it we can deal with it in due course.

A. There is so many inaccuracies in this letter, it would

be helpful, if you don't mind, if we can do it - can

we break it into bits.

Q. That is precisely what we are going to do. I am going

to pause at that part of it because we then go on into

May.

A. We got as far as 6, did we?

Q. Say 5?

A. Okay.

Q. Then we might go into 6. We will just look at it. We

will deal with paragraph 1, so, first.

"Denis O'Brien came personally to see me in Oslo,

probably sometime during September last year." That

is probably right, that was the 22nd of September?

A. The 22nd of September, that's right.

Q. "He informed me that based on information from various

very important sources, it was necessary to strengthen

the Irish profile of the bid and get on board people

who would take a much more active role in fighting for

Digifone than the neutral banks who basically would

like to keep a good relation to all consortia."

Now, just reading that, it would convey to me, that

what he is saying there, that you had told him, that

you had got information from very important sources,

that it was necessary to strengthen the Irish profile

and to get on board somebody who would fight for the

Digifone licence rather than the neutral banks. Did

you say that?

A. No, I didn't, no.

Q. Did you refer to important sources?

A. No. I mean, the only people we would have had is advisers and he would have met them infrequently, if at all, or maybe he might have met Mr. Mara, he may have met Mr. O'hUiginn, he may have met Mr. French.

Q. But "very important sources" conveys to me an impression somebody other than your advisers, very important sources?

A. Well, this is Norwegian to English, so I don't know, you would have to ask him.

Q. Yes.

"I accepted Denis' word for the necessity for this new move."

A. Can I just come back to this thing?

Q. Please do.

A. This much more active role in fighting for Digifone, I don't know what he means by that. And I am not sure what he means by "neutral banks" who basically would like to keep a good relationship. Like, none of our people who wrote letters for us, I believe, was involved in any other consortium, so he is wrong in that. That is not accurate.

Q. Well, I think what okay. Now, I want to distinguish here when you say he is wrong objectively in these matters, or are you saying that he is wrong to say that you conveyed this to him?

A. He is wrong that I conveyed it and also, he is wrong in thinking that the neutral banks wanted to keep all good relations. It is in marked contrast to what he says in his letter of the 10th or the 2nd of October.

Q. I will come back to that and we will deal with that.

I will come back to that.

A. I mean, he is saying here, you know, from our meeting with the Ministry, then he is talking about basis of information from important sources. I don't know what he means by that.

Q. Mm-hmm. Well, it certainly seems to convey some an important source seems to be conveying something other than a Communicorp advisor, would you agree?

A. I don't -

I wouldn't accept that, no, no. It is something to be directed to him. I don't know.

Q. Now, the next sentence:

"I accepted Denis' word for the necessity for this new move. Note: Underwriting was never used as an explanation." At that time.

A. On the 22nd of September, Mr. Coughlan, underwriting was discussed and why were we getting our bid underwritten, because Telenor were still not happy.

Q. "2. IIU should apparently be the ideal choice for this function, the only string attached being that they had demanded a 30% equity participation for the job." That seems to be correct they had accepted,

they had looked for 30%, isn't that right?

A. It demonstrates that he knew about the negotiations, yes, because we didn't end up at 30.

Q. In fairness to him as I read this memorandum now, he is not associating the second paragraph with the concept of underwriting. He is saying underwriting wasn't mentioned. He is associating the second paragraph with getting somebody in to strengthen the Irish profile and to fight harder for the licence.

But anyway, I will continue.

"IIU should apparently be the ideal choice for this function, the only string attached being that they had demanded a 30% equity participation 'for the job'."

You probably did have a discussion with him where you said they were looking for 30%, isn't that right?

A. And we settled then on 25.

Q. "Denis had managed to reduce this to 25%, but it was absolutely impossible to move them further down."

Yeah?

A. That was where seven weeks of negotiations with IIU got us to.

Q. Then he said: "This was a disappointment to us."

Probably was?

A. And more to us.

Q. "Since everything we had said and done up to then had been focused on at least 40% ownership for the principal shareholders at the time of the issuing of

the licence." That's right, that is what the focus

had been?

A. It is still a great result because the largest holding they had at that time was less than 40% in an overseas GSM operation.

Q. That probably was said, would you agree, because that was the sorry, that was the level of focus at the time, at the time of the issue of the licence it would be 40%.

Then it continues: "But not only that, Denis then pushed very hard for Telenor to swallow 15% of this and Communicorp only 10% to which I never agreed but I accepted." You probably did?

A. Dead right I did. I was doing the work.

Q. Right. Okay?

A. And paying for this, taking the exposure, of course I did.

Q. I don't mind what negotiations you were doing

A. That is business.

Q. in business terms. I am just wondering, is

Mr. Johansen correct in what he is recording there, that you were

A. Yeah, I think he is right on that, yeah.

Q. Very good. But Mr. Johansen never agreed to a 15%?

A. No, it went 37.5/37.5.

Q. But you accept that he accepted the principle?

A. Yes.

Q. And then he continues: "It was also said that a too high Telenor ownership stake would be seen as aggressive and could be inhibiting the award of the licence." Do you say that?

A. Yeah. Do you know why?

Q. Why do you say that?

A. Non-EU.

Q. Non-EU, right.

A. Norway adopted, they weren't part of the European Union.

Q. All right. Maybe you are right.

A. They are

Q. When I first read this, I first look I just looked at it as being a bit of business pushing on your part.

A. They are non-EU and that was a factor at the time in our minds, maybe it would not have been on the minds of other people.

Q. All right. So then he goes on: "This is the first time I experienced real hard and very unpleasant push from Denis."

A. That is business.

Q. Is that right?

"3. Some days later the nature of the agreement with IIU comes clearer into light, as an underwriting agreement to guarantee for Communicorp's timely payment of its share of the capital into Digifone, and including the right to place the shares with up to

four nominees. This was unwillingly accepted by Telenor (since we understood it to be the right steps to be taken from an 'official Irish standpoint' to secure the licence)."

A. This is gobbledegook. I will tell you why.

"Underwriting agreement to guarantee for Communicorp's timely payment of its share of the capital into Digifone, and including the right to place the shares with up to four nominees." They never had the right to place Communicorp's shares with four nominees. I mean, it was broken into two parts. I think he is confused here between the institutions and then Communicorp.

Q. Yes?

A. So there is certainly he didn't understand the agreement or he was mistaken at that time.

Q. I will just read it again. You may be correct, but just reading it: "Some days later the agreement comes clearer into light as an underwriting agreement to guarantee for Communicorp's timely payment of its shares of the capital of Digifone, and including the right to place the shares with up to four nominees."

It seems to me that they are unrelated, but maybe you are right?

A. I think they are tied, but I could be wrong. It looks to me they are tied.

Q. Very good. If they are unrelated, he understands it

correctly, I think?

A. Well, I think I think he is confused there.

Q. All right. He says this was unwillingly accepted by

Telenor. Since we understood this to be the right

step to be taken from "from an 'official Irish

standpoint' to secure the licence."

Now, doesn't that seem to be the same thing that he is

talking about in the first paragraph No. 1?

A. I don't

Q. About information from very important sources?

A. I don't think I don't see the connection.

Q. That what is being conveyed to him, that from an

official Irish standpoint this needs to be done?

Remember, he is out there, he is not a player here in

Ireland, he is travelling around the world, Telenor

have just come into this a short time previously,

there is no suggestion

A. There is a year later. Hold on.

Q. Sorry?

A. This is a year later. This is May. It is precisely a

year.

Q. But we are talking about what happened in September of

1995 now.

A. I don't know what he means by that to be honest with

you.

Q. Well, could it be the case, the situation that they

were dependant on matters being relayed to them from

you about dealings with Departments, Ministers,

matters of that nature, they weren't

A. Well, there was no Ministry involved, Ministerial involvement, but they were at the meeting with the assessors and the Department.

Q. They were?

A. So he may be coming from that angle, but you are better to direct that question to him, I don't know.

Q. All right. Did you say anything to him that he could form the view from which he could form the view that this was the right step to take from an official Irish standpoint?

A. I don't believe I said that to him, no.

Q. You don't believe you said it?

A. No, I don't.

Q. Could you have said it?

A. In my recollection is that I never said that to him.

Q. If you did say it to him, doesn't it look likely that

A. I repeat I never said that to him. It is not my recollection that I said that to him.

Q. We will continue.

"The agreement was drafted by Frys/OO'C and signed in a hurry. Basically, in draft form by Denis O'Brien alone on behalf of Communicorp and Digifone (even though we in the JV agreement have made it clear that two authorised signatures are required one from

each party.)"

A. Nonsense.

Q. Well, it was signed by you, wasn't it, on behalf of Digifone?

A. Yeah, but he is trying to make out that he had no hand, act or part in it. "Drafted by Frys," they were involved in the drafting of the documentation.

Q. What involvement?

A. Well, if you look at all well, if you want to go through the tabs.

Q. I will go back through it now in a minute now.

A. Because there are it shows that they were involved in the underwriting agreement, that they were involved in looking at the drafts of the letters and the agreement.

Q. Yes?

A. And then

Q. We have a memorandum from Mr. Amund Bugge that he saw these on the I will have to

A. But he is alluding to the fact that

Q. That he saw these the day before, that is on the he had been away on holidays and he saw them on the 28th of September, I think?

A. Mr. Simonsen saw them long before that now.

Q. Mr. Simonsen saw them?

A. Well, it is in the books. And also, he is saying that Denis O'Brien alone on behalf of Communicorp and

Digifone. I signed that agreement with the express

consent of Telenor.

Q. Who

A. So this is incorrect.

Q. Who specifically in Telenor told you to sign it?

A. I would I would have to go through the files again, but we informed them every step of the way, they had input in the drafting of the documentation and I only signed it when I was told that Telenor are happy for you to sign it, so that is why we call this the conspiracy memorandum.

Q. Yeah?

A. Because he is washing his hands and saying I did this unilaterally, totally untrue. It was with the total cooperation of Telenor.

Q. Right.

A. And basically this memorandum, I think, and you need to check this, found itself up to a higher authority in Telenor and it was his version of events, when you look at the other evidence, this contradictory evidence.

Q. Well, the one thing I will continue on through and I will come back then for a moment.

Paragraph number 4: "The agreement was never signed by Telenor, neither as authorised Digifone signature nor as a shareholder and a party to the agreement."

That was correct, it was never signed in that context?

A. Hold on a second now. Sorry, neither as authorised

Digifone signature

Q. No, the agreement was never signed by Telenor?

A. No, it wasn't, but they did authorise me to sign it, which may be a different thing.

Q. "After this, the Advent commitment to invest \$30 million into Communicorp disappears, as it was essentially not necessary anymore, since the Communicorp ability to pay capital" "liability to pay capital to Digifone was anyway underwritten by IIU."

"5. In hindsight it is quite clear who benefitted from this arrangement.

"I have good reasons to believe that the terms forwarded by Advent for investing into Communicorp did not suit Denis O'Brien. With the above arrangement, that he orchestrated for all other sorts of reasons, he has actually achieved to bolster his/Communicorp's balance sheet and paid for it with Digifone shares at a cost to Telenor. He has done this in an atmosphere of trust, where Telenor even has agreed to bridge finance Communicorp while he raises funds through a private placement in the US."

What do you say about that paragraph?

A. There is a number of things that I would take issue with.

Q. All right.

A. First of all, you know they knew the they knew of the Advent agreement. And we always said the Advent agreement was, the terms were fairly rich, I have given evidence to that fact already. And basically he is saying that I orchestrated, which I don't agree, to bolster "his/Communicorp's" balance sheet. I don't know what he means by that, but to bolster your balance sheet is either getting in a fusion of capital most likely in a long-term basis or equity. I don't see how my balance sheet and Communicorp had any benefit out of this.

Q. You say that he was aware of the Advent agreement and that they were happy with that, is that right?

A. Sorry. Well, all along I am saying that the 12th of July agreement, I believe, that Telenor had sight of that and knew the terms of it, otherwise how could they reject it? It's logical. If I was bolstering my balance sheet, even if you took these shares as value, my shares are going down because I have now got 37.5.

So it is illogical what he is saying here. There is no element of trust here. We were totally transparent to Telenor as to what was going to Advent and what was happening with IIU. And the only reason why he did the bridge was because he wanted to be in a position to take up the half of the shares if we defaulted.

Q. Right. Now, I want to go back now to paragraph No. 1, and you say that you didn't say this to him and he is

wrong objectively anyway.

"Denis O'Brien came personally over to see me in Oslo probably sometime during September last year. He informed me that based on information from various very important sources, it was necessary to strengthen the Irish profile of the bid and get on board people who would take a much more active role in fighting for Digifone than the 'neutral' bank who basically would like to keep a good relation to all consortia.

"I accepted Denis' word for the necessity for this new move. Note: Underwriting was never used as an explanation."

Now, as I understand that paragraph, what he is saying there is that in the first instance you came to him and you told him that you needed to replace, swap, whatever word you want to use, the neutral banks or we just call them the institutional investors or words to that effect, and that is all you told him about on that occasion?

A. I didn't say that.

Q. And that you were getting on board IIU for that purpose at that time?

A. I didn't say that.

Q. You didn't say that?

A. Basically he is saying that underwriting was never used as an explanation.

Q. At that time?

A. He knew sorry, he is trying to separate the two, but they are all the one. The reason why we swapped the institutions was to strengthen the bid and the way we did that was to create an underwriting agreement which IIU and ultimately Bottin participated in.

Q. Mm-hmm.

A. An important sources, I believe, is what he got out of the oral hearing, and the feedback from our advisers.

Q. You see, in the Memorandum of Intended Evidence in which you have given in evidence now which you furnished to the Tribunal on the 10th of April, 2002

A. Well, can I just open that because I haven't got that. Where is that?

Q. Please do. It is in Book 36, Tab 7A. We went through this in your direct evidence, but I just want to bring something to your attention.

A. Fine. Is that the 10th of April 2000 or 2002? It could be a typo.

Q. The 10th of April, yes.

A. I have got it.

Q. And the first question that is at (A), you were asked for your knowledge of the association of Allied Irish Banks, the institutional investors, with the bid and the consortium. And you said that you asked Kyran McLaughlin of Davys to help him place 20% of the equity in Esat Digifone with a number of institutions,

Advent's 5% was included in this 20%. Mr. McLaughlin approached an institution, a client of Davys, but ultimately the letters of interest received from the institution did not show an irrevocable commitment to proceed should Esat Digifone be successful in the licence bid.

Mr. O'Brien, you believe this lack of irrevocable commitment to be a significant weakness in the makeup of the consortium. Communicorp and Telenor had committed irrevocably, whereas the institutions had not.

You then were asked for your knowledge of Mr. Desmond and IIU's association with the bid. And you informed the Tribunal that you decided to source some other institution to underwrite this institutional 20% block of equity to demonstrate that all the equity funding was pre-committed. As far as you can recall, you spoke to Credit Suisse First Boston, because of the tight timeframe it was going to be impossible to put an underwriting agreement in place in time. In June 1995, Communicorp was short of cash and needed to raise approximately 5 million. Dermot Desmond had been approached by you on behalf of Communicorp, but Communicorp and you and he were unable to agree terms. Then a \$5 million loan was ultimately obtained from Advent at 30%.

Then you say that you were invited by Mr. Desmond to a

Celtic football match in or about August 1995. In the course of the conversation during that trip, you explained the bid initiative to him. He offered to underwrite the institutions 20% holding in its entirety. In subsequent negotiations over a couple of weeks, it was agreed eventually that Mr. Desmond would not just underwrite the institutional 20% but would actually take it up in the first instance with a view to selling some of it on later as well as underwriting Communicorp's equity commitment as well in terms agreed that Mr. Desmond would be allowed to increase the initial 20%, he actually sought 30%, and that he would also be paid an underwriting fee. This left the consortium split as 37.5/25%. On or before the licence then, Mr. Desmond's 5% was brought back, or 25% was brought back to 5%.

You see, you have told us that your first reason for approaching Mr. Desmond and I will get you I will read you portions of Mr. Desmond's memorandum now as well as to how the approach came, was because of your concern to satisfy Communicorp, or Telenor?

A. Mm-hmm.

Q. That does not appear to have been the view that you had when you furnished this Memorandum of Intended Evidence on the 10th of April, 2002. You first approached him in relation to the or you told us you approached him sorry, he approached you but

arising out of a discussion, the concern seemed to be the irrevocable or the lack of irrevocability on the part of the letters of the institutions rather than a concern about Communicorp or Telenor. Sorry for confusing you.

A. Well, in isolation you really can't look at this because the reason why we ended up with IIU was because Telenor weren't still happy. That is my evidence.

Q. Now, Mr. Dermot Desmond has furnished a Memorandum of Intended Evidence dated the 22nd of February, 2002, to the Tribunal, and that is in Book 36, Tab 5A.

A. Could I just say, Mr. Coughlan, I didn't think you were opening up 36 today.

Q. All right.

A. We will run with it and see how we go.

Q. If you want to think about it, that is fine and we can come back to it.

A. Fine.

Q. I just want to if I bring it to your attention for the moment.

A. Do you want to read it out and then so we will move on and then if I can't help you we may revisit it tomorrow?

Q. Yes. Just on, it is on background.

(Folder handed to witness.)

"Denis O'Brien and I attended a football match on the

10th of August, 1995. At the match there was a discussion on Denis' progress with the bid for the second mobile licence. Denis stated that" sorry.

"Denis stated that they had made a very good presentation" I think that means bid. I am not going to

A. That's right.

Q. "And had a good team in place but were uncomfortable on the funding side. They had no binding commitment from the financial institutions and no indication on pricing and no willingness from the financial institutions to bear any of the costs if the bid was not successful.

"I offered to invest in Esat Digifone on the same basis as Telenor were investing, to meet Denis' proportional share of the bid costs and to underwrite Denis' share of the investment.

"Following negotiation an agreement was reached on the 29th of September, 1995 which is attached hereto as Appendix 1. No other agreement was consummated between the parties prior to that date."

"So, that seems to be broadly along the lines of the memorandum you furnished in that one we just opened?

A. 2002.

Q. I think it was 2002. That your initial discussions with Mr. Desmond were you informing him that you had

no binding commitment from the financial institutions,

and that he offered to invest on the same basis in

Esat Digifone as Telenor?

A. And

Q. And?

A. To underwrite.

Q. Sorry, then: "I offered to invest in Esat Digifone on

the same basis that Telenor invested to meet Denis'

personal share of the bid costs"

A. "Proportional".

Q. "Proportional share of the bid costs and to underwrite

Denis' share of the investment."

A. Two things.

Q. Yes?

A. Why was I getting myself underwritten? Because Advent

Q. I am asking you why for the first time did we hear in

this Tribunal, in the form of theory or speculation,

from Mr. Owen O'Connell that the reason for the

approach to Mr. Desmond was to satisfy the

requirements of Telenor, when the initial approaches,

both as stated by yourself and Mr. Desmond, related to

the position of the financial institutions?

A. Because Mr. O'Connell was only dealing with certain

aspects of what was going on in our world at that

time, and that was relating to drafting of agreements.

Now, if Mr. O'Connell was in my car, in my office,

travelled with me for the space of three months, he then would have known quite clearly what I was trying to achieve and that was to satisfy Telenor; and by doing that, I had to go if I couldn't do it with Advent I had to go and find somebody else and fortunately I found somebody who had the wherewithal but also the brain power to see what the opportunity was and that was Mr. Desmond.

Q. Right. But initial discussions with Mr. Desmond were about

A. Sorry, this is a limited statement. I think you direct the question to Mr. Desmond, did I ever mention Telenor, the reason Advent, letting down, maybe he knows about that, I don't know. But I don't think anything really twists and turns on this, Mr. Coughlan.

Q. Well, you see, Mr. O'Brien, what I am trying to ascertain here is, it has been since Mr. O'Connell's evidence been portrayed that the primary reason for the approach to Mr. Desmond

A. We never approached him now, let's be very clear.

Q. Sorry.

A. Absolutely we didn't approach him. Okay.

Q. Fair enough. That the primary reason for going with Plan B, if I put it that way

A. I agree with the Plan B, yes.

Q. Is that right?

A. Yes.

Q. Was because of Telenor?

A. That's right. We are still trying to satisfy them on the 3rd of June.

Q. Now, you say that you never approached Mr. Desmond, that he approached you, you told him about the institutions, you definitely did, I take it, did you?

A. Well, I mean, it is in my memo of the 11th and the fact that I need a bank guarantee.

Q. And you say he had the brain power to see the opportunity, the investment opportunity?

A. But also he had the he had the balls to do it, it was him on his balance sheet irrevocably committing that he was going to put up the money for not alone the other institutions, which I was taking on his own sheet, but also for us. Now, I could go down to any bank in Ireland and spend months and months with them and they still wouldn't be able to do that, they were incapable of doing that because it would be like opening up and giving a blank cheque. Mr. Desmond took a different view. I can see the I can see the risks here, I will give my open blank cheque for a certain cover through a certain extent and I'll take my chances because I can see the opportunity.

Q. The blank cheque he was giving was your proportion of the bid costs?

A. No. The blank cheque was well, it was capped at a

certain level, but he had to pay up for the 20% and if we didn't meet our commitments on the day, he would also have to finance us.

Q. Oh yeah, but we know things would have changed if the licence was obtained, isn't that right? The risk here

A. That is a totally that is Plan B-2 at that stage.

Q. What was involved here was the risk, say the licence wasn't obtained, the risk was say the licence wasn't obtained, the risk was the proportion of the bid cost, isn't that right? That was the exposure?

A. That was a significant amount of money.

Q. I am just trying to understand. That was the exposure?

A. Yeah.

Q. Right.

A. I think also, he would have been associated with a losing bid.

Q. Well, how would he be?

A. Because he would have put a lot of effort into this in his Michael Walsh and other people in IIU and then they wouldn't have won the licence.

Q. Sure, he wasn't in the bid?

A. He was in the bid.

Q. He wasn't in the bid?

A. Sorry, when I say "the bid" generally he was in now, he was in Plan B taking out the 20%.

Q. So far as you were concerned, he was in the bid as and

from then?

A. From the 29th.

Q. And he was in the bid in this way, from the 29th, he had the right to participate in 25% of the equity in Esat Digifone, isn't that correct? And he had obligations and rights arising out of your ability or inability to meet your obligations?

A. More obligations than rights.

Q. Well, he would have acquired he would have acquired, perhaps, in those circumstances, a greater shareholding if he had obligations and rights?

A. If we weren't able to meet our commitments, yes, he would have, and that is why May, what happened in May happened.

Q. Well, I just want to you say as and from the 29th he and we talk in business terms about this now he had 25%, you had 37.5%, Telenor had 37.5%. He had obligations to underwrite your commitments if you failed to meet those commitments, for one reason or another, he had obligations to take up or place the shares, isn't that right?

A. Within certain parameters.

Q. Within certain parameters. There were timeframes that you had put

A. Let's be very clear, the reason why he was in that position is because I still had to satisfy Telenor.

Q. Sorry?

A. That is my evidence.

Q. All right. All right. I just want to be clear. Do we agree that that is the position he was in from the 29th?

A. Broadly, yes.

Q. Broadly speaking.

And the one thing that was clear on the 29th, you had cut the ties with the three Irish institutions on the 29th?

A. I will have to look at the whatever is in the tab.

Q. You tell me, Mr. John Callaghan was sent to see Mr. Kyran McLaughlin, isn't that right?

A. That's right.

Q. And there had been consideration

A. Can we just open this, this evidence as we go through it because I just want to be right

Q. You tell me now first, Mr. O'Brien, what did you instruct Mr. Callaghan to do?

A. Can I go I would like to go to the Davy letter.

Can I open the Davy letter? What date is that, please?

Q. You can open it, just can you tell me

A. What date is that?

Q. Not the Davy letter.

A. No, I would like to go to the Davy letter.

Q. I am asking you first of all. We will go to the Davy letter

A. I am sorry, you want me to answer the question. I want to look at the letter.

Q. Can you tell me, can you remember what instructions you gave to Mr. Callaghan in the event of Mr. McLaughlin

A. I would like to look at my ring binder and open up the Davy letter.

Q. You can open it, but I am asking you a question, first of all, can you remember it?

A. Chairman, may I ask you, can I open the ring binder and look at the Davy letter?

CHAIRMAN: Yes, you can.

Isn't it common case, that as and from the 29th,

Mr. O'Brien, you had entered into an agreement with Mr. Desmond of IIU?

A. That would be correct, Chairman.

CHAIRMAN: By virtue of that, that effectively that Advent and the institutions were out?

A. Yes, yes. I just want to get the dates right.

CHAIRMAN: Feel free, of course, take your time.

A. Yes, thanks.

Q. MR. COUGHLAN: Which letter are you looking for now, the letter that Mr. McLaughlin sent you?

A. Yes.

Q. Right. It was in November the I will just get it now. Sorry, I have got the wrong book here. It is Book 49.

MR. McGONIGAL: Mr. Chairman, unless it be forgotten, and I have no doubt you have spotted it yourself, but just in relation to paragraph 1 of Arve's memo of May '96, which we now seem to be passing by

MR. COUGHLAN: No, we are not.

MR. McGONIGAL: from the very important sources, I do note that from a memorandum which was submitted by Mr. by Arve Johansen to the Tribunal, that he does seem to suggest that he understood the important and useful sources of information as being the consultants retained by Mr. O'Brien.

CHAIRMAN: All right.

A. Where is that? Which document?

MR. McGONIGAL: It is in Arve's tab on his reply. It is Tab B of Book 36. We will get you a copy.

A. Please. Thank you.

Q. MR. COUGHLAN: Now, Mr. McLaughlin's letter is, I think, is it Book 49, Tab 91?

A. Book 49?

Q. Tab 91.

A. 90?

Q. 91.

CHAIRMAN: Yes.

Q. MR. COUGHLAN: Yes?

A. I have it, yeah.

Q. Now, I want to ask you, I know you have it here. I want to ask you, do you remember what instructions you

gave to Mr. Callaghan when you sent him to see

Mr. McLaughlin on the 29th?

A. I can't remember word for word what I said to him.

Q. All right.

A. But we would I would have informed John about IIIU

and I would have told him that obviously we were about

to enter into an agreement with IIIU.

Q. Right?

A. And that we should inform that we are asking the

institutions to step aside and that would be done

through our broker, which was Davys.

Q. Mm-hmm. Now

A. Can I just say to you, the reason why I wanted to look

at this, because I wasn't sure what date when this

letter was. I wanted to make sure that this was sent

prior to the execution of the 29th of November.

Q. Yeah. He went on the 29th?

A. Well, this is before it, but I just wanted to make

sure in my own mind.

Q. What is before it?

A. Well, he had a conversation last Friday. This is

dated the 22nd of November, it is either seven days or

two or three days or whatever.

Q. No, I think that is just I think you are confused,

there is confusion there. It is the 22nd of November.

A. Sorry.

Q. He is talking about something that occurred afterwards

and he is recounting, he is summarising the whole position there.

A. Yes.

Q. He says that on the 29th of September, which was the day

A. Yeah.

Q. the deal was consummated, isn't that right?

A. Yes.

Q. That you sent him to see Mr. McLaughlin to ask the institutions to step aside, is that right?

A. I didn't send him. We agreed that he would go because he introduced the relationship at the outset.

Q. Now, I will come back to that letter in its correct timeframe in November of 1995 in due course, Mr. O'Brien. But the institutions were out on the 29th of September. Mr. Desmond was in for 25% through IIU, isn't that right?

A. Sorry. Could you repeat that again.

Q. Mr. Desmond was in through IIU for 25%?

A. IIU were in, yes.

Q. I have had this with Mr. O'Connell. Mr. Desmond was the one you conducted negotiations with. Mr. Desmond has stated that he would invest in the company on the same basis as Telenor. There subsequently Mr. Walsh then informed Mr. O'Connell that the vehicle that would be used would be IIU, isn't that right? I can go to Mr. O'Connell's evidence.

A. I don't really mind what Mr. O'Connell said.

Q. You can take it that it is.

A. If you are asking me the question, and you are saying

I am not sure what the point is here, is it Mr.

Desmond or IIU, is that the point?

Q. That is not the point. That is not the point. It is of significance

A. What is it then?

Q. The point that is of significance, Mr. O'Brien, is

this: That on the 29th, the institutions were out,

Mr. Desmond/IIU, I will put it that way, were in. Not

just for the 25%, but were in as underwriters for

Communicorp as well, isn't that right?

A. Yes.

Q. But the one thing that is certain is the swap, as you

have described it, had taken place?

A. Correct.

Q. And that was not notified to the Department?

A. Well, if you look at the letter that went to the

Department.

Q. I have.

A. It is very clear in that letter.

Q. That the swap had taken place?

A. That we had brought somebody in to underwrite the 20%,

there is no other interpretation of that letter.

Q. Yes. Sorry, I am not disagreeing with you about that.

The letter says

A. So the Department did know.

Q. That the swap had taken place?

A. Well, if they were coming in to underwrite they would understand that the 20% financial institutions are gone.

Q. So you say that that conveyed the swap?

A. It would have, yeah.

Q. So did it convey the swap in relation to Communicorp as well, then, because they were coming in to underwrite Communicorp?

A. Well, there was no swap taking place. Communicorp were staying.

Q. Exactly. Exactly.

A. Communicorp

Q. The institutions they weren't underwriting the institutions. The institutions were gone.

A. Well, let's go back to this letter because I am reading this letter as a businessman.

Q. Mr. O'Brien, Mr. O'Brien, were the institutions gone? Were the institutions gone?

A. On the 29th, yes, they were.

Q. The institutions were gone.

A. But you are saying that this

Q. This letter?

A. doesn't convey to the Department that the 20% had been swapped.

Q. Yes.

A. That's not true.

Q. Now, Mr. O'Brien, you show me where that letter states that the institutions are gone. That letter says, "We are underwriting." It doesn't say we are gone, we have taken their place, does it?

A. No. It says here: "We can confirm that we have arranged underwriting on behalf of the consortium for all the equity (circa 60%) not intended by Telenor."

Q. Look, I am asking you a simple question because you are asking me to interpret this letter this way.

A. No, I am not. I don't want to be putting words in your mouth. I am just giving my evidence.

Q. This is a letter coming on your behalf, your advisers were involved in the preparation or agreement in the content of this letter. You have told me that a proper reading of that letter clearly shows to the Department that the swap has taken place because it says that the institutions have been underwritten, isn't that what you are saying?

A. It is clear from this letter, in my mind, that IIU had taken over the 20% and this is the point that I said at the outset.

Q. If that

A. Just let me finish. That the Tribunal should consider to have an advisor because if a financial person read this letter, they would immediately see what was going on, that the 20%, that IIU were in for the 20% if they

are underwriting the 20%. It is as clear as daylight.

Q. That is okay. Right. I understand that.

A. You can't see it, but I can see it.

Q. Now, can you explain to me, why it isn't as clear as daylight, if that is daylight, why they are not taking over the Communicorp shareholding as well because they are underwriting that?

A. Do you know what underwriting is?

Q. Sorry, Mr. O'Brien, I am asking you to explain to me if a reading of that letter says that they are, it is as clear as daylight because they say they are underwriting the financial institutions, that they are replacing them, why isn't it as clear as daylight that they are replacing Communicorp?

A. You have got to read the letter very carefully.

Q. I have.

A. The letter, they are saying they are underwriting Communicorp, so there is no swap. And they are taking over the 20%. That is really what the letter, the essence of this letter, is.

Q. Let's go through it.

A. If you are a financial person reading it, not a lawyer.

Q. Let's go through the letter.

"Re 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.

"We confirm that we have arranged underwriting on behalf of the consortium for all of the equity (i.e. circa 60%)."

Now, in fact, it was known that the what was involved here was 62.5%, isn't that right?

A. Well

Q. Definite?

A. Just hold on a second. I also had a belief that the Department would always insist on the 20%, so I didn't think that 5% was ever going to be an issue because the Department were looking for, in the application, the financial institution that was going to take the 20 which was set out, that we were going to place that with a third party. So, I didn't see a problem with it.

Q. I will come back to it now in a second. I will continue.

A. But it is amazing like because this morning, this morning

Q. Circa 60%, not intended to be subscribed by Telenor, right. Now, in fact, the frank position which had been stated to the Department as of that moment was this; that IIU had an entitlement to 25%, they were

underwriting 37.5%, isn't that right?

A. Correct.

Q. And you were telling me that anybody from a financial background reading that letter

A. That wasn't your question.

Q. would understand it?

A. That wasn't your question. You are saying where is it

about how do you know from this letter that the

Department or the assessors would have known that the

20% was going to go into IIU's hands. Yes, and it is

as clear as daylight. I mean, it is as clear as

daylight that there was that there was discussion

and we disagreed about that this morning.

Q. All right. Where

A. Are we inquiring or prosecuting because my view is I

am trying to help you with this, but I can't change

what the letter says.

Q. Where does the letter say that IIU have another 5%

then?

A. It doesn't say that, but I have explained to you

Q. Wasn't that the true position as of that moment?

A. Yes, it was.

Q. And that was not stated to the Department?

A. No, it wasn't.

Q. And in fact, what was stated to the Department, was

that they were underwriting circa 60%?

A. Well, circa, yes.

Q. Around?

A. Around.

Q. Around 60%?

A. So it was around plus or minus 10 percent.

Q. A fudge?

A. It wasn't a fudge.

CHAIRMAN: Well, was it to cover the contingency as you believe matters, Mr. O'Brien, that the Department might afterwards have insisted on a version to 40:40:20 and what was agreed on that day was 37.5 by two plus 25?

A. That's correct. I think, Chairman, we always suspected that the Department might have difficulty in accepting 25 instead of 20 and that is why we ultimately bought out that 5% for 2.75 million in March in May 1996. I mean, we explained that to IIU. We don't think that this will be acceptable when we actually go to negotiate, if we are awarded the licence, if we are awarded the licence.

Q. MR. COUGHLAN: When did you explain that to IIU?

A. Well, I mean, I would have said that to Mr. Desmond and Mr. Walsh.

Q. When?

A. In my negotiations.

Q. In August?

A. That is why we fought tooth and nail.

Q. In August or September you told Mr. Walsh and

Mr. Desmond that you wouldn't be able to

A. I said that we would have difficulty, difficulty because if the Department insisted and the assessors insisted on sticking to 20,% well then, we would have to stick to 20%, that is ultimately what happened.

Q. No, what ultimately happened was that you entered an agreement with IIU whereby Mr. Desmond got 25% and he then

A. What ultimately happened in May

Q. And he then sold 5%, 2.5 back to you and 2.5 back to Telenor. That is what happened.

A. Sorry, I will repeat. Ultimately what happened in May 1996, Mr. Desmond went down to 20%.

Q. Mr. Desmond went down to 20% by selling 5% ?

A. And he was fine, that is what he did. He was entitled to sell it.

Q. Mr. O'Brien, let's come back to the 29th of September. He had 25%. The only way he could be brought back to 20% was by selling the 5.%

A. And what is wrong with that?

Q. Sorry, I am just

A. That is business.

Q. Sorry, Mr. O'Brien, that was the true fact as of the 29th of September and what I am asking you about is why that true fact was not conveyed to the Department?

A. Because we always felt that the Department were going to insist on 20%. It was a totally academic situation

to find ourselves in. I mean, you have to direct that to the Department and ask them what they took out of the letter.

MR. MCGONIGAL: Mr. Chairman, can I rhetorically ask you, Sir, as to whether it is part of the case being made by the Tribunal, that there was an obligation on Communicorp or someone else, by reason of the rules of the competition, by reason of regulations governing the Minister or by some other rulings or regulations, was there an obligation on a consortium to inform the evaluators of a change? Or is it the Tribunal's position that there wasn't such an obligation? It is not quite clear from Mr. Coughlan's questioning which horse he is running.

CHAIRMAN: The Tribunal is not making a case. It could scarcely be more central to the Tribunal's business than to make detailed inquiries into all the attendant circumstances of this letter of the 29th of September, and I am certainly not going to inhibit counsel from making appropriate inquiries. Proceed, Mr. Coughlan.

A. Well, are you accepting my evidence, Chairman, because my evidence is something different to what Mr. Coughlan is trying to put forward?

CHAIRMAN: I am certainly going to reflect fully on all that you state, Mr. O'Brien, but I do feel your last answer may not have done yourself justice when

Mr. Coughlan suggested to you that the fact of matters was that as of the earlier agreement on the 29th of September, 1995, the agreed distribution amongst the shareholders was 37.5/37.5/25, and he put it to you that the actual position should have been conveyed and you responded that it was merely academic because the Department was likely to insist on a reversion to 20%. I feel you may have done yourself less than justice in that answer.

A. Okay. I accept that maybe. Yes.

Q. MR. COUGHLAN: Now, I do want to draw your attention to, as Mr. McGonigal has rightly drawn my attention to, Mr. Johansen's response to the question concerning the sources, you know his memorandum of the 4th of May. This is in paragraph 1.

A. Just now

Q. Sorry. Book 36.

A. I had it but I have now lost it.

Q. All right. I will put it up on the screen.

(Folder handed to witness.)

Do you know sorry. I will just explain, you know, the point, you know, Mr. Johansen's memorandum of the 4th of May.

A. Oh yeah, the conspiracy.

Q. The conspiracy as you call it. Paragraph No. 1, where he said that you came over and saw him on the second part and that you explained to him from senior sources

the need to get somebody more vigorously involved than the neutral banks. I am paraphrasing. In relation to that particular reference to senior sources or important sources, I think we asked him what he meant by that and he informed the Tribunal that he has no understanding as to the source of such information, "although from time to time Denis O'Brien would refer to having important and useful sources of information. Arve Johansen always assumed that this referred to the consultants retained by Denis O'Brien."

So that is

A. Thank you for clarifying that.

Q. Also I just, at this stage, in case it slips my mind, when I put Mr. Simonsen's memorandum to you, I should, of course, state that, and you vigorously rejected that you had a conversation with Mr. Lowry along

A. No, I didn't

Q. When I put Mr. Simonsen's memorandum, you know, the meeting in the pub and that you had said to him that the Minister had said about involving IIU or words to that effect, and you vigorously rejected that. I just want to say that Mr. Lowry also vigorously rejects that that that such a conversation I will put it specifically. Sorry, the exact words of Mr. Lowry, Mr. Simonsen's memorandum was put to him, that portion of it, and he said:

"If it is being suggested that matters as outlined in

the Tribunal's letter of the 8th of November" that was where it was contained "were discussed, then this is absolutely refuted by Mr. Lowry. Neither at the meeting in Hartigan's or at any other occasion did Mr. Lowry ever suggest to Mr. O'Brien any matters such as that outlined in the Tribunal's letter of the 8th of November." And that contains Mr. Simonsen's statement.

There is just another matter that I just want to because I did ask you before lunch about your meeting with Mr. Desmond on the at 6:00 on the 17th of September, 1995, and you are clear, you had a meeting. You told Mr. Leslie Buckley that you had a meeting. I just want to put Mr. Desmond's position, just in case there is any confusion.

A. Fine.

Q. I think we will just put this up on the monitor.

Mr. Desmond was asked about a meeting between you and him on the 17th of September at 6:00. He was asked the place the identity, of the purpose its the purpose of the meeting, all matters on discussion.

Mr. Desmond informed the Tribunal:

"I attended the All Ireland Final on the 17th September, 1995, but I do not remember meeting Mr. O'Brien on that day."

And then in answer to question 5, he says: "I do not remember meeting Mr. O'Brien on either the 17th or

18th September, 1995. I can confirm that I was out of the country from 8 p.m. on the 17th September, 1995, and for the following week."

That covers any potential meeting, I think, on the 18th of September. So that is just Mr. Desmond informed the Tribunal that he has no recollection of meeting you.

Do you see Mr. Desmond at the match by any chance?

A. No.

Q. And just in relation to the match itself, I think you had gone to London on the Friday, isn't that right, according to your diary, I think, and you came back on the Sunday morning to attend the match?

A. Yes. If that is what is in my diary.

Q. Now, if you go to Tab 69 in Book 48. That is a letter from Martin Brennan to you. And it is headed: "Re additional correspondence received."

"Dear Mr. O'Brien,

"I refer to the ground rules of the competition as outlined at our recent meeting with you on Tuesday, 12th September. The Department has already made it clear, that Applicants shall not be permitted to provide any further material to supplement their applications, except where expressly requested to do so by the Department."

You knew that anyway yourself I think?

A. We knew from the oral, yeah.

Q. "Accordingly, the additional material received from you on Friday last is enclosed herewith. It shall not be taken into consideration in the evaluation process.

"Yours sincerely, Martin Brennan."

Now what he returned there to you was Michael Walsh's letter. Do you remember receiving it?

A. I remember receiving this letter, yes.

Q. And what was your reaction?

A. We had gone to an awful lot of trouble again, and obviously disappointment. And I informed I believe I informed Telenor, I believe I informed IIU. I would have thought probably Frys in passing.

Q. Yes.

A. That was it, we couldn't do anymore.

Q. Do you believe you couldn't rely on it then?

A. Well, if he is saying that it wouldn't be taken into consideration.

Q. Yeah.

A. I would accept that.

Q. Well, did you think then that the dye was cast and that you weren't going to be successful?

A. No. I had no reason to know one way or the other.

Q. Well, I think when you wrote to Mr. Prelz on the 26th of September you told him that it was clear, I will just get it now for you. Tab 61.

A. This is the same book?

Q. Yes. It is Book 48, I beg your pardon. You told him

that regardless of the Telenor position, it is now clear that we will not be awarded the GSM Licence with the existing financing arrangement. We need something much stronger to have any chance of success."

So you were of the view that without the strengthening, that it was clear that you would not be awarded it?

A. Well, you know, every day was different at that time because one day you would feel good about it and the next day you would feel bad about it, it depends who you were talking to, the advisers. So, I mean, I am not sure what my frame of mind was when I wrote to Mr. Prelz on the 26th.

Q. Well, if if the letter from Mr. Brennan was correct, you were back to square one, weren't you, but

A. No, we weren't.

Q. You were back to square one minus one because you had now cut all ties with the financial institutions and were, in fact, in the process of cutting ties with Advent in real terms, in your own mind you probably had?

A. I think we were ahead. I would have thought we were ahead.

Q. Why?

A. Because we had one instead of four investors and plus we had satisfied Advent sorry, satisfied Telenor.

Q. But weren't you being told here in this letter,
that

A. We still had a binding agreement.

Q. Pardon?

A. We still had a binding agreement.

Q. Oh, I know you had you had an agreement with IIIU
and Dermot Desmond, I know that?

A. So you know, okay, the assessors didn't, wouldn't take
it into account, but I was left with an agreement that
helped satisfy Telenor, which is something that I had
been trying to do at that stage for three months, and
also, we were dealing with one party instead of four
parties, which is always going to be much easier. And
in fact, it was one of the things we stressed about
our applications, that there were only two cooks in
the kitchen, I think Arve's words were, and it was
easier if we were going to have one person, one
institution with the 20, 25%.

Q. Mm-hmm. So you felt that you were, in fact, in a
better position even though you received this letter?

A. Well, I was in a better position because my partners
were happy.

Q. But what about the Department, were the Department
happy as far as you were concerned?

A. They said they weren't taking account of it so it was
irrelevant what they thought.

Q. But wasn't the letter obtained to try and keep them

happy to strengthen the financial position?

A. Well, nothing to keep them happy, I don't where that is coming from, but that was never the idea, of keeping them happy. They were never unhappy, from what I know. It was about strengthening the bid in our eyes, nothing to do with the Department.

Q. You said they were never unhappy. So then why did you have a perception that they were unhappy?

A. No, you are saying that, not me. If you roll that back, I never said they were unhappy or unhappy.

Q. Mr. O'Brien, you told us that after the presentation that you were of the view that the Department viewed the Communicorp financial position as being in some way a bar to getting the licence or words to that effect?

A. I never used the word "bar". I think I believe I said that we had a perception that they were having difficulty understanding the financial side of Communicorp and how we were going to fund ourselves.

Q. Mm-hmm. And you say that you got this letter to strengthen your bid.

A. The underwriting was put in place to strengthen the bid and also to satisfy Telenor.

Q. All right. You told Mr. Prelz that with the existing financing arrangements it was clear that you wouldn't win the competition, isn't that right?

A. That is what I thought on that, at that particular

time, it was a view that I had and that was post

the

Q. It was on the 26th of September?

A. Two weeks after the oral hearing.

Q. The 26th of September. You see, Mr. O'Brien, Mr. O'Connell has told us that when this letter came back there was a view being taken that at least the information had been got into the Department and it would in some way allay their concerns about the financial position of Communicorp. Was that your understanding of things?

A. That is not what that letter says back to us. They were saying clearly they wouldn't take account of it.

Q. Yes. I yes, they are.

A. So that is what I thought.

Q. And what did you say to Telenor and what did you say to IIU about it?

A. I copied them the letter and said, look, they are not accepting the underwriting agreement from IIU.

Q. And now, Telenor had agreed to dilution, isn't that right?

A. So did we.

Q. Yes, I accept that. Based on the involvement of IIU, isn't that right, that is why they had agreed to dilution?

A. That was the price of us getting underwritten and getting the 20% underwritten.

Q. What did Telenor say to you about this, when you told them that it had been rejected by the Department?

A. I actually don't remember. I don't know whether we were disappointed or I can't remember.

Q. Would there not have been, as one might expect, a convening of a meeting, either telephone conference or an actual face-to-face meeting to discuss what appeared to be a fairly significant event?

A. I am sure we had a conversation, but I don't recall specifically when that conversation took place.

Q. You see, if Mr. O'Connell is correct and there wasn't any great concern, when this came back what the Tribunal would like to try and establish is, why there wouldn't be any great concern, considering what had taken place, the negotiation of agreement, the dilution of interest in the company, consideration having to be given, whether you could send a document into the assessors in contravention of the ground rules?

A. I haven't read Mr. O'Connell's evidence so I I mean, you are taking stuff there and asking me to comment on it. It is difficult because he was his view of the world may have been different to mine.

Q. Matters seem to be fairly relaxed though, didn't they? One would have thought that this might have created some sort of a crisis at least?

A. Can I just tell you, everybody at this stage was

exhausted from the whole thing. We had been flat out now for three months, plus the period in the run up to June, and to be quite honest, everybody was frazzled.

It was just another setback in a marathon.

Q. Now, did Telenor have a specific response to you when you informed them, in light of the letter written by Mr. Arve Johansen on the 2nd, on the 2nd of October, 1995, which you got the same, the same date as the letter from Mr. Martin Brennan on the 2nd of October?

A. I don't know if it is clear if he saw

Q. Oh no, I am not suggesting that he saw that on that day. I agree with you there, I am not necessarily saying that he saw it. You got the letter from Martin Brennan dated the 2nd of October. You got a letter from Arve Johansen dated the 2nd of October. And in that letter from Mr. Johansen it said that, "All that had been gone through apparently requires us to accept dilution of about 5% in total, for Telenor it is definitely very hard to give up ownership stake at all on the basis of supporting Communicorp's and the Irish institutions' capabilities to raise the necessary funding. But on the basis of the Joint Venture Agreement and draft Shareholders Agreement we feel obliged and accept a pro rata dilution to 37.5%. Any further dilution would be in conflict with the principles of our participation and the Board resolution of Telenor AS."

And this had been done, he had felt, in order to reassure the Ministry that an even stronger and send an even stronger signal to the Irish community?

A. He is confirming what they all believed at the time.

Q. But when you told him that what he had suffered what he had accepted is part of the pain, sharing the pain as he described it, accepting

A. Share the feeling.

Q. Yes, accepting a dilution. Was there any response from Telenor, that you can remember, about this, when you informed him?

A. There may be correspondence that we haven't that I haven't read in one of these books.

Q. There may be, I haven't seen any.

A. I don't I haven't seen any either, so I don't know.

It would have been faxed up to them and maybe we would have had a conversation sometime after that.

Q. Did you have any conversation with any of your sources when you received this, because they were the if sources be I mean sources, I mean consultants.

A. Consultants, yes.

Q. Did you have did you have any discussion with Mr. O'hUiginn or Mr. Mara when you received this

A. It would have been likely that I had a conversation with them and told them what was, about this letter.

And the same with IIU, I would have told them about IIU.

Q. And what advice do you think you got or information was imparted to you from either Mr. O'hUiginn or Mr. Mara about this?

A. Well, I mean, it was fairly clear-cut, the material was the underwriting agreement wasn't going to be considered, so it was dead in the water. The whole thing was dead in the water. There was nothing else that we could have done.

Q. Had you told Mr. O'hUiginn and Mr. Mara that a letter was going in to the Department?

A. Yes, I would have told them, yes.

Q. Did you tell Mr. O'hUiginn and Mr. Mara that you had been told at the presentation: Don't call us, we will call you?

A. I have no idea. It was an exchange of information but the same thing.

Q. And you have no recollection of what advice you would have received from them when you got this letter from Martin Brennan on the 2nd of October?

A. No, I mean, it was dead, there was no point in even trying to write another letter. They were never going to take account of it.

Q. Now, you have told us that you felt that you were within your rights and you were entitled to both strengthen and to communicate this to them, isn't that right?

A. Well, what I said was really was, it was a rock and a

hard place, either we didn't tell them or we did tell them and we thought on balance that we should tell them.

Q. But you felt that you were entitled and that you had a right to and that you were being open?

A. Well, if you looked at it, if you wanted to nitpick about it, it didn't come from us, it came from IIU.

That's maybe a weak interpretation or a weak angle to go on this.

Q. I know that point. I know it is weak. The letter came from IIU. Was there discussion about that, that it should come from IIU rather than you and therefore you might be able to argue that you weren't in breach of the

A. I don't we could have had a discussion. I actually don't remember much of a debate, who should send the letter in, although I think we were of the view that it would be better that it would be IIU directly.

Q. That is that is the plausible deniability theory that I think one witness, Mr. Martin Brennan, suggested in relation to it, that if it came from IIU it could be plausibly denied that it didn't come from you, but it is a weak point, I know.

A. I don't hold a lot of stock in that, maybe you could argue that. Lawyers could argue that, but I am not sure how practical it is.

Q. In any place, something very significant did happen,

you didn't send the letter in, but it came back to you from Martin Brennan. Did that cause you any surprise?

A. No.

Q. Did you

A. IIU weren't the Applicants.

Q. Pardon? IIU weren't the Applicants, but they were now, they were now.

A. I am sorry, they weren't the applicant company.

Q. But sure, they were now?

A. No, they weren't.

Q. They had sorry, the applicant company was Esat Digifone?

A. Yeah, I know, but that is the point, they were

Q. That is the point you are making?

A. They were a participant now.

Q. They were definitely there now, weren't they?

Was there any consideration given to asserting what you all or you believed to be the position that you were entitled to do this and that you were right to do this?

A. We were not going to upset the assessors. We had enough of a barney going on with the other side of house, McMahon's, Sean McMahon's side.

Q. On the DDI/DDOs?

A. Which was like taking on a life of its own at that stage in terms of correspondence. It was War and Peace.

Q. Now, if you go to Divider No. 70 I think you wrote to Massimo Prelz the day after you got the letter from Martin Brennan and you told him that:

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

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

What was that about?

A. Basically it was trying to explain to him that what he had done to us hadn't satisfied Telenor.

Q. And the Irish authorities?

A. No, that was, you know, that was the context that he wrote the two letters.

Q. Oh sorry, I should read that it didn't satisfy Telenor?

A. That is the why I read it, sorry.

Q. That is fine. You wrote it.

CHAIRMAN: We are at 4:00 and we seem to have sounds of the Berlin Philharmonics striking up. By the time I get them stopped there is probably little point in us going on another 15 minutes. We will resume at 11 o'clock tomorrow, Mr. O'Brien.

I understand in conjunction with Mr. McGonigal and Mr. Coughlan there have been some discussions about our trying to facilitate you. I know we are trying to facilitate you. I know you are anxious to get this process over as quickly as you are. So I would heartily encourage that to go on and whatever can be done to facilitate your commitments, I will assure you I will give you my maximum cooperation. 11:00.

THE TRIBUNAL ADJOURNED TO THE FOLLOWING DAY,
WEDNESDAY, 26TH NOVEMBER, 2003, AT 11:00 A.M.