

A P P E A R A N C E S

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I N D E X

Witness: Examination: Question No.:

John Callaghan Ms. O'Brien 1 - 265

Mr. Fitzsimons 266 - 297

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 4TH

DECEMBER, 2003, AT 11AM:

MS. O'BRIEN: Mr. John Callaghan, please.

JOHN CALLAGHAN, PREVIOUSLY SWORN, WAS EXAMINED AS

FOLLOWS BY MS. O'BRIEN:

CHAIRMAN: Good morning Mr. Callaghan. You are, of

course, already sworn from two years ago. I

appreciate very much the trouble you have gone to in

facilitating the Tribunal in regards to your resumed

evidence in the light of your own commitments.

Q. MS. O'BRIEN: Thank you Mr. Callaghan.

As the Sole Member indicated, you have previously

given evidence in the Tribunal. But just refresh your

memory in relation to the approach the Tribunal

adopts.

What I propose doing is, taking you through both your

memoranda initially and reading them into the record,

and taking you back to discuss one or two matters in a

little bit more detail, and in doing so, I propose and

intend, if it's agreeable to you, opening some of the

small number of documents that have been opened to the

Tribunal over the past weeks.

Now, you furnished the Tribunal with two memoranda; a

short memoranda of the 22nd February, and a more

lengthy one of the 17th July. And they can both be

found in Book 37, behind Tab 3. I think they are not in those books, Mr. Callaghan. They are I think you have your own with you?

A. I do.

Q. Now, in your memorandum of the 22nd February, 2002, you stated that you were a non-executive director of Esat Telecommunications Limited from the 15th December, 1994, to the 10th April, 2000; and Esat Telecom Group plc from the 7th group, 1996, to the 10th April, 2000, collectively referred to as Esat; and Esat Digifone Limited from the 15th June, 1995, to the 10th April, 2000.

Just to pause there for a moment, Mr. Callaghan; I wonder are you mistaken in the year 1995? Would that have been 1996? Because I think certainly the Tribunal's understanding is that that company really wasn't up and running until just before the licence was granted on the 16th May, 1996. So you may just be out a year on that?

A. That may be I mean, obviously if the company wasn't up and running until then I couldn't have been a director beforehand. I don't know why I thought that, that it was '95.

Q. Now, you say that Mr. Denis O'Brien, as Chairman and Chief Executive of Esat, had full responsibility for processing the bid for the second GSM licence. This included negotiations with prospective partners and

investors. As a non-executive director, you were informed of progress, but you were not directly involved in negotiations with the various parties referred to by the Tribunal, except on the one occasion referred to under 1 below.

There were then just a short number of questions which the Tribunal raised with you and which, to which you provided answers.

Question 1: You were asked for your knowledge, direct or indirect, of the association of Allied Irish Bank, Investment Bank of Ireland, Standard Life of Ireland and Advent International with a bid or the consortium and the subsequent disassociation of them from the bid or the consortium.

And you answer, that you were aware of the discussions with the institutions to which reference is made in relation to the bid, but you had no direct involvement, except on one occasion as follows: You state that Esat was dissatisfied with the qualified nature of the institutional support for its bid. In autumn of 1995 Mr. Callaghan does not know the exact date you were asked by Mr. O'Brien to meet Kyran McLaughlin of Davys Stockbrokers, who acted for the Esat Consortium in securing institutional support, at his office. The purpose of the meeting was to see if the conditions of institutional support could be improved. Early in that meeting, before making any

progress in the matter, you received a telephone call from Denis O'Brien informing him that he had come to an understanding with Dermot Desmond/IIU, and that there was no need to continue discussions. At that point the meeting ended. The agreement reached with Dermot Desmond/IIU was much more suited to the requirements of the bidding consortium, and it was decided to proceed with it rather than the less attractive understanding with the financial institutions.

Just to pause there for a minute. You do return to that matter in greater detail in your subsequent memorandum, which I would intend to raise with you after I have opened the memorandum.

Question 2: You were asked for your knowledge, direct or indirect, of the association of Mr. Dermot Desmond/IIU with the bid or the consortium and the subsequent disassociation from the consortium.

And you answered, that you understand that on a social occasion in July or August, 1995, Denis O'Brien complained to Dermot Desmond about the quality of institutional support for the Esat bid. They entered discussions, that led to an agreement under which Dermot Desmond joined the consortium. At the time the GSM licence was granted, Dermot Desmond held 20% of the shares of Esat Digifone Limited. The other shares were held 40% by Esat Telecom Group, Esat, and 40% by

Telenor. An agreement between the shareholders provided that if Mr. Desmond sold shares to either Esat or Telenor, he had to offer them in equal amounts to the others. He sold shares in equal amounts to Esat and Telenor at various times over the following four years. By spring of 2000 when British Telecom completed acquisition of Esat he had sold all but 1% of his shares to him. He finally became disassociated with Esat Digifone when he sold the remaining 1% to British Telecom soon after they acquired Esat.

I think that was that 1% that didn't have the preemption rights attached to it under the Shareholders Agreement?

A. That's right.

Q. Question 3: You were asked for your knowledge, direct or indirect, of the negotiations with Mr. Desmond/IIU from August 1995 to May 1996.

And you answer, that you were aware of, but not directly involved in the discussions between Denis O'Brien and Dermot Desmond at the time of the original bid. You were aware of, but not directly involved, in the ongoing discussions subsequent to the signing of that agreement. Although you cannot recall the timing, the Tribunal's description of events in its letter dated 14th February, 2002, is in line with your recollection of reports given by Mr. O'Brien with regard to suggested or agreed improvements to the

original, as they evolved. Your understanding is that changes emanating from these ongoing discussions were not brought into a formal agreement until May of 1996.

Now, in fact, I think the Tribunal's letter of the 14th February, 2002, simply set out what appeared to be the milestones in negotiations between Mr. Desmond and Mr. O'Brien, dating from I think, around about January of 1996, or perhaps December of 1995, and culminating in the Shareholders Agreement of the 16th May, 1996.

At Question 4 you were asked for your knowledge, direct or indirect, of the agreements or arrangements with Mr. Desmond/IIU, whether concluded or otherwise in the period August 1995 to May 1996.

And you answer, that you had no knowledge of these matters, direct or indirect, other than that referred to above.

You know of no other agreements or arrangements reached with IIU/Mr. Dermot Desmond.

Question 5: You were asked for details of your involvement in any aspect of the negotiations with IIU/Mr. Dermot Desmond, or with the agreements or arrangements reached with Mr. Desmond/IIU, whether concluded, or otherwise, in the period August 1995 to May 1996.

And you answer, that you had no direct involvement in the negotiations with IIU or Mr. Desmond.

And can I take it therefore, that you were completely dependent on information provided to you by other parties for your knowledge of these matters?

A. Correct.

Q. Now, if I can take you to your second memorandum, which is at Divider B behind the same Flag 3 in Book 37. And that's your memorandum of the 17th July, and that's a more lengthier document, and again, it's in question and answer format. And I think it's clear from a reading of it, Mr. Callaghan, that there are many matters that the Tribunal raised with you and in which the Tribunal had an interest, and in which you had no involvement or no knowledge. So what I propose doing in those instances is just referring to them briefly and passing on beyond them, unless you want me to open them in greater detail.

You state that it may be helpful to first summarise your connection with the matters under discussion.

A. You were a director of Esat Telecom, having joined the Board in December 1994, and Esat Digifone from June, you say, 1995, but we have talked about that already. You were not a director of any of the other companies referred to in Schedule 1. And I think that's the other Denis O'Brien companies, perhaps RINV, Communicorp Group Limited and so forth. It was purely Esat Telecom of which you were a director.

B. You say that Denis O'Brien, as Chairman and Chief

Executive of Esat, took full responsibility for processing the bid for the second GSM licence. This included negotiations with perspective partners and investors. As a non-executive director you were informed of progress, but you were not directly involved in negotiations, other than as referred to below.

C. You say discussions and negotiations relating to the final shareholding in Esat Digifone were conducted by the three partners in the consortium. Again, you would have had no involvement other than as referred to below.

And you stated at Paragraph D that you were not involved in any discussions with the Department of Transport, Energy and Communications.

You state that in setting out your comments, you have adopted the numbering that the Tribunal used in Schedule 1, which was the schedule to the letter sent to you which set out the questions.

Now, at 1 you were asked for your knowledge, direct or indirect, of all approaches made by Mr. O'Brien or Communicorp, or any associated entity, or any person on their behalf to any party to join or form a consortium to apply for the second GSM licence, other than to Telenor. And in each instant you were asked to indicate firstly, the identity of the party or parties to whom such approach was made.

Secondly, the approximate date.

Thirdly proposal made to such party or parties.

Fourthly, the steps taken, if any, on foot of such proposal.

Fifthly, the reason or reasons that such proposal, if any, did not proceed.

And you were asked to indicate your source or sources of knowledge in each instance.

And you answer, that so far as you can remember, your first direct involvement in discussions with potential partners in the consortium to bid for the second GSM licence in April 1995 was when you travelled to Paris for a meeting with France Telecom. Prior to that, Denis O'Brien had been in discussions with others, you believe originally with the German company, Deutsche Telecom, and then the US company, Bell South. You do not know why the first of these did not proceed but Mr. O'Brien told you of how he was frustrated by difficulty in delay in trying to come to an agreement with Bell South through the early months of 1995. Mr. O'Brien had concluded that they would not be suitable partners and decided to approach France Telecom.

You informed the Tribunal that Denis O'Brien, Massimo Prelz, Leslie Buckley, and you met representatives of France Telecom in Paris on the 30th April, 1995. The meeting went well. France Telecom were opposed to a 50/50 ownership structure in the bidding company, and

you put forward, that's "you" collectively, put forward the idea that maybe 20% could be held by Irish institutional investors. You rang Kyran McLaughlin of Davys Stockbrokers from the France Telecom offices, and he was of the view that this could be achieved in the right circumstances. You left Paris pleased with the progress made.

You have informed the Tribunal that you cannot be sure of exactly what happened next leading to the involvement of Telenor, but this is what you understood occurred:

PA Consultants had been engaged to advise and assist in the preparation of the Esat consortium's tender for the GSM licence. They had particularly relevant experience and knowledge in the construction of such bids, and their view on who would make a good partner would have carried a good deal of weight. They took the view that France Telecom would not be a convincing bid partner because, although it was a big powerful company, it did not have an impressive track record in the new area of mobile telephony. They believed Esat would do better with one of the telecom companies in the Nordic countries where the development of mobile telephony had been enormously successful. They suggested Telenor, and made an introduction you believe in the latter part of April, 1995.

Representatives from Telenor travelled to Dublin soon

afterwards and met Denis O'Brien. As you understand it, matters moved very quickly and a broad understanding was reached within days. The idea discussed with France Telecom that 20% ownership could be with Irish investing institutions became part of that understanding.

The only other approach that you were aware of was to Mr. Tony Boyle of the Persona consortium prior to submitting the bid. Mr. O'Brien and yourself had a short meeting with Mr. Boyle and one of his Board colleagues to see if there was any merit in joining forces. And you say that Mr. Boyle and his colleagues were not involved.

Now, at Question 2 you were asked for any approaches made by other parties to Mr. O'Brien or Communicorp to form a consortium. And again you were asked to deal with the five queries. And you indicated that you knew of no such approach.

Question 3: You were asked for your knowledge, direct or indirect, of the circumstances surrounding the establishment of a consortium by Telenor and Communicorp to bid for the second GSM licence, including, firstly, the manner in which the parties were introduced to each other.

Secondly, the approximate date of that introduction.

Thirdly, the initial proposals for the capital configuration of the bid company.

And fourthly, the date on which agreement was concluded between Telenor and Communicorp to establish a consortium. And again, in each instance you were asked for the source or sources of your knowledge.

And you stated that firstly, as you explained above that's in your answer to Question 1 you indicated your understanding of how the Esat/Telenor relationship was established.

Secondly, you say that you were not at the relevant meetings. You did not know who put forward the initial proposal for the capital configuration of the bid company.

And thirdly, you state that you do not know the exact date on which agreement was concluded between Telenor and Esat, but you presume it was on the signing of the Joint Venture Agreement referred to at Questions 4 and 5 below, which was the 2nd June, 1995.

Now, Questions 4 and 5 you dealt with by a composite answer. So I'll just deal with the questions first.

Question 4: You were asked for your knowledge, direct or indirect, of negotiation of the Joint Venture Agreement dated 2nd June, 1995, including details of any professional advice provided to Communicorp or to Mr. O'Brien in connection with the negotiation and finalisation of the Joint Venture Agreement.

And at Question 5 you were asked firstly, the purpose for which the Joint Venture Agreement provided for a

guarantee by Communicorp of £1/25 million. Secondly, whether and in fact what should have been said there, more accurately, was £1/25 million plus half the licence fee secondly, whether and if so, when such guarantee was actually provided. And thirdly, the form of the guarantee.

And your answer to both of those sets of queries, is that you do not have knowledge of the conduct of the negotiation leading to the Joint Venture Agreement or of what, if any, professional advice Denis O'Brien or Communicorp had. You state that you had no recollection of any discussion or getting any information on the guarantee referred to in paragraph 5.

And that was your answer.

Now, at Question 6, you were asked for your involvement in, or knowledge, direct or indirect, of the dealings between Communicorp or Esat Digifone or any other person on their behalf with J&E Davy for the purpose of securing the backing of institutional investors, together with the source or sources of your knowledge.

And you have informed the Tribunal, that as stated in the reply to Question 1, you rang Mr. McLaughlin of Davys Stockbrokers from the France Telecom meeting on the 13th April, 1995, to inquire about the possibility of a 20% institutional investment. You met

Mr. McLaughlin during the following week to talk further about this. You believe your discussion was general in nature. You have no recollection of any further involvement of the steps leading up to securing the backing of the institutional investors.

You inform the Tribunal further, that on the 29th September you met Kyran McLaughlin at his office. You cannot precisely recall what was said, but you believed you discussed the conditions of institutional support, and you explained that Esat needed a much firmer commitment to be credible enough to win the licence. That you were in negotiations with another party on an arrangement that would give Esat the stronger financial backing that Esat needed. And that you wanted him to ask the institutions involved to step aside so that the 20% would be available to the new investor. Is that correct?

A. Correct.

Q. Paragraph 7: You were asked for your understanding of the commitments provided by Allied Irish Bank, Investment Bank of Ireland and Standard Life to the funding of the Esat Digifone. You have informed the Tribunal that your understanding is that the three institutions were prepared to invest $\frac{1}{2}$ 8.5 million, but only after the licence was granted, and subject to them being satisfied as to its terms and conditions. They would not be partners financially or otherwise in

the preparation of the tender, and would only get involved if the bid was successful. And that was your understanding of the commitments they made.

Now, Questions 8, 9, 10 and 11 all relate to negotiations with Advent International. And again, you have dealt with those queries by way of a composite answer, Mr. Callaghan. So what I propose doing is dealing firstly with the questions and then going on to deal with your composite answer.

Question 8: You were asked for your knowledge, direct or indirect, of the precise terms of all agreements concluded between Communicorp, Esat Digifone, Mr. O'Brien or any associated entity with Advent International Corporation, and including, in particular, firstly, an agreement whereby Advent provided a facility of IR $\frac{1}{2}$ 3.5 million to Communicorp or RINV, or any other entity associated with Mr. O'Brien.

Or, secondly, an agreement dated the 12th of July, 1995, between Advent International Corporation, Esat Digifone, Communicorp and Mr. O'Brien, for the provision of letters of comfort by Advent to the Department of Transport, Energy and Communications, and to Telenor.

At Question 9, you were asked for your knowledge, direct or indirect, of the precise terms of the offer made by Advent International to Communicorp of IR $\frac{1}{2}$ 30

million to fund Communicorp's equity participation in Esat Digifone as referred to in the letter of the 10th July, 1995, from Advent International addressed to the Department, together with the source or sources of your knowledge.

Paragraph 10: You were asked for your involvement in, or knowledge, direct or indirect, of all dealings between Communicorp and Telenor in the period from the 12th July, 1995, to the 4th August, 1995, in relation to the letter of comfort to be furnished by Advent to Telenor, together with the source or sources of your knowledge.

And at Question 11, you were asked for your involvement in, or knowledge, direct or indirect, of all dealings between Communicorp, Esat Digifone, Mr. O'Brien, or any person on their behalf, and Advent International, in the period from the 12th July, 1995, to the 4th August, 1995, regarding the provision by Advent of a letter of comfort acceptable to Telenor, and in particular, a telephone conversation of the 3rd August, 1995, between Mr. Peter O'Donoghue and Mr. Massimo Prelz, as referred to in a fax transmission from Mr. O'Donoghue to Mr. O'Connell, dated 3rd November, 1995, together with the source or sources of your knowledge. And they were the four questions, and as I said, you provided a composite answer.

And you have informed the Tribunal as follows in

relation to those matters:

As stated earlier, you were a director of Esat Telecom and Esat Digifone, and you were not directly involved with any of the other Denis O'Brien companies.

Through Esat Telecom's involvement with Communicorp, Advent International had an interest in Esat Telecom and Esat Digifone, and Massimo Prelz was on the Board of Esat Telecom. Although you had no direct relationship with Communicorp and the other companies, you were called on to help in negotiations with Advent on the occasion referred to below.

Your memory of the events surrounding the loan facility from Advent are as follows: In the summer of 1995, Denis O'Brien's companies were stretched for cash. He turned to Massimo Prelz of Advent, a venture capital company that had already provided significant support to his companies. In May 1995, they had negotiations on the basis of a \$5 million convertible loan, but the Advent Board would not give its approval.

You attended a meeting on the 15th of June, at which an agreement was reached on a bridging facility for Communicorp, a one year facility for 3.2 million punts, with a 30% redemption premium. Denis O'Brien insisted on similar terms for amounts due to him of £1,600,000. And I think we have heard evidence of the

€1,600,000 investment that Mr. O'Brien made in RINV at the time.

At the same time as this facility was being put in place, an agreement was under negotiation whereby Advent, or funds it represented, would secure the right to take up 5% of the equity in Esat Digifone if the Esat consortium succeeded in getting the GSM licence. In return, Advent would give a comfort letter supporting Esat's ability to meet its financial commitments to Telenor and for the GSM licence tender.

This is the letter referred to in paragraph 9 of the schedule. The agreement was signed on the 12th July, 1995.

You inform the Tribunal that the comfort letter did not meet Telenor's requirements. You state that Esat Telecom and Telenor were uneasy about the perception that the consortium could be perceived to be weak financially. It was believed that the deal agreed with IIU improved the consortium's financial position.

However, it prevented Advent subscribing for 5% as the entire institution equity stake would be taken up by IIU.

You state that a dispute arose as to whether Advent had the right to subscribe for a 5% stake. This was first conducted through the respective solicitors. In December, 1995, Paul Connolly, Richard O'Toole and yourself were asked to try to find a compromise that

would settle the dispute. You put forward a proposal that involved restructuring Mr. O'Brien's companies, other than Esat, into a new group in which firstly, Advent would have an enhanced equity position. Secondly, Advent could participate in group funding to be arranged by Credit Suisse First Boston. And thirdly, any and all claims by Advent for a 5% stake in Esat Digifone would be deemed satisfied.

Now, I think we have seen and we can look at it again, there was an memorandum of understanding of the 24th December, 1995.

You state that this was accepted, and with some amendments and additions incorporated in the agreement between Advent and Denis O'Brien dated 24th December, 1995.

You state that, in paragraph 10, you were asked for dealings between Communicorp and Telenor between the 12th July and the 4th August in relation to the Advent letter of comfort. You state that you cannot recall having any involvement or knowledge, other than as set out above.

You refer to paragraph 11, where you were asked about a telephone conversation on the 3rd August between Peter O'Donoghue and Massimo Prelz, and again you state that you know nothing of this.

Now, skipping on then to Question 12. You were asked for your understanding as of the 4th August, 1995, of

the following:

1. The status of Telenor's involvement as a party to the bid, having regard to the failure of Advent International to provide a letter of comfort acceptable to Telenor.

And secondly, your understanding of the funding available to Communicorp as of the 4th August, 1995, to finance its 40% equity participation in Esat Digifone.

And again, you were asked for the source or sources of your knowledge.

You state in relation to the first query, that in Telenor's letter of the 2nd October, 1995, that was furnished to you, that was furnished to you by the Tribunal, Arve Johansen said to Denis O'Brien, "At an early stage of our collaboration, we made our concerns regarding Communicorp's ability to fund Esat Digifone clear. After considerable pressure, Advent's comfort letter was presented to us and the Ministry. Even though the contents of these letters were not very satisfactory, we decided to submitted bid due to time constraint."

And you state that you believe that this sums up Telenor's position at the time as you understood it.

And I presume that's as you understood it at the time also?

A. Yes.

Q. And secondly, in relation to the funding available to Communicorp and your understanding of that as of the 4th August, you state that Communicorp did not have the funds to finance a 40% equity participation in Esat Digifone. "Advent gave letters of comfort to Telenor and the Department of Transport, Energy and Communications, in which it referred to Communicorp's requirement to provide up to 1/230 million. In those letters Advent stated, 'We can confirm that we have offered that amount to Communicorp to enable it to fund its obligations.'"

Your understanding is that Communicorp would have preferred not to have to take up the offer as it was considered to be disadvantageous to them. However, they were prepared to do so if no alternative could be found. You state that your knowledge of these matters comes from a combination of your recollection of general informal discussions at the time and the papers that were sent to you.

Now, at paragraph 13, you were asked for your knowledge, direct or indirect, in each and every respect in which it was considered that the terms offered by Advent International to fund Communicorp's equity participation in Esat Digifone were unfavourable to Communicorp as asserted in a letter dated the 4th August from Communicorp to Telenor, together with the source or sources of your knowledge.

You have informed the Tribunal that you were not directly involved in negotiating the agreement with Advent, and you do not recollect participating in any discussion of detail or any dissatisfaction with it.

Any comments you make are based on a combination of general informal discussions at the time and the papers sent to you by the Tribunal.

You understand that in the summer of 1995, the relationship Communicorp had with Massimo Prelz and Advent was not cordial. Your impression was that there was a general feeling that Advent was putting pressure on when Communicorp was at a critical point in its development. "The demand for a 30% redemption premium on the one year facility of £3.2 million referred to above is an example," but you suspect there were more issues with which you would not be familiar. Consequently, your impression was that having to rely on comfort letters from Advent was not an attractive proposition to people in Communicorp, particularly in circumstances where the offer was subject to certain events occurring before certain dates.

You state that there was doubt as to the strength of the letters of comfort given as part of the agreement.

In their letter to Advent's solicitors on, I think it's the 11th November, 1995, William Fry says: "Letters of comfort are not, by definition, legally

binding and accordingly, the mere issue thereof by your clients neither imposed any liability on them nor (critically) conferred any benefit upon Communicorp Group Limited."

And there you are quoting I think, from a letter which Mr. Owen O'Connell sent to, in fact, the late Ms. Helen Stroud of Baker McKenzie?

A. Correct.

Q. And I suppose would you agree that that would really be the nub of it in terms of the letter of comfort; it didn't impose any obligation on Advent and it didn't confer any benefit on Communicorp?

A. Yes.

Q. In a real sense?

A. Yeah.

Q. You say their letter goes on this is Mr. O'Connell's letter of William Fry, goes on to explain that Telenor were dissatisfied with letters of comfort, but Advent refused to amend them to give the strength required.

You state that Clause 2.5 of the agreement required that Communicorp could not sell without giving an equivalent buyer for Advent. You state that Advent was not really a partner in the bid. For example, if the bid failed, they would not have to meet part of the considerable costs incurred. Like the original institutions, offering to participate in the 20%

equity stake in Esat Digifone, they could stand back until they were satisfied without any outlay or risk.

Now, I suppose in stating that, Mr. Callaghan, you are referring to them as a direct 5% shareholder?

A. Correct.

Q. They would of course, presumably, have had to absorb some of the costs as a shareholder in Communicorp?

A. Indirectly, yeah.

Q. Now, at paragraph 14, you were asked for your involvement in, or knowledge, direct or indirect, of all steps taken by or on behalf of Mr. O'Brien, Communicorp, Esat Digifone, or any person on their behalf to secure funding for Communicorp's equity participation in Esat Digifone from any source other than Advent International, including, in particular, the following: And you were asked six separate questions.

And your answer was that you were not aware of any steps taken to secure funding for Communicorp's equity participation in Esat Digifone, other than the discussions with Advent and IIU.

So can I take it, therefore, that you had no role whatsoever in the discussions with CS First Boston?

A. No, I wasn't involved in that.

Q. Now, you were asked for your involvement or knowledge, at Question 15, direct or indirect, of all dealings between Communicorp, Esat Digifone, Mr. O'Brien, RINV,

or any associated entities, or any person on their behalf, and Advent International, subsequent to the 4th August, 1995, in relation to the facility of 3.25 million, that's the bridging finance. And (2), in relation to Advent's rights on foot of the agreement of the 12th July to 5% of the equity in Esat Digifone, including the manner in which the issues between the parties were ultimately resolved. And you were asked for your source or sources of knowledge.

And then at 16, you were also asked about your involvement or knowledge, direct or indirect, of all dealings between Communicorp, Mr. O'Brien, Esat Digifone, RINV, or any person on their behalf, and Telenor, subsequent to the 4th August, in relation to the funding of Communicorp's equity participation in Esat Digifone by Advent, and in relation to the provision of a letter of comfort by Advent to Telenor, together with the source or sources of your knowledge.

And in relation to both of those queries you state that you have no recollection of any matters, other than those that you set out above.

Now, at Question 17 you were asked for your understanding of the RFP document. That was the request for the proposal document that was issued by the Department back in March of 1995. And your attention was drawn particularly to paragraph 3, paragraph 9, and paragraph 19. And I don't propose

reading those out, unless you want me to,

Mr. Callaghan, because I think we are all very familiar with them.

And you answered that in general the document is clear and unambiguous in explaining the requirements applicants must meet. You indicate that are listed under A, B and C, a number of factual statements which you understand to mean what they say. If the Tribunal wanted you to comment any further, you ask for the Tribunal's further assistance.

You were then asked for your specific understanding of the this is at Question 18 of the requirement that the Minister be satisfied as to the financial capability of the applicant as provided by paragraph 19, and in particular, in the light of the information memorandum issued by the Department to applicants on the 28th April, and specifically that portion of the memorandum which responded in the following terms to questions posed by Esat Digifone as to how financial capability will be assessed. And whether there were any specific criteria.

And the information given by the Minister was that financial sorry, I should say by the Department is that financial capability would be assessed by reference to the proposed financial structure of the company to which the licence would be awarded if successful; the financial strength of the consortium

members and the robustness of the projected business plan for the second GSM operation.

And you stated that you were asked about your understanding of that requirement. And that it seems to you to be a reasonable requirement. And again, if the Tribunal wanted any further assistance from you, you'd welcome the Tribunal's guidance.

Can I just ask you in relation to the financial capability point there, Mr. Callaghan. That as, if you like, a person particularly skilled in financial matters, do you remember at all being consulted in relation to that requirement of the RFP?

A. There would have been some discussion. I can't I couldn't say now that I can't remember having a specific time or date when I sat and spoke about it, but there would have been general discussion about getting, you know, satisfaction on all of what was required in the RFP. But, you know, as I say, I couldn't think of any specific time or point where I would have been talking about. But I would have been familiar generally with what was happening there.

Q. I see.

Now, at paragraph 19 you were asked about dealings or submissions made by the consortium to the European Commission. And you indicate that you had no knowledge of any of those submissions.

Now, at paragraph 20 you were asked about details of

the progress which had been made in the preparation of the Esat Digifone bid as of the 16th June, 1995, including details of all aspects in the bid which had yet to be finalised. I think the 16th, the materiality of that date is I think it was on that date that the consortium was informed that the closing date would have to be postponed.

And you stated, that the original date by which tenders had to be submitted was the 23rd June, 1995.

Denis O'Brien had assembled a large team working under his guidance on the tender with a view to meeting that deadline. On the 16th June the Department announced that the date for submission would be put off for some weeks. Your recollection is that assembly of the Esat Digifone bid was on target to meet the original date.

You believe the level of licence fee had not been finalised, but that would not normally happen until the very last stage in the process. "The agreement with Advent referred to above was still under discussion." Do you not know what else, if anything, was outstanding?

You were then asked at Question 21, for your knowledge, direct or indirect, of the precise level of licence fee which the Esat Digifone consortium intended to nominate in its application prior to the deferral of the evaluation process on the 16th June, 1995, and the steps taken by Communicorp to fund its

contribution to the proposed licence fee, together

with the source or sources of your knowledge.

And you have stated, that it is your recollection that

the precise level of licence fee to be nominated in

the application had not been finalised by the 16th

June, 1995. Is that correct?

A. Yes, that's correct.

Q. You were then asked, at Question 22, about your

knowledge of a meeting between Mr. Kelly, Mr. Ed Kelly

and Mr. O'Brien with Mr. Martin Brennan and Mr. Fintan

Towey, on behalf of the Department, on the 19th June.

And you stated that you had no knowledge of the

meeting to which reference was made, other than what

you have learned from the note of the meeting signed

by Mr. Towey that was included with the documents sent

to you by the Tribunal.

You were then asked at Question 23 about your

knowledge of the source of information contained in a

letter which Mr. Owen O'Connell, of William Fry, sent

to Ms. Stroud, of Baker McKenzie, dated 20th June, as

to how it was expected that the Commission might deal

with the difficulty that had arisen over the

open-ended licence fee.

And you answer, that you do not know the source of the

information to which Mr. O'Connell was referring.

Question 24: You were asked firstly, your

understanding as to the purpose for which oral

presentations by applicants were conducted by the Department.

Secondly, your knowledge, direct or indirect, of all queries raised by the Department in the course of the presentation regarding the financing of the Esat Digifone consortium, including any queries specifically addressed to Communicorp's funding of its equity participation in Esat Digifone, and in particular, any queries regarding the letter of comfort provided by Advent or the terms governing the offer of funds by Advent.

Thirdly, you were asked for your knowledge of all queries raised by the Department regarding the commitments provided by the institutional investors in the Esat Digifone bid.

And fourthly, you were asked for your understanding as to the overall impression made by the Esat Digifone consortium in the course of the presentation, and in particular, any matters which appeared to be problematic or areas of perceived weakness. And again, you were asked to indicate where appropriate the source or sources of your knowledge or understanding.

And you informed the Tribunal as follows: You said, firstly, that you were not involved in these presentations, and so you have no direct knowledge of their precise purpose.

You can only assume that they were intended to give the assessors an opportunity to seek clarification and query certain aspects of the submissions.

Secondly, you state that you have no knowledge of any of the queries raised by the Department in the source of the presentations.

Thirdly, you state that you have no knowledge of any of the queries raised by the Department in the course of presentations relating to institutional investors.

And fourthly, you state that your impression at the time was that from the line of questioning, those presenting felt that the assessors had some concerns about the Irish financing arrangements. You cannot recall how precisely you got that impression, possibly from discussions with Denis O'Brien.

You state that it is clear from the papers that were sent to you by the Tribunal, that Telenor left the meeting with that impression. And you refer to Mr. Haga's letter of the 19th September, and Mr. Johansen's letter of the 2nd October.

Paragraph 25: You were then asked for your knowledge of any discussions with IIU before the 4th August?

And you state that you had no dealings, discussions or meetings with Dermot Desmond or IIU prior to the 4th August relating to any matters to do with the Esat consortium's bid.

Question 26: You were asked for your involvement in,

or knowledge, direct or indirect, of all dealings, discussions or meetings between Mr. O'Brien, Communicorp, Esat Digifone, or any person on their behalf, with Mr. Desmond or IIU, or any person on their behalf, in relation to Mr. Desmond or IIU joining the Esat Digifone consortium or providing funding for the consortium, or any member of the consortium, including, in particular, Communicorp, or any related or associated entity at any time after the closing date of the competition after the closing date after the closing date of the competition on the 4th August, 1995, together with the source or sources of this knowledge.

Now, you have answered quite lengthily to that, Mr. Callaghan. You state that although not directly involved, you were aware of negotiations with Dermot Desmond/IIU through discussions with Denis O'Brien.

You were indirectly involved through your meetings with Davys, outlined in 6 above. That's the meeting of the 29th September, which we'll come back to.

You state that as you understand what happened on a social occasion sometime in August 1995, Denis O'Brien complained to Dermot Desmond about the quality of institutional support for the Esat bid. They entered discussions that led to the agreement dated 29th September, 1995, under which IIU joined the Esat consortium. Under that agreement IIU agreed to

underwrite all of the equity of Esat Digifone not subscribed for by Telenor. They sent a letter stating this to the Department of Transport, Energy and Communications. That letter was returned to Denis O'Brien with a letter stating that applicants were not permitted to provide further material, and the IIU letter would not be taken into consideration in the evaluation process.

Now, can I just pause there for a moment to ask you, Mr. Callaghan; were you aware of these events at the time, or was it subsequent to that, or to an extent re-piecing this together from the documents the Tribunal sent to you?

A. It's very difficult to I certainly had nothing to do or had no participation in the decision by IIU to send in the letter. So when you say "at the time", I would believe when I learned was when the letter was actually sent back. I may have been told by Denis O'Brien, they have decided to send a letter, I don't know. But I wasn't actually involved in anything to do with it or in any discussion leading up to sending it. I would say the best way to describe it is, I would have known after the letter went, and I suspect before it was returned maybe even, you know. I suspect in that little gap I would have known.

Q. It could have been sometime between the 29th and the 2nd?

A. Yes.

Q. Because presumably you would have gone back to Denis O'Brien to report on how you had got on with Kyran McLaughlin?

A. Absolutely.

Q. And it might have been on that occasion?

A. Yeah.

Q. Now, you say that Dermot Desmond was to hold 25% of the equity of Esat Digifone, 5% more than the original group of institutions. Initially Denis O'Brien had hoped that Telenor would accept a 5% reduction to 35% to accommodate the increase to 25%, but they would not agree. This meant that both Telenor and Esat Telecom would have to reduce their holdings from 40% to 37.5%. Telenor did not want to reduce from 40%. And you recall having a discussion with Arve Johansen arguing for them to do so. In the end they agreed. You state, however, before the GSM licence was issued, the IIU stake was brought back to 20,% you believe, to meet the Department's desire that the shareholding structure should conform to the 40:40:20 format in the application. You state that this was done through the purchase of shares from IIU by the other two shareholders.

You have informed the Tribunal that at the time the GSM licence was granted, Dermot Desmond held 20% of the shares of Esat Digifone Limited. The other shares

were held 40% by Esat Telecom Group and 40% by Telenor. An agreement between the shareholders provided that if IIU sold shares to either Esat or Telenor, they had to offer them in equal amounts to the other. IIU sold shares in equal amounts to Esat and Telenor at various times over the following four years. By the spring of 2000, when British Telecom completed the acquisition of Esat, they had sold all but 1% of his shares to them. IIU finally became disassociated with Esat Digifone when they sold the remaining 1% to British Telecom soon after BT acquired Esat.

Now, Question 27: You were asked for your involvement in, or knowledge, direct or indirect, of the negotiations between Mr. O'Brien, Communicorp, Esat Digifone, or any entity on their behalf, and Mr. Desmond/IIU, or any person on their behalf, between 10th August, 1995, and the 29th September, 1995, and including details of the meetings on the 10th August, 1995, 15th September, 1995 and 17th September, 1995, and in particular, the persons who attended such meetings, the purpose of such meeting and the matters under discussion, together with the source or sources of your knowledge.

And you have informed the Tribunal, that you were aware of, but not directly involved, in discussions between Denis O'Brien and Dermot Desmond, between the

10th August, 1995, and the 29th September, 1995. You do not know who attended the particular meetings referred to, their precise purpose or the matters under discussion. However, your understanding is that all meetings were to make progress towards the agreement eventually signed on the 29th September, and the matters discussed would have been those covered in that agreement.

You were then asked at Question 28, for your understanding of the precise obligations and entitlements of Esat Digifone, and of Communicorp, on foot of the agreements of the 29th September between Esat Digifone and IIU and between Communicorp and IIU.

And you answered by stating, that Communicorp was obliged to secure the placing of 25% of the equity of Esat Digifone with IIU. In return, they were entitled to have the cost of their 37.5% equity interest in Esat Digifone underwritten by IIU.

Now, at Question 29, you were asked for your understanding of the precise obligations and entitlements of IIU on foot of the agreement of the 29th September, 1995, between Communicorp and IIU and between Esat Digifone and IIU.

And you answer that IIU was obliged to underwrite the costs of the Communicorp 37.5% equity interest in Esat Digifone. In return, IIU was entitled to subscribe for 25% of the equity shares in Esat Digifone.

Now, at paragraph 30, you were asked for your understanding of the purpose for which the letter of the 29th September, 1995, from IIU, addressed to Mr. Martin Brennan of the Department of Transport, Energy and Communications, was sent. And all matters or considerations which prompted the furnishing of the letter.

And you have answered, that you believe the purpose of the letter was to demonstrate that the equity investment by the Irish partners in the consortium was solid and secure. There was unease about the strength of the bid in this regard from the outset. And you have the impression that this was increased as a result of the questioning in the September presentation to the Department. And you refer back to your answer to the earlier question on your impression as to the section of the presentation.

At Question 31, you were asked for your involvement in or your knowledge, direct or indirect, of all dealings or contacts of whatsoever nature which Mr. O'Brien, Communicorp, Esat Digifone, or any associated entity or any person on their behalf had with the Minister or the Department or any person in relation to the letter of the 29th September, the Department's refusal to consider its contents or the Department's letter of the 2nd October, whether in advance of or subsequent to the forwarding of the

letter of the 29th September, together with the source or sources of your knowledge.

And you have informed the Tribunal, that you had no involvement in, nor do you know of any contacts of the type described, other than those referred to above.

You were then asked a fairly lengthy question about your involvement or knowledge of a meeting between Mr. O'Brien and Mr. Johansen in Oslo on the 22nd September. And you have indicated that you have no knowledge of this meeting. And I think that's the position, is it, Mr. Callaghan?

A. Yes.

Q. You were then asked at Question 33, for details of all further contacts between you or, to your knowledge, direct or indirect, between Mr. O'Brien or any person whatsoever with Mr. Johansen, or any other Telenor official, subsequent to the meeting in Oslo on the 22nd of that should read September, I think there is a typing error in the memorandum in the Tribunal's books 22nd September, 1995, and prior to Mr. Johansen's letter to Mr. O'Brien dated 2nd October, 1995.

And you have informed the Tribunal, that your recollection is that you spoke with Arve Johansen about the shareholding in Esat Digifone, in particular the need to reduce the Telenor and Esat Telecom holding to accommodate the IIU 25%. Other than that,

you have no recollection of any contact or discussion with him during the period between the 22nd September and the 2nd October. You do not know of any other contacts with him in that time.

You were then asked for your knowledge as to the source of information available to Telenor on the 10th October that the Minister intended to announce the winner of the competitive process in the following two or three weeks as relayed by Telenor to Telenor's solicitors on the 10th October 1995.

And you have informed the Tribunal that you do not know the source of the information to which the Tribunal referred.

Is that correct?

A. That's correct.

Q. Paragraph 35: You were asked for the date on which, and circumstances in which you first became aware that Esat Digifone had won the licence competition.

You inform the Tribunal, that Denis O'Brien rang you at home a short time after the announcement by the Department to let you know that Esat had been successful. You believe that that was part of the process of ringing all Esat directors to tell them the good news.

Now, at Question 36, you were asked for your knowledge, direct or indirect, and the circumstances in which and terms on which J&E Davy, Investment Bank

of Ireland, Allied Irish Banks and Standard Life agreed to withdraw from involvement in the consortium, together with the source or sources of your knowledge. And you have informed the Tribunal, that as you recall what happened was as follows: After your meeting with Kyran McLaughlin on the 29th September, he notified each of the three institutions concerned that he wanted them to step aside to allow another investor to take up their stake in Esat Digifone. It is your understanding that they did not have a particular problem with this. You state that there were no terms in relation to their withdrawal, nor, so far as you were aware, or you know, any documentation. Is that correct?

A. That's correct.

Q. Now, you dealt with Question 36 and Question 38 by way of a composite answer, so I'm just going to read both of the questions first and then deal with your answer.

Question 37: You were asked for details of all dealings or discussions to which you were a party or of which you have or had knowledge, direct or indirect, in relation to the queries raised by Mr. McLaughlin in a letter dated 22nd November, 1995, from Mr. McLaughlin to Mr. O'Brien, together with the source or sources of your knowledge.

And at Question 38, you were asked for your involvement in, and knowledge, direct or indirect, of

the manner in which Mr. O'Brien dealt with the queries raised by Mr. McLaughlin in the letter of the 22nd November, 1995, together with the source or sources of your knowledge.

And you have informed the Tribunal that you could be wrong, but your memory of the letter of the 22nd November is it was sent in draft form to Denis O'Brien. Mr. O'Brien showed it to you. You both felt that it was intended to cover Davys if any of the institutions complained about the lost opportunity now that Esat Digifone had been awarded the GSM licence. You think that you decided I think by that, I think you mean you collectively decided not to respond and nothing further happened. You cannot recall having anything more to do with it. Again, we can come back to that later.

A. Yes.

Q. You were then asked, at Question 39, about your knowledge of contacts between the consortium or any member of the consortium and the Department regarding the involvement of IIU Limited as a member of the consortium, and in particular, the Department's attitude to such membership as recorded in an attendance of Mr. Halpenny of William Fry, dated 21st November, 1995. And you have indicated that you have no knowledge of such contacts.

At Question 40 you were asked for details of your

understanding of the following:

Firstly, the composition of the Esat Digifone consortium as of the 4th August, 1995, being the date on which the Esat Digifone application was lodged with the Department.

Secondly, the composition of the Esat Digifone consortium as of the 25th October, 1995, being the date on which the consortium won the licence competition.

Thirdly, your understanding of the capital configuration and beneficial ownership of the shares of Esat Digifone Limited as of the 12th April, 1995, being the date of the Board meeting at which the full complement of shares in Esat Digifone was issued.

And fourthly, the capital configuration of the issued capital, and the beneficial ownership of the shares of Esat Digifone as of the 16th May, 1996, being the date of issue of the GSM licence to Esat Digifone.

And you dealt with that question and also the next question together. And the next question related to your knowledge of the Department's understanding of what the capital configuration of the company or consortium was on each of the same four dates.

Now, you dealt with this question, Mr. Callaghan, by preparing a table which you inserted in your answer.

And we have just extracted that from your memorandum, and we are in a position just to put it up on the

overhead projector. You'll see it there on the monitor beside you.

What you did on the left-hand side was, you specified the four dates which you were asked about. And at the top, the breakdown as between Esat, Telenor, proposed institutional investment and IIU.

And we can see there that on the 4th August, 1995, your understanding was that the consortium was made up of 40% Esat, that's Telenor or Communicorp, I should say; 40% Telenor, and institutional investment 20%.

Then on the 25th October, Communicorp 37.5%; Telenor 37.5%; and IIU had come in there in place of the institutional investors at 25%.

Then, on the 12th April, 1996, again the same capital configuration: 37.5%, 37.5%, and 25%.

And then the last date about which you were asked, the 16th May, 1996, you show a capital configuration as 40% Communicorp; 40% Telenor; and 20% IIU.

You say, as you had no direct involvement with the Department, you cannot say what its state of knowledge was in relation to each of these three positions at the dates mentioned. You state it is clear from the papers that were given to you by the Tribunal that they knew the exact situation at the time of the application that's on the 4th August and the time of issue of the licence that's the 16th

May and that in between, the Department had discussions about the position that pertained at the other two dates that are referred to.

Now, you have dealt with Questions 42, 43, and 44, again by way of a composite answer. So I'll just refer to the questions first.

At paragraph 42, you were asked for your knowledge, direct or indirect, of the queries and issues raised by the Department regarding the ownership of the Esat Digifone consortium, and the information provided to the Department by or on behalf of Esat Digifone regarding such issues and queries, including a letter of the 17th April, 1996, from Mr. Owen O'Connell, solicitor, addressed to Ms. Regina Finn of the Department, together with the source or sources of your knowledge.

Paragraph 43: You were asked for your knowledge, direct or indirect, of all dealings and discussions which Mr. O'Brien had with IIU, any servant or agent of IIU, Mr. Arve Johansen, Mr. Knut Digerud, any servant or agent of Telenor, any adviser of Esat Digifone Limited, Communicorp, Telenor or IIU in relation to the issues and queries raised by the Department regarding the capital configuration of Esat Digifone and the beneficial ownership of the issued shares, together with the source or sources of your knowledge.

And at Question 44, you were asked for your knowledge, direct or indirect, of all dealings, discussions or contacts between Mr. O'Brien and the Department, or any official of the Department in relation to the issues and queries raised by the Department regarding the capital configuration of Esat Digifone and the beneficial ownership of the issued shares, and in particular, the beneficial ownership of the shares issued or to be issued to IIU Limited, together with the source or sources of your knowledge.

And you have answered that firstly, you were not involved in the discussions outlined in paragraph 42.

Your understanding of the matters referred to would concur with Owen O'Connell's letter of the 17th April.

You state that you have no knowledge, direct or indirect, of any discussions of the type referred to in paragraph 43. And you also state that you have no knowledge, direct or indirect, of any discussions of the type referred to in paragraph 44.

Paragraph 45: You were asked for your involvement or knowledge, direct or indirect, of when and how the Minister or the Department was informed that Esat Telecom would not fund its equity participation in Esat Digifone by drawing on funds from Advent, but rather would fund it by placements that had been organised by CS First Boston.

And you have stated, that you had no knowledge, direct

or indirect, of how or when the Minister was informed that Esat did not intend to take up finance offered by Advent.

Question 46: You were asked for your knowledge of a meeting which took place in the Department on the 3rd May, and which was attended by Mr. Digerud, Mr. Johansen, Mr. Donoghue, Mr. Walsh, Mr. Connolly and Mr. O'Connell. And you were asked for specific items of knowledge that you might have.

And you have informed the Tribunal, that you were not involved in this, and you had no knowledge of how the matters referred to were discussed.

You were then asked, at Question 47, of the date and circumstances in which you became aware the Department had requested that the configuration of the issued share capital of Esat Digifone should be restored to capital configuration of the consortium which had applied for the licence, that is restored to 40:40:20, together with the source or sources of such knowledge.

And you stated that you cannot say precisely when you heard of this.

Then you were asked for your knowledge of any contacts between Esat Digifone Limited or the consortium, or any person on their behalf and the Department in relation to that request.

And again you have said, you have no knowledge of any such contacts.

Paragraph 49: You were asked about your knowledge of discussions with IIU regarding the 40:40:20 split.

And again, your position is the same, that you have no knowledge of any of those contacts or discussions.

Paragraph 50: Mr. Callaghan, you were asked for your knowledge, direct or indirect, of a meeting which took place in the Department on the 13th May. And which was attended by Mr. Digerud, Mr. O'Connell, Mr. Brennan and Mr. Towey, and of which Mr. O'Connell produced quite a formal typewritten report.

And you have stated that you were not involved in this. And that you had no knowledge of how the matters referred to were discussed, other than what you have learned from the documents that you were sent.

Now, at Questions 51, 52 and 53 you were asked for your knowledge of steps that may have been taken consequent upon that meeting, and what was discussed at that meeting of the 13th May. And again, in each instance, you have indicated that you have no knowledge of any of those matters.

Now, at paragraph 54, you were asked for details of all matters to which your knowledge, direct or indirect, prompted the renegotiation of the underwriting arrangements between the members of the consortium and, in particular:-

Firstly, the release of IIU from its obligations on

foot of the agreements of the 29th September, 1995, to underwrite the entire of Communicorp/Esat Telecom's equity participation in Esat Digifone Limited.

Secondly, the assumption by Telenor of an obligation to share with IIU in the underwriting of

Communicorp/Esat Telecom's equity participation in Esat Digifone on a 2:1 ratio.

Thirdly, details of precise terms on which IIU and/or Telenor provided funding to Esat Telecom to finance its obligations to contribute to the licence fee of $\text{N} 15$ million paid by Esat Digifone to the Department on the issue of the GSM licence to Esat Digifone on the 16th May, 1996.

And fourthly, precise details of funding arrangements between IIU, Esat Telecom and Telenor regarding all aspects of the funding of Esat Digifone Limited.

And you have stated, that you were not involved in these negotiations which were conducted between the three Esat Digifone shareholders. You state that at that stage at this stage you cannot recall what prompted them, nor do you know the precise details referred to in paragraph 54.

Now, at paragraphs 55, 56 and 57 you were asked about your knowledge in 55 of documents that were submitted to the Department on the 13th May under cover of a letter from Mr. Digerud of that date.

At paragraph 56, you were asked about a query raised

regarding underwriting for Communicorp and Esat Telecom that was referred to in a letter of the 9th May from KPMG. And that was a letter that was actually delivered to the Department on the 13th May by Mr. Digerud.

And at paragraph 57, you were asked for your knowledge of documents submitted to the Department regarding the rights and obligations of the shareholders and project financing.

And unless you wish me to read them all out, I don't intend it, because in each instance you have indicated that you had no knowledge of any of those matters?

A. Correct.

Q. Now, at paragraph 58, you were asked about your knowledge of firstly, all side letters entered into between the parties, between the members of the consortia or any two or more of them in September and October of 1995.

Secondly, all side letters entered into between the members of the consortia or any two of more of them in advance of the issue of the licence on the 16th May, 1996.

And thirdly, all side letters entered into between Esat Digifone or any shareholder of Esat Digifone with the financial institutions which provided project financing to the company.

And you have stated that you have no knowledge of any

of those side letters.

Then, at paragraph 59, you were asked about details of all meetings, discussions, dealings or contacts of whatsoever nature which you had with any of the following:

Firstly, Mr. Michael Lowry;

secondly, Mr. John Loughrey;

thirdly, Mr. Martin Brennan;

fourthly, Mr. Fintan Towey;

Fifthly, Mr. Michael Andersen, or any member of Andersen Management International;

sixthly, any official of any Government department;

seventhly, any member of the Government;

and finally, any public official.

You have informed the Tribunal, that you were introduced to Mr. Michael Lowry at the announcement of the result of the tender in the Department. That was presumably on the 25th October, 1995?

A. No, I put a ring around that. In fact, that's incorrect. What I was thinking of there was the day the licence was granted.

Q. That would be the 16th May, 1996?

A. Correct. I was going to correct that.

Q. There is no difficulty in that.

A. I remember meeting him in the Department, but it was actually on the evening of the licence. There was a little, a kind of a press conference thing and he came

out and just shook hands with us. That was the first time I met him.

Q. Of course. You say that "We just said hello." You say that you met him again and spoke to him briefly on the night of the first anniversary of the start-up of Esat Digifone. And you state that other than that, you had no dealings or contacts of any kind with Mr. Lowry. Is that correct?

A. Correct.

Q. You say that you know Mr. Loughrey a long time, and you met him socially on a number of occasions over the years. However, you have had no dealings or contacts of any kind with him at any time that relate in any way to the GSM licence or any other matters discussed in your memorandum. Is that correct?

A. Correct.

Q. You state that you do not know, nor have you any recollection of ever meeting Mr. Martin Brennan, Mr. Fintan Towey, or Mr. Michael Andersen. You state that although you know and would have met occasionally people in each of the categories, official of any Government department, member of Government and public official, that you had no discussions, dealings or contacts with any of these that relate in any way to the GSM licence or any other matters discussed in this memorandum.

And then finally, Mr. Callaghan, you were asked for

your knowledge, direct or indirect, of all meetings, discussions, dealings or contacts of whatsoever nature, between Mr. Denis O'Brien or any person on his behalf and the Minister or the Department at any time prior to the date of issue of the licence on the 16th May, 1996.

And you state that you have no knowledge of any meetings, discussions, dealings or contacts of the kind described in paragraph 60.

And I think in fact, a formal memorandum wasn't prepared because you answered entirely in the negative. The Tribunal did take up with you, under separate letter, whether you had any knowledge of a meeting between Mr. Michael Lowry and Mr. Denis O'Brien in a licensed premises on Leeson Street on the 17th September, 1995. And you indicated you had no knowledge and you never heard of such a meeting.

That completes both your memoranda.

Now, Mr. Callaghan, you have told the Tribunal that you were appointed a director of Esat Telecom in December of 1994. And just by way of background, could you indicate to me how it came about that you joined the Board of Esat Telecom at that time?

A. I had I had been I was the managing partner of KPMG up to September of '91. And I had spent two years as Chief Executive of Ffyes plc, between '91 and '93, and I had decided, when I left Ffyes, that I

would do a number of things on my own, part of which was to take up directorships. I had taken up other directorships. Denis O'Brien contacted me. I had met Denis sometime in the past, I think in KPMG days on something

Q. I think they were clients of KPMG at one stage?

A. And I would have I would have known him, not very well, but he just decided I was the kind of person he'd like to have on his Board and invited me to do so. I spent a bit of time thinking about it and looking at it because it was a fairly risky area at the time, but I was happy to join then.

Q. So it was Mr. O'Brien made the approach to you?

A. He made the approach to me, yeah.

Q. You were subsequently then a director of Esat Digifone, and you resigned all your directorships in April of 2000?

A. Correct.

Q. And at all times of course, you were a non-executive director of all of these companies?

A. Correct.

Q. Now, you have indicated that, I suppose, your first immediate involvement with the putting together of the bid was when you went with Mr. Leslie Buckley and Mr. O'Brien and Mr. Massimo Prelz to France, to Paris, to meet representatives of France Telecom with a view to negotiating a possible consortium with them?

A. I should say on that, that Leslie has since pointed out to me that he wasn't there.

Q. I see.

A. And I must accept that. But I know Massimo and Denis and I were there. I don't know how I slipped Leslie into it, but

Q. There is no difficulty with that at all.

A. Okay.

Q. I think in your memorandum you said that France Telecom were opposed to the notion of a 50:50 partnership. Can you assist the Tribunal as to why they would have been opposed to that proposition?

A. Denis O'Brien was very keen to ensure that there was a really strong Irish participation. He had this idea that most of these consortium are made up really of foreign groups who slip in somebody for a very small proportion to give it a green tinge. He was very keen to be able to show that this was a very strong Irish bid. He really would have wanted more than 50%. His intention all the time was to try to get more than 50%. But in discussion, it was clear that if France Telecom were to come into the frame, they wanted to at least have the 50%. And then the question arose as to, you know, how would this work if we fall out with each other? You know, there is no balance of power in this. It's 50/50. Then the suggestion was made, well perhaps if we had a kind of the leveling effect of a

third group of shareholders, not necessarily industry players, but people who would have had a financial interest and could give a, the effect basically of never getting into a position where you would have a stand-off as between two 50/50 partners. This was attractive to Denis from another point of view because he had this idea that the Irish share of it was now going to be increased. You know, with this you would have an even better Irish dimension or stronger Irish dimension to the bid. And that was the that was basically how it came up.

Q. That was the thinking on it?

A. That was the kind of thinking that came up.

Q. Would I be right then that when the initial approach was made to France Telecom that what Mr. O'Brien had in mind was not 50/50 for Communicorp/France Telecom, but something in excess of 50% for Communicorp and something slightly less than 50% for France Telecom?

A. Certainly. I would say walking in the door we had no prior discussions walking in the door Denis would be very strongly of the view that we better try and get that first. I don't quite remember how the discussions went, but it didn't that didn't last very long, that idea, and we ended up with the best being a 50/50.

Q. And in fact I think you said in your memorandum that you put a phone call through to Mr. McLaughlin from

France Telecom offices, or from wherever you were meeting in Paris

A. In the France Telecom offices.

Q. to inquire whether that would be achievable, and he thought it might be at the time?

A. Correct.

Q. I think you informed the Tribunal then that after that, I think, the negotiations with France Telecom came to nothing. That there was an initial introduction of Telenor through PA Consulting, and that initial contact or introduction was made at the end of April with a meeting some time in early May?

A. Yeah.

Q. I want to ask you now, if you don't mind, about your role in relation to agreements that were concluded with Advent in or about July of 1995. Now I think in your memorandum you have indicated that Mr. O'Brien's companies were pretty well strapped for cash in the spring of 1995, April, May, June, around that time, and I think the initial approach that had been made to Mr. Prelz was that he would provide a \$5 million loan for redeemable loan stock, would that be right?

A. Correct.

Q. And I think according to a chronology that we have seen in a fax that Mr. O'Brien sent to Mr. Prelz, those initial early discussions took place on the 19th May, there or thereabouts?

A. Something like that.

Q. According to the same fax it appears that a phone call might have been made from Mr. O'Brien to Mr. Prelz from your house on the Sunday, which was the 20th May, and that some form of initial outline understanding was concluded in the course of that phone call. Would that be right?

A. Correct.

Q. I think we have been informed as well that that initial agreement effectively broke down because Mr. Prelz couldn't get approval from his board?

A. That's right.

Q. And that negotiations commenced again on the 15th June at a meeting with I think you were at, Mr. Prelz was at, Mr. O'Brien was at and I think Mr. Peter O'Donoghue was at that meeting as well?

A. I don't think was it Mr. O'Toole was at it? I am not sure, it could have been Peter.

Q. But you were certainly there?

A. I was certainly there.

Q. Can I draw your attention now just to the contents of one of the faxes of the 29th June that we have from Mr. O'Brien to Mr. Prelz, in which he appends a note of the negotiations which was in fact made by you, and that's at Book 48. That's the first of those big leverarch files that's beside you in the witness-box.

And it's at Divider 20.

A. Yeah.

Q. In fact it's the earlier one, if you don't mind, if I could refer you to first, the one at Divider 13. It's the same date, the 29th June, 1995.

A. Yes.

Q. And you have it there in front of you. It's also on the monitor. It says: "On the 19th May 1995 Advent agreed to give the Communicorp Group a loan of US \$5 million convertible after five years into 20% of the Radio Division. This agreement of reached at a meeting in Esat's boardroom attended by Bob Shenfield, yourself and myself.

"On following Saturday, 20th May the terms of the agreement were confirmed to John Callaghan when John and I spoke to you on the phone from his house.

"Subsequent to this agreement you attended a meeting with me at Woodchester Bank and confirmed to them that the loan was being made available.

"On Tuesday, 30th May 1995 you spoke to me in Norway and informed me that your board had not approved our agreement and that you were now offering a straight five year loan with an annual coupon of 30% and specific terms relating to early repayment.

Communicorp never accepted this offer. On the 15th June, John Callaghan, Peter O'Donoghue, yourself and myself met in our GSM offices in Jenkinson House. We reached agreement on the terms of the bridging finance

and these were documented by John Callaghan, an independent director, a copy of which are attached.

"Can you please confirm to me whether Advent are going to adhere to the agreement reached on bridging finance at our meeting of the 15th June? If Advent are not going to do so I need to inform the directors at the board meetings scheduled for tomorrow. In addition we would also need to hold a board meeting of Communicorp Group Limited immediately to discuss the financing needs of the group.

"The outstanding issues in relation to the Esat GSM agreement can be resolved later.

"Regards

"Denis O'Brien."

I see it's PP-ed by Peter O'Donoghue.

A. Yeah.

Q. If I could just ask you to turn over the page, you'll see a copy of your handwritten notes. And I take it you recognise those as your own?

A. I do.

Q. You see that you have made two separate headings on the page. At the top you have "Bridging Finance With" a bracket "3.2 Million" and halfway down the page you have "5% Equity in GSM Company".

And in relation to bridging finance you have four bullet points.

Firstly "1 year bridging facility (draw down 1.2

million, 1 million, 1 million as required)

Second bullet point: "30% interest/charge for years use of facility drawn.

Third bullet point: "Denis O'Brien $\frac{1}{2}$ 600,000 treated the same.

Fourth bullet point: "If refinancing take place, look favourably at taking out Advent and paying the year's charge."

And do I take it that those were the principal headline terms that were agreed in relation to the bridging finance: it was 3.2 million, it was a 30% coupon, that if Communicorp was able to refinance, that they would look favourably at taking Advent out before the year was up?

A. Correct.

Q. And that Mr. O'Brien did not think unreasonably that the $\frac{1}{2}$ 600,000 that was coming up would also be treated in the same way?

A. Correct.

Q. Then you have a separate heading "5% equity in GSM company."

First bullet point: "Advent to invest in 5% of the 20% institutional investment (at par)." Do I take it that that means that Advent weren't to pay any premium for the 5%?

A. Yeah, I think the main thing here was, whether at par is the right expression, that they wanted to be keen

that they would be coming in on exactly the same terms as everybody else. That that was really the point.

Q. They weren't to pay anything more?

A. Yeah.

Q. Secondly, "Advent to give letter to satisfy Telenor and requirements of GSM bid. In bracket below that you have "Strong letter that cannot be in a 'commitment' to invest." Can I just ask you about that. You have in quotes "'commitment' to invest", does that in any way signify that perhaps that was the word that Mr. Prelz used at the time?

A. Yes, yes, I mean, I can't remember exactly, but the point we were making here was that Massimo was saying he would give us the letter but he could not give an absolute commitment. That was the point he was trying to make.

Q. He couldn't give a commitment?

A. Mm-hmm.

Q. That was obviously a very significant point because you were noting that and in fact you placed those words in parenthesis?

A. Correct.

Q. Third point you made was, "Advent to have opportunity to participate in and financing arrangements for group and/or GSM company if money is raised directly for GSM company." So they were to have a right to participate in funding raised by Communicorp or any connected

company in order to subscribe funds to Esat Digifone?

A. Yeah.

Q. I think Mr. O'Brien said to us, in fact, that Advent may have already had that right on foot of their original investment agreements. Would you agree with that?

A. Well I don't know, because I wouldn't have any involvement with Communicorp and Advent's relationship was directly with Communicorp.

Q. I see. And you say finally, "If GSM licence is secured, the contingent payment is deemed to be 3.6 million, originally 4 million for 50%."

Could you just explain to me what that means? As I said we are only lawyers; we are not commercial people.

A. I don't understand it either to tell you the truth, because Denis O'Brien had a very complex relationship with Massimo Prelz and Advent, and there was money had come in and there was understandings about more money to come in. And part of the understanding about more money to come in was that there would be a kind of a formula by which, if they put in a certain amount of money, they'd get a certain result, be it equity or voting or whatever it may be. And what this was meant to do, I actually don't remember the formula, I don't think I was even that familiar with it at the time, but what this was saying was that given that they have

now put in the 3.2 million, that the formula by which they would have invested additional money in Communicorp in the normal course of events was to be adjusted.

Q. I see. That was to represent 3.6 million because that would have been the 30% coupon, is it?

A. Yeah.

Q. Oh, I see.

Now, can I refer you to the second fax of that date also, which is at 48/20, Divider 20 in that book.

Now, it's a memorandum to Massimo Prelz, Advent International plc from Denis O'Brien dated 29 June 19956789 he says:

"I have received a facsimile from Helen Stroud responding to my memos of the 28th June 1995." If you just pause there and as I say, unfortunately we haven't been able to obtain a copy of that fax from Helen Stroud. So to an extent, we are working in the dark as to what it contained, but in a subsequent letter which she sent to Mr. O'Connell, of the 13th December, she refers to that and that does provide some assistance. And it appears that in that fashion she was seeking to tie in the release of the $\frac{1}{2}$ 3.2 million that was badly needed they were strapped for cash with the 5% equity participation.

Mr. O'Brien goes on to say, "I have set out below Communicorp's response to the points raised.

"1. Advent's view that the Esat deal and the RINV are one package is wrong. This was not agreed at our meeting of the 15th June 1995 and John Callaghan has also confirmed this. By interlinking the two agreements, Advent have introduced a new condition to the loan agreement which is now preventing the Communicorp Group from drawing down the bridging facility and consequently Advent are putting the group's development in jeopardy.

"It was agreed that Advent is being given the right to participate directly in 5% of the equity of Digifone in exchange for a letter satisfying Telenor in relation to Communicorp's credit standing in respect of the GSM project. We will not accept any change to this provision. In addition we will point out that we have already agreed with Telenor on Advent's right to participate directly in 5% of Digifone's equity.

The next paragraph just deals with technical matters that I don't need to bother you with.

Do you recall Mr. O'Brien raising this matter with you around this time?

A. No, I can't say I do, I must say. No, I don't recall, I don't recall him raising that particular matter with me, the interlinking of the two.

Q. There is no reason, of course, that you wouldn't have confirmed to him that they were two separate agreements, because that's clear from your record?

A. Absolutely. My my recollection is very clear on that that we were dealing with very two quite separate events.

Q. Now, we know that the 5% equity deal was, if you like, concluded and formalised in an agreement of the 12th July, and that's in the same book that you have before you, Mr. Callaghan, at Flag 22, and it's an agreement between Advent International, Communicorp Group Limited and Denis O'Brien. And I am not going to open it all, unless you wish me to, but would I be right in just summarising that what this agreement provided was that Advent was to have two rights: firstly, it was to have an entitlement to participate in 5% of the equity; that's the 5% of the 20% being provided for financial institutions. And secondly, it was to have a right to participate, to a stated and defined extent, in funds raised by Communicorp for provision to Esat Digifone. And in and that was all in consideration for the provision of letters of comfort addressed to the Department and letters of comfort addressed to Telenor. And an issue then subsequently arose as to the conditionality of all of that, which I won't go into at the moment.

And do I take it that you would agree with me that that agreement, in its formal concluded form, reflected the substance of what you had recorded in your note on the 15th June in the lower part of the

page?

A. Yeah.

Q. And would you agree that apart from reference to the
\$30 million funding in the comfort letters, this
agreement itself didn't govern the offer of \$30
million?

A. I am not quite clear the point you are making. The
comfort letter is, as I understand it, without reading
the agreement, as I understand, is an addendum or an
attachment to the agreement referred to in the
agreement as being the letter that was required to
satisfy the agreement.

Q. Precisely.

A. But other than that it's not referred to in the
agreement, yes.

Q. There is no provision for a \$30 million facility in
this agreement?

A. Sorry yeah, I know what you are getting at now.
This does not cover the actual provision of 30
million.

Q. Precisely.

A. What it covers is the statement and the commitment, we
have called it commitment, by Advent to make, to offer
30 million to the company. That's what the agreement
is.

Q. Just so that we are perfectly clear on it. It governs
the provision of two comfort letters?

A. Correct. I think it is important, though, to state that two comfort letters, the content of which is to offer 30 million.

Q. Yes, of course, of course.

A. Okay.

Q. Now, the letters, as you say, the two letters were appended to this agreement: the letter sent to the Department and a letter pretty well identical in substance to Telenor. There were just obviously changes consequent point the fact that one was to the Department and the other was to Telenor. And if I can refer you to the Department letter; it's at Divider 21, and it's addressed to Mr. Martin Brennan, it's dated the 10th July. I don't know, would you have seen this letter at the time, Mr. Callaghan?

A. Not at the time, no.

Q. You wouldn't have been asked to review it or anything like that?

A. No, no.

Q. And you have had no input into negotiations that kind of refined the letter or decided what should be in it or anything like that?

A. No, I wasn't involved in anything like that.

Q. And if I just refer you to it. It's to Mr. Martin Brennan.

"We refer to the application made to you today by Esat Digifone Limited in connection with the grant by you

of a licence to operate the second GSM cellular system throughout Ireland." There was then a heading:

"Introduction to Advent International." And that just explains who Advent are, and it sets out what Advent's credentials are.

The next heading is: "Advent's Investment in the Communicorp Group." That explains Advent's historic investment in Communicorp as a venture capitalist.

Then the third heading on the second page is:

"Advent's commitment to the GSM Licence Application."

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

Then it goes on to say, and I suppose this is the operative part of the letter: "The said application also shows Communicorp Group remaining as a 40% shareholder in Digifone, and being required to provide

up to 30 million Irish punts to fund that 40% equity participation. We can confirm that we have offered that amount to Communicorp to enable it to fund its obligations.

"Please do not hesitate to contact Massimo Prelz, Oltramonti at" the telephone number "should you have any queries."

Can I take it, that that's exactly what you contemplated would be provided when you made a note on the 15th June that what would be provided was a strong letter but not a commitment?

A. Yes.

Q. Now, can I refer you to a letter which is at Divider 23 in the same book. It is a letter of the 14th July, from Mr. O'Brien addressed to Mr. Prelz. Do I take it that you wouldn't have seen a copy of that letter at the time?

A. That's correct.

Q. Do you recall at all before the Tribunal sent you these books, whether you remember ever seeing a copy of this letter?

A. No, I didn't see those at any time until they were sent to me.

Q. Now, this is a letter that was included with the bid that was submitted to the Department, along with the letter of comfort from Advent, and along with commitment letters from the financial institutions.

And that's how the Tribunal obtained a copy of it, it was through the solicitors, effectively, that were then acting for British Telecom who had a copy of the bid. But this letter isn't within any of the papers that were produced to the Tribunal by Mr. O'Brien, nor were they within the William Fry file of their, if you like, dispute and the ultimate resolution of that, with Advent. Indeed, it hasn't been produced by Telenor either.

It's dated the 14th July, and it's from Mr. O'Brien to Mr. Prelz. It says: "Dear Massimo,

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

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

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

And it's signed, "Yours sincerely, Denis O'Brien, Chairman, Communicorp Group Limited." Do you see that?

A. Mm-hmm.

Q. Can you tell me at all, and I suppose I can take it from your earlier answers; when you were subsequently trying to reach a solution to the Advent dispute with

Baker McKenzie in December, did anybody ever bring this letter to your attention?

A. I have no recollection of ever seeing that letter at any time. It certainly didn't make any impression on me, if it was brought to my attention.

Q. If it had been brought to your attention, and if you just look at it now closely; would you agree that it seems an extraordinary letter to write? Because it seems to be confirming acceptance of an agreement that had already been formally executed and witnessed on the 12th July?

A. Correct. Correct, I have no understanding of why one would just take one paragraph out of the agreement and put it into a letter basically or a paragraph describing the agreement.

Q. It's a paragraph, in fact, taken out of a letter of comfort, isn't it?

A. Mmm. Yeah. I don't know, I don't know why that was done.

Q. If you didn't know what was in the agreement of the 12th July, if you hadn't seen it, we have just discussed that agreement. As you say, it governs the issue of letters of comfort. It deals with Advent's right to 5%. It deals with Advent's right to participate in funding. Would you agree that you could be confused by that letter, and that you could perhaps be led to believe, or you could perhaps be

given the impression that the agreement of the 12th July, the one referred to in that, actually provided for an offer of $\frac{1}{2}$ 30 million, and that that $\frac{1}{2}$ 30 million offer was being accepted by this letter of the 14th July, if you understand the point I'm making?

A. It is factual. "You have offered Communicorp Group Limited 30 million in respect of their equity participation in the bid." It's a factual statement.

One would want to know who was reading it before you would say what would somebody, what would somebody determine from that? If you were reading that as a provider of funds, for example, perhaps I would say, well, what was the offer? And what are the terms of it? And you know, what does it look like?

Q. Of course.

A. I really I think it is a factual I think, in fairness, it is a factual statement. I think you are trying to suggest that this statement is made in a particular way in order to say something to somebody that's not the truth. I mean, I just don't see that.

Q. Mr. Callaghan, I am not trying to suggest anything. As you said to me, if you were a financial person looking at it, you'd want to know what's the offer, what is the terms of it. You'd want to know an awful lot more about it, wouldn't you?

A. I would, yeah. I think maybe just I mean, you have asked for a judgement on it. It's a statement of

fact. There is nothing incorrect in the statement.

But, I do agree that if anyone were to really understand the facts properly and if you wanted to understand the facts properly, you'd ask a lot more questions.

Q. You would.

A. But you'd do that of the agreement indeed I should say, the agreement has the same problem.

Q. The agreement of the 12th July?

A. Yeah. It also has the same problem, in that it talks about an offer and doesn't say anything about acceptance or terms.

Q. Do you mean the letter

A. The letter.

Q. of the 10th July?

A. I include the letter with the agreement because it's the basis of the agreement.

Q. Yes.

A. So in that sense, this letter is no different from the letter attaching to the agreement and the agreement itself.

Q. Now, in your memorandum, you recall at Question 12, you were asked what your understanding was of the status of Telenor's involvement in the consortium as of the 4th August, when the bid was lodged. And I think you answered your answer to that is on page 11 of your memorandum. And you, in fact, I think

quoted from Mr. Johansen's letter of the 2nd October.

And you recall that I asked you, when I was reading it out, whether that was your understanding in hindsight, or whether that was your understanding at the time.

And I think you said to me, that that would have really been your understanding at the time. And what you said was, you quoted from his letter, where Mr. Johansen had said, "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 was presented to us and the Ministry. Even though the contents of these letters were not very satisfactory, we decided to submit the bid due to time constraints."

And you said, "I believe this sums up Telenor's position at that time, as I understand it."

So your understanding would have been that while the letter of comfort or the guarantee, whatever way you want to describe it, it wasn't ideal, Telenor were taking a commercial pragmatic approach to this. There was no more time left, and either the bid went in or it didn't go in?

A. That's correct.

Q. And I think you said as well in your memorandum, that you don't recall anything specific in relation to the guarantee that Telenor were seeking?

A. No. I knew they wanted comfort on the ability of

Communicorp to fund its side of the bargain. I actually don't think I read that agreement. I didn't know the exact terms of the comfort they wanted, but I knew that Denis O'Brien was, he seemed to be pretty confident that what he had would satisfy them. Now, I wasn't involved in the negotiations or whatever that led up to that, but he was pretty comfortable that what he had got from Advent would be and I think was a bit surprised when Telenor came back and said, no, that doesn't meet what we want. We want an absolute guarantee.

Q. But as far as you were concerned, the bid had gone in. They were reasonably happy?

A. Correct.

Q. And that was the end of it?

A. Correct.

Q. Now, you said in your memorandum that really you had no further involvement, specific involvement in relation to the dealings with Advent until about November/December of 1995, when you were drafted in, together with I think Mr. O'Toole, was it, and Mr. Connolly, to try and reach a compromise with Mr. Prelz and with Advent in relation to the dispute that had arisen.

Can I just ask you; obviously you were the financial people, you know, Mr. O'Toole is financial, Mr. Connolly was financial, you were financial. Was

there any particular reason other than that, that

Mr. O'Brien would have asked the three of you to try
and deal with it?

A. I can't think of any reason. I am trying to think. I
can't think of any reason other than he relied very
heavily on Mr. Connolly, who did a lot of funding with
him. Mr. O'Toole I think, was on board for a while at
that stage, and he was dealing with these kind of
matters, and I suppose, I was drafted in, I don't
know, drafted in because I was drafted in. I really
have no idea why he asked me to come in.

Q. You didn't have a particular relationship with
Mr. Prelz or know him from your previous experiences
or

A. I got on I was he was on the Board of Esat
Telecom with me, and we got on, yeah. Maybe that
would be part of it. Denis O'Brien would have thought
that I would have a reasonable relationship with
Massimo Prelz and be able to maybe communicate with
him if there was issue or a problem.

Q. And do you recall, did you have meetings with him or
were you dealing with somebody else other than
Mr. Prelz? Or did you do the whole thing by telephone
conference, or how did you go about trying to sort out
this impasse?

A. Well, my memory now, and this is very much now relying
on memory of the events of eight or nine years ago.

My memory is that when we decided to go with IIU, then obviously the 5% that Advent were to get had to be sidelined. And then the question arose as to whether the agreements you will have seen the correspondence with Baker McKenzie

Q. I have, yes.

A. Whether the agreements that had been entered into were such that Advent was, in fact, entitled to subscribe for 5% of the equity, and you know, were we doing them out of something to which they were entitled? And that meeting then came at the end, because we said, well look, we know you can't get the 5% because it's just not on, but let's see is there something else we can do to put you in a position where you'll feel comfortable that, as it were, the new situation is as advantageous as would have been the case had you got the 5%. Now, I wasn't involved in any of that correspondence that went on leading up to that. And my recollection is, the time and the only time I got involved in it, was that particular meeting where we sat down Denis O'Brien may have told me some of what was going on. I certainly was aware that there was a problem on the 5%, and I may have talked to some people about it. I never spoke with Massimo Prelz about it. But the only time I really got into the frame on that one was at that particular meeting, where Denis had asked us could we sit down with

Massimo and see is there some way in which we could sort it out.

Q. You sat down; you, Paul Connolly and Richard O'Toole sat down with Massimo Prelz

A. Yes.

Q. Was there anyone else from Advent or just him?

A. Just him.

Q. to sort it out. I think you said once you decided to go to IIU you had to have the Advent 5% for IIU?

A. Well, had to is maybe a tough way of putting it because theoretically

Q. Advent could have insisted?

A. Yeah, and Communicorp could have given up 5%. You could see theoretically Communicorp could have said, we'll stick with 35% rather than 40 and give Advent the 5.

Q. That would have been pretty academic so, given that Mr. O'Brien wanted more than 50% at the start?

A. Absolutely. No, the point I was making was, this was not the only possible answer, but probably in realistic terms, given that the other two parties were most unlikely to agree to any reduction or dilution of their interest, in practical terms, the only way to deal with Advent was effectively to get him to step out of whatever understanding he felt he had in relation to it. But there is no doubt though, that if, for example, if the legal agreement could have

been seen to be solid and to stand up, and it was definitely one which he could stand behind, if it was very clear that that was the case, then he could have, and possibly would have, insisted on his 5%, and then it would have been up to the rest of the participants to see how they were going to do with that.

Q. It would have been very difficult though, wouldn't it, for Mr. Prelz, when you say that, Mr. Callaghan, because here he was, he had two interests at this stage and they weren't necessarily co-extensive. He had a direct, or as he felt it, a direct entitlement to 50% in the Esat Digifone company, and through Communicorp he really had a far more valuable right. So while he could have stood on his rights and said, no, no, my contract is clear, wouldn't he, to an extent, been biting off his nose to spite his face because he would have been undermining the equilibrium of the company?

A. Well, he would have had to I mean, that's the reason why he sat and talked to us and we came to the deal. He had to balance. He is a venture capitalist. He is in the business. He has got to balance the benefits of standing out on one issue against the disadvantage of so doing in maybe another part of the organisation, and he would have valued his relationship with Communicorp. And all the people associated with Communicorp would not have been in the

business of sort of kind of standing on some particular right if there was a reasonable way in which we could deal with the matter. And in his own way, he is a very reasonable man.

Q. And that's really how you approached it?

A. Correct.

Q. You sat down with him and said, look, we need this 5%, it's really not in your interest that we don't have this for IIU, what can we do to give you something that you would see as an equivalent benefit?

A. Correct.

Q. And I think the way it was done was he got out of the radio interests and he got an extra 3.2% of the shares in the ultimate holding company, whichever it was, one of the Esat companies, that was going to hold the telephone interests?

A. That's right.

Q. And that's how you did it?

A. Yeah.

Q. Would I be right in thinking, therefore, that we know that Mr. O'Brien went to see Mr. Johansen in Oslo on the 22nd September, that Friday, and we know from Mr. O'Brien himself that I suppose, his baseline and his openers were that he wanted Telenor to drop to 35% to enable him to maintain his 40% and to free up another 5% for IIU. And I think we know that that wasn't agreeable to Mr. Johansen. Now, Mr. Johansen

has said in his memo that you subsequently telephoned him, and I think you, in a vein hope, were also trying to persuade him to dilute to 35% and leave Mr. O'Brien at 40, and perhaps when you got a negative response you decided that the best thing to do was to get him to agree to the 37.5. Would that be fair enough?

A. Yeah, Denis asked me to contact Arve and see if they would agree to this idea that they would drop the 5% to accommodate IIIU, as you describe. I'd have to say that I was not terribly confident they would because they had indicated before then they continuously used to talk about this idea that they were equal partners. And I wasn't all that confident. When Arve came back very, very strongly saying he wouldn't do it, I didn't press the issue. So it wasn't like a big long debate or discussion or negotiation. When Arve came back and said he just wasn't going to do it, I just didn't press the issue very much further.

Q. I suppose once it was clear that Telenor weren't going to drop to the 35%, that they were going to insist on 37:37, it became even all the more important that the 5% from Advent be available from Mr. Desmond?

A. I don't remember thinking of it that way, but presumably that's right. Now we are getting dilution that nobody wants already, we don't want further dilution, so if you can avoid it, obviously it would be an advantage, yeah.

Q. In any event, you sat down with Mr. Prelz and you sorted everything out?

A. Yeah.

Q. And you reached the memorandum of understanding in December of 1995. And would I be correct in thinking really, and again it's a technical point, and maybe you didn't appreciate it at the time, but the real issue I suppose, between them at that stage, was all on this agreement of the 12th July, whether it was conditional that the Telenor satisfaction was conditional on just the right to participate or extend it both to the right to participate and the 5%?

A. Correct.

Q. But in any event, you reached this commercial, sensible business-like resolution?

A. Correct.

MS. O'BRIEN: I am just about to move on to something else now, Sir.

CHAIRMAN: Yes, it's probably a suitable time for us to resume at two o'clock, Mr. Callaghan, if that suits you?

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

Q. MS. O'BRIEN: Thank you, Mr. Callaghan.

Can I just bring you back again, Mr. Callaghan, to April/May of 1995. And as I said, you went over to Paris for the negotiations with the France Telecom

negotiations. And I suppose the initial opening position of Mr. O'Brien was that, is that he wanted to secure a majority shareholding in the consortium that he was negotiating. And France Telecom weren't agreeable to that. And then the proposal of the 20% block of shares arose. And you made initial contact with Mr. McLaughlin by telephone. And then I think you said that when negotiations opened with Telenor, that that concept of having 20%, and to park that 20% with I suppose, to an extent, slightly disinterested financiers, continued into the arrangement that continued in the matters under negotiation with Telenor. And I think, in fact, when Mr. O'Connell gave his evidence, you'd have given evidence pretty much along the lines that you have, that it was really a constant and recurring theme of Mr. O'Brien's, that he wanted to try and secure a majority shareholding for himself. And in fact, we saw that once IIU were on board from I think, about January, 1996, he was negotiating directly with Mr. Desmond to acquire an additional 12.6%.

Now, as you said, you went subsequent to that then I think, the following week, to meet with

Mr. McLaughlin. And I think we know from

Mr. McLaughlin's memorandum, that Mr. O'Brien may have accompanied you to that meeting with Mr. McLaughlin.

And could I just refer you to the first two paragraphs

of Mr. McLaughlin's statement. It may not be now in those books that have been furnished to you this morning, but we can hand you a copy of it.

A. Will it be on the screen?

Q. It will. We'll hand you a copy, because it will be easier for you to deal with from a hard copy. For everybody else, it's in Book 38, behind Tab 7. And I just want to refer you to the first two paragraphs of his memorandum.

He states that: "Mr. John Callaghan, Mr. Denis O'Brien came to a meeting in Mr. McLaughlin's office in April, 1995. They inquired as to whether J&E Davy could provide some institutional investment interest to support the Esat Digifone consortium's application for the second GSM licence.

"Mr. McLaughlin indicated that it would be difficult to generate support from institutional investors, as the eventual financial terms of the licence were unknown, and it would be difficult to put a precise financial proposal to potential investors."

Can I just pause there for a moment. Would that be effectively your understanding of the exchange that you had with Mr. McLaughlin on that occasion?

A. Yes.

Q. Would I be right in thinking, from Mr. McLaughlin's subsequent letter, that the financial uncertainty, at that time, was what level the licence fee was going to

be?

A. That certainly would have been one of the issues. I think in general, the uncertainty would have been what conditions were going to be imposed by the licence. You know, what actually it was that we were looking at. But, yeah, I am trying to be as considerate as possible about it. I would have thought that high on the list certainly, and maybe the one that was most pre-occupying, was the fact that it wasn't known, the cost of the licence. I think I am right in saying at that time it wasn't known.

Q. No, it wasn't. No, it wasn't.

A. Not until April or May it wouldn't have been, yeah.

Q. It was open-ended at that stage I think

A. That's right.

Q. until the bid finally went in on the 4th August.

A. I am sure that was one of the main things he was thinking of.

Q. I think that's what he said in his letter of the 22nd November, which we'll come to anyway.

He then says that: "Mr. Tom Byrne of J&E Davy, and Mr. Paul Connolly of the Esat Digifone consortium, jointly prepared a memorandum for prospective investors setting out the principal features of the Esat Digifone consortium's bid. J&E Davy secured three prospective institutional investors who were prepared to provide a continual commitment to invest

approximately 8.5 million. The commitments were conditional upon the Esat Digifone consortium acquiring a licence of financial terms acceptable to the institutions. These commitments were provided in June, 1995."

Now, in your memorandum, you indicated that after you attended that initial meeting with Mr. McLaughlin, you didn't have any direct involvement in bringing forward or carrying forward the negotiations with Davys or the preparation of the memorandum that was circulated?

A. Correct.

Q. Or indeed, in securing the institutional support?

A. That is right.

Q. And the next time, if you like, that you came into the picture was on the 29th September?

A. That is correct.

Q. Can I just refer you briefly to the executive summary, if you wouldn't mind. It's in Book 48, which is the first of those two big leverarch files, and it's behind Divider 6. You see it's,

"Esat Digifone GSM Holdings Limited,

Cellular mobile licence application.

Executive summary."

This was the one, I think, jointly prepared by Davys and by Esat. Would you have reviewed that document at all, do you think, Mr. Callaghan?

A. No. The first time I saw that document was when you sent it to me. It wouldn't have been something that I

would have

Q. Could I just draw your attention to two small parts of the document. Firstly, "Synopsis." It says:

"The consortium is bidding to secure the second mobile cellular telecommunications licence in Ireland. The bid has been carefully planned and the partners are confident that it will be successful. Finance for the project is available from the current partners; Esat Telecom supported by Advent International, and Telenor. The current partners will underwrite the bid. However, for strategic reasons, they believe that it would enhance the bid if Irish investors held a majority of the equity. Consequently, the consortium is requesting institutions to take a minority stake on the basis set out below.

"A total investment of $\text{€}12$ million in amounts not less than $\text{€}1$ million is being sought. The investment will only be required if the consortium is awarded the licence in October, 1995, on terms acceptable to it."

The only thing I am going to ask you about that, and perhaps you can't help me on it is, it says there "the current partners will underwrite the bid." I don't think there was any provision in the bid that they'd underwrite the institutional investors. But was that, perhaps, a reference to the costs of promoting the bid?

A. I have no idea. I really don't have any idea. I see

the words, but I don't know what they mean.

Q. That's fair enough. If I could just bring you to the very last paragraph, which deals with the commitment sought.

It says: "Effectively what is being sought is an option to participate if the consortium is successful with its bid. As indicated earlier, the consortium believes it will strengthen the bid if Irish shareholders held a majority of the shares, and consequently a limited number of institutions are being approached for investment.

"Telenor and Esat Telecom would like to have, as a minimum, 40% each, so up to 20% is available for institutional investors for their $\text{€}12$ million investment.

"Despite the fact that up to $\text{€}1$ million will have been spent on the licence application, no immediate contribution is sought from institutional shareholders."

So I suppose that would accord with what you understood was going to be sought from the financial institutions. They were being offered an option to participate. The maximum funding, subscription funding available to them was $\text{€}12$ million, and they were not being asked to shoulder any part of the bid costs at that stage.

When these letters of comfort, or letters of

commitment came in from the three banks, would you have had, been asked to review them in any way?

A. No, I had nothing to do with those.

Q. Can I just refer you to them very briefly?

A. Mm-hmm.

Q. They are at the following dividers, 8, 9, 10. The one for AIB is the 8th June; IBI is the 9th June; and Standard Life is the 13th June. And the first one is the AIB letter of the 8th June. It says:

"Dear Sirs,

"Re Esat GSM2."

It's addressed to Esat GSM Holdings Limited, care of Esat Telecom.

"We refer to our recent discussions in relation to the proposed tender by the Consortium for the second cellular mobile phone licence.

"We have reviewed the information memorandum (the Memorandum) prepared by the consortium, and we are now writing to confirm that we are prepared to invest $\text{€}1\frac{1}{2}$ million by way of equity and/or loan stock in the consortium, subject to:-

(a) the licence being prepared by the Consortium on lines broadly in line with those set out in the memorandum or the tender documents, or where amended, on terms which we agree with the consortium are acceptable.

(b) the terms of our investment being approved by our

investment committee or board.

"We understand that our proposed involvement may be disclosed in the tender documents, and that in the event of the licence not being awarded to the consortium, we will have no further commitment other than our responsibility under the confidentiality agreement."

The letter then, of the 9th June, from IBI, is effectively on the same terms. I am not going to open it to you. And the letter from Standard Life, which is dated 13th June, is on roughly the same terms.

At paragraph C they also wanted the fact and details of their interest were confidential to you, your advisors and the licencing authority and the expression of interest was such that the licence being granted by the 15th November, 1995.

And they'd be fairly standard letters of interest, letters of comfort provided by Irish financial institutions in your experience, would they?

A. Yeah.

Q. Mr. O'Brien indicated in his evidence that, if you like, you were the contact with Mr. McLaughlin. You would have been the person involved with Communicorp, Esat Telecom, who was most closely known to Mr. McLaughlin, most closely connected with him. You weren't asked, were you, before the 4th August, when this bid went back in, to go and see Mr. McLaughlin

again about these letters?

A. No, no.

Q. That was what was sought in the executive summary, and that's exactly what was got, isn't that right?

A. Correct. Mm-hmm.

Q. Now, the bid, as I said, was originally due in on the 23rd June. That time was extended to the 4th August, and these letters, as we see, were the 8th, 9th, and I think, the 13th June, so they were raised six or seven months six or seven weeks, I should say, before the bid went in.

Could I just ask you to look at Mr. McLaughlin's letter of the 22nd November. There is just one item in it that I want to ask you if that accords with what your understanding was at this time when the letters were produced. You will find it just behind the memorandum that we handed up to you, Mr. Callaghan. It's the first document after the actual typed memorandum.

A. Okay.

Q. It's dated 22nd November, 1995. And it's addressed to Mr. O'Brien. I am just going to refer you to the first three paragraphs.

It says: "Further to our telephone conversation last Friday, and the subsequent announcement in Saturday's newspapers concerning the involvement of Dermot Desmond's company, International Investment and

Underwriters (IIU), in the financing of Esat Digifone, I thought I would write to you setting out my understanding of some of the issues which have been raised.

"When John Callaghan and yourself asked me last April if Davys could get some institutional investment interest to support your application, I said it would be difficult, as the eventual financial terms of the licence were unknown, and it would be difficult to put a precise financial proposal to potential investors.

"However, Tom Byrne and Paul Connolly prepared an information memorandum and an investment proposal, and we secured three institutional investors prepared to commit $\frac{1}{2}$ 8.5 million in support of your licence application in early June. The commitment was conditional on your consortium acquiring the licence on financial terms acceptable to the institutions, but this condition was not seen by yourselves at the time as one which could make your application financially unacceptable. As you are aware, a large number of financial issues were not finalised when the institutions made their commitment, in particular the size of the bid by your consortium and the consequent debt/equity ratio of the consortium. Therefore it was difficult to get a firm, unqualified commitment in early June from the investing group."

Would you agree with what Mr. McLaughlin was saying

there?

A. Yeah.

Q. You were happy that at the time the conditionality attaching to those commitments was not seen as something that would undermine the financial standing of the bid?

A. Yeah. I think sorry, just to be careful on it.

Q. Yes.

A. There was always a sense of discomfort that what we have would not be strong enough. But I think an important way of looking at it you called out the final paragraph in the memorandum that went around to institutions. I don't know, I wasn't involved in drawing it up, but you can be nearly 100 percent certain that that wasn't, if you like, the asking position. That is not what you would like to have.

Q. Yes, I appreciate that.

A. That is what, after some discussions, either with advisers, or indeed, maybe with the institutions, you learn that's what is probably available. So the document, when it went, was basically setting out, I would suggest, I don't know this, and I haven't talked to anyone about it, but I would suggest that the document, when it went out, was setting out what was known to the sender to be the acceptable position to the other party. Now, that is not to say that what was asked for was what we would have liked to get.

Q. Of course it wasn't ideal.

A. It was not ideal.

Q. You'd much prefer

A. So when I am just referring here to the thing about, we didn't say it was financially unacceptable.

I mean, we would have wanted more, but had to accept that you couldn't get more. So we had to then go, as it were, with what was available.

Q. Of course.

A. Other than that, I have no difficulty with what is said here.

Q. Of course. In an ideal world it would have been much better if AIB and IBI and Standard Life were prepared to say there and then: we are pledging 3 million, we are pledging 3 million, we are pledging 2.5 million.

It doesn't matter what the terms and conditions were.

But in a realistic commercial world, isn't that as good as you could have possibly got at the time?

A. I don't when you say "as good", I believe it is as good as could be got by us at that time. Is it as good as we might have expected to get or could have hoped for is a different matter. What I think of is, these institutions would have supported other applicants as well. I'd be very interested to see how conditional their commitment to the other applicants was.

Q. Mmm. It would have

A. In other words, the point I'm trying to make is that, this, I would have to accept, because we had the best advisers in town, Davys, working on it; I'd have to accept that this was as good as this particular consortium could have got from the people to whom they were talking at that time. I have to accept that.

Q. And you also accepted that you were never asked to go back to Mr. McLaughlin to try and improve on what was the bottom line after the 13th June?

A. No, but I would say that although it is true that I had the contact with Kyran, and I would have known him perhaps more than others, Paul Connolly is a very serious player, and he was driving this. There would be absolutely no reason for someone to turn to me and say, John, would you go and talk to Kyran McLaughlin, Paul Connolly hasn't been able to get. I mean, Paul is a serious player, and whatever was available to be got, I would be very convinced Paul would have been in the position to do it.

Q. Except of course, when bad news was being brought⁵ to Mr. McLaughlin on the 29th September, it wasn't Mr. Connolly was asked to go, was it, Mr. Callaghan, it was you.

A. No, it was me, absolutely.

Q. Now, as we said, the bid was then lodged on the 4th August. I suppose the next milestone, if you like, in the process was the oral presentation, and that was on

the 12th September. And you have indicated to the Tribunal already in your memorandum, in reply to Question 24, that you weren't part of the presenters that went to that presentation. You do not know what went on. You don't know what questions were asked, which is fair enough. But you did say that you got the impression from them, those that had presented, that there may have been a perceived weakness with the Irish financial arrangements. In your memorandum, I think you indicated that you can't remember who it was, but it may well have been that Mr. O'Brien said this to you?

A. I think in a way, PA were saying it. I mean, there was a sense that everybody who left had this feeling that the one place that we seemed to do awfully well in all of the areas other than when we were questioned on the financing arrangements. And I think the reason I say it may have been Mr. O'Brien told me, I think it was just a fact that people came away with. The Norwegians had it, PA had, our people had it. Who exactly said what to whom I don't know, but certainly was it an impression that those who made the presentation came away with.

Q. Do you recall being present at any kind of formal post mortem following the presentation?

A. No, I wasn't.

Q. You weren't. Do you recall having discussions with,

apart from Mr. O'Brien, perhaps you do or don't recall having discussions with him, do you recall having discussions with any of the other directors or advisers to Esat at the time, or to Communicorp at the time?

A. No.

Q. Mr. Connolly or Mr. O'Toole?

A. No, I certainly didn't have any discussion with Mr. Connolly on it. I am just thinking of the people I might have met going in and out of Esat. No, I would say that the only person really that I had any real kind of contact there was Denis. It may well be that particularly Mr. French from PA was in kind of around the place all the time. It could well be that, you know, I would have been there at the same time as he or someone else was there, but there was certainly no formal post mortem. And I was not in any way kind of drawn into some kind of analysis of what had happened. If there was such an analysis, it wasn't one that I was involved in.

Q. It wasn't one that you were involved in?

A. Mm-hmm.

Q. When you say you got the impression that there was a perception that there was a financial weakness in the Irish arrangements. Now, there were two aspects to the arrangements on the financial side on the Irish side of the bid. There was firstly the financial

institutions, and there was, secondly, the provision of funding of Communicorp's equity participation, over 1/230 million, in Esat Digifone. Now, we have had the tapes of the presentation. And the interesting thing about those tapes is, while of course there was reference to the financial institutions, there was reference to them being there, there was reference to them having 20% of the shares, there was reference to them forming a group so that they would have a representation on the Board of Directors and voting in bloc, if you like. But there wasn't one question raised by the assessors in the Department regarding the solidity or the support being furnished by those financial institutions. Any question that was raised regarding financial arrangements was solely in relation to the funding of Communicorp.

And I am just wondering the impression that you had regarding what the specific financial weakness was that the Department was raising questions over?

A. No, I had no I really couldn't analyse the impression into its different constituents, except to say that there seemed to be a concern that the Irish part of the financing wasn't as strong as the people making, doing the questioning would have liked it to be. I am surprised when you say no question was asked, because it is, it certainly is a very strong impression that people came away it.

Q. Oh, there were questions asked, lots of questions asked.

A. I see.

Q. But the questions were not about the financial institutions.

A. Yeah.

Q. The questions were solely in relation to Communicorp's funding arrangements with Advent. That's where the questions were asked.

A. Okay.

Q. I am just asking you about this, Mr. Callaghan, because it's quite clear that Mr. O'Brien genuinely feels that there was some question-mark over the financial institutions. So that's why I am asking you whether you can throw any light as to the source of his understanding or his belief at the time?

A. No, I can't.

Q. Now, at this time also, we know from the evidence of Mr. O'Brien, from the evidence of Mr. O'Connell, from the documents that we have seen, that Mr. O'Brien was in negotiation with Mr. Dermot Desmond. And we know, again from all those sources, that these negotiations appeared to have opened as a result of a social meeting, social engagement on the 10th August, Sunday, 10th August. And we know also from Mr. O'Brien's diary, and from his evidence, that he then had a meeting with Mr. Desmond in the IFSC on Monday, 11th

August, the following day. And we also know from a fax which Mr. O'Brien sent to Mr. Desmond on the 11th August, setting out outline terms of agreement, that what appears to have been on the table at that time, on the 11th August, at the beginning of these negotiations, was the provision of a banking guarantee of $\frac{1}{2}$ million from Mr. Desmond to enable Mr. O'Brien to draw down funds of $\frac{1}{2}$ million for which Mr. Desmond would be paid $\frac{1}{2}$ 300,000, and for which he would also be entitled to subscribe for 15% of the shares in Esat Digifone. And I think as part of those outline terms, it was also being proposed that Mr. Desmond would shoulder a proportionate part of the costs of funding the bid. Do you recall that?

A. I don't really. I'd have to say, I don't recall that detail, but

Q. Can I just refer you very briefly to that fax that we have. It's at Flag 36 of Book 48. Because I just want to make sure that I have summarised it correctly.

A. Yes.

Q. It's to Dermot Desmond from Denis O'Brien. Do you have it there?

A. I have it, yes.

Q. It's dated 11th August. It's: "Re outline agreement on $\frac{1}{2}$ million guarantee for Communicorp Group Limited.

"1. Esat Digifone Limited.

"Communicorp Group Limited will arrange for Dermot

Desmond to have the right to take up at par 50% of the ordinary shares in Esat Digifone Limited replacing IBI, AIB and Standard Chartered.

"2. GSM Bid Costs.

"Since $\text{€}1.3\text{--}\text{€}1.5$ million would have been expended on the bid by award of licence, it is agreed that Dermot Desmond will pay his portion of costs win or lose.

"3. Bank Guarantee.

"Dermot Desmond will provide a bank guarantee of $\text{€}3$ million in order for Communicorp Group Limited to draw down a $\text{€}3$ million bank facility which will remain in place up to March 31, 1996.

"In exchange for this guarantee, Dermot Desmond will be paid a fee of $\text{€}300,000$ no later than the March 31, 1996. Should Communicorp Group Limited complete its placing of equity through CS First Boston before March 31, 1996, the fee will be paid within 10 days after the completion of a placing."

It then goes on to deal with security and negative pledge. But that seems to be the bones of what was on the table at that time.

We then know that, on the 18th September, on Monday, 18th September, Mr. O'Brien went with Mr. Buckley to Mr. Owen O'Connell, and Mr. O'Connell has kept an attendance of this, and said that Mr. Desmond was going ahead with the funding arrangements, and what was needed was an underwriting letter for the

Department. That was on the 18th November.

And then 18th September, I should say.

Then, on the 29th September, if you like, all these negotiations were formalised and they were consummated in the agreements. You had the Arrangement Agreement, you had the two side letters and you had the letter of the 29th that went from IIU to the Department. It was on that day you went to Mr. Kyran McLaughlin. And the position as of the 29th, on foot of all those agreements, was that Mr. Desmond had 25%, Telenor and Communicorp's shareholding had been diluted to 37.5%, and Mr. Desmond was providing underwriting for Communicorp's 37.5% subscription obligations.

I wonder can you assist the Tribunal at all as to how those early negotiations on the 10th and 11th August, which were effectively for a banking guarantee, were somehow transformed into the arrangement that was consummated on the 29th September, whereby Mr. Desmond was now underwriting IIU?

A. In short, no. I really I wasn't involved in those discussions. I can see, you know, maybe what happened. But I have no idea whatever as to what the different processes or the different discussions would have been that brought us from that original letter, which that original note which, I should say, I had never seen. I mean, it obviously didn't come to anything. It's some, it's something drawn up after a

meeting presumably reflecting the point to which discussions had come at that particular meeting. It doesn't really provide what we actually wanted. So I'm not surprised that further discussions would have moved a lot further than that.

Q. Well, did you know, as of the 10th or 11th August, what Mr. O'Brien wanted?

A. I certainly would have known on the 10th/11th August I don't know, but I would have known before the day I went to

Q. Mr. McLaughlin?

A. Yeah, to Kyran McLaughlin. Now, how long before; would it be days, or whatever? I had a reasonable idea as to where things were going. I think by then, although the thing was consummated on the 29th, my impression is that the kind of understanding that was eventually put down in writing on the 29th was kind of being hatched, like, sometime before that, because I know I was aware of the kind of shape of it before the 29th, before the day that I went to see Kyran McLaughlin.

Q. As a commercial person, would you agree that there seems to have been a huge movement from what was originally on the table, the $\frac{1}{2}$ million bank guarantee, to the underwriting that was ultimately hatched on the 29th September?

A. Yeah, I think what was being discussed at the start is

a different proposition entirely to what was there at the end. So it's not that this is metamorphised into the last bit. It is just two deals. This is a different deal entirely to the last one. They are not the same transaction, I would have said.

Q. Exactly. I am just wondering did you know anything at all, or can you assist the Tribunal at all, as to what might have prompted, if you like, the different deal on the 29th September to the one that was being contemplated on the 10th August?

A. I knew nothing about this, this deal here. It's something that didn't see the light of day in Esat. As far as I know I can't remember ever having any, anything to do with that. The only deal that I knew anything about is the one that eventually came out on the 29th. So when you say how did one get from A to B? I really have no understanding of what A is about. I understand B all right. So I can't really say how you get from A to B. It doesn't look to me to be the kind of thing that naturally would move from where it was to where we eventually ended up.

Q. It doesn't look like an evolution; that the second is an evolution of the first, does it?

A. Correct.

Q. Now, as you say, you would have known and you would have had to, because you made your phone call to Mr. Johansen sometime after the 22nd September?

A. Mm-hmm.

Q. And presumably that must have been before the 29th September, the following Friday, because if you like, the deal was done. You were looking to get Mr. Johansen's agreement to what was being proposed?

A. That's correct.

Q. So you must have been told by Mr. O'Brien prior to that date?

A. That is correct, yeah.

Q. Now, can you recall first of all, I suppose I should ask you; why would Mr. O'Brien have asked you to contact Mr. Johansen, as opposed to anybody else?

A. I suspect he thought that I might have a better chance of convincing Mr. Johansen than others. I would have been seen as independent on the Board of Esat Telecom. Denis would have seen me as that way, and the other directors would have seen me that way, and you know, others might have been seen as being closer to Denis O'Brien perhaps, and I would believe, one would have to ask Denis O'Brien this, but I would believe that he would have thought that I would have a better chance of getting his case across to Mr. Johansen than would, say, Leslie Buckley or someone else that might be more closely identified with him.

Q. And of course, you had only joined the Board the previous December anyway, so you were very newly there?

A. Also, I should say, I was also involved something that was taking up a great deal of my time at that time was, we were talking about how this thing would, who would run it, and all that type of thing. So I had some bit of contact, I think it might have been then or around then, with Arve Johansen on kind of other issues as well.

Q. That's what I was wondering.

A. So it seemed to be the comfortable thing to do. I was in the office and he said, would you have a go at seeing would he agree to this arrangement?

Q. And your opening position was that you were trying to get Arve Johansen to agree to take all the pain, to drop down to 35% to allow Denis to maintain his 40%?

A. That's right.

Q. Can you recall at all what armour you used to try and persuade him of that?

A. I don't. I wasn't very convinced myself of what I was asking for, and I doubt if I was very convincing to Arve Johansen either. And my memory is that I said that this had emerged. We were getting a good answer out of the IIU involvement, but it needed this dilution. And we wanted him to drop the 5%. There is no easy way of asking someone to do that. There is no kind of great financial argument one could make for doing it. I mean, it's a very simple fact: Will you accept a dilution? I was kind of aware, I don't know

why, but I was aware that they really saw their position, and this is what he said, as a partnership.

So, if he didn't want to come down at all, I should say. That was his opening position.

Q. He wanted to retain

A. He wanted to retain 40%, and I think maybe, he didn't say why doesn't Denis take the 5%, he never actually said that.

Q. Maybe he knew there was no chance?

A. He probably knew there was no chance either on that side, but I think what he would have liked would be for Dermot Desmond to take 20 rather than 25. So once we had said, well look, that's the deal. I mean, that's as good as we can get, and it's a good arrangement and it really gives us the kind of security we need going forward but it takes 25, he did then agree to do it on a 37.5:37.5 basis.

Q. Do you recall at all when you were talking to Mr. Johansen on that occasion when you discussed the fact that Mr. Desmond was going to underwrite Communicorp?

A. I really can't you know, it's nearly impossible to remember. The only thing is, I would have I mean, I would have been trying to explain to him why it was that IIU/Dermot Desmond was getting 25%.

Q. Sure.

A. So I must assume that the reason because, after

all, we were asking at the very least for him to go down to 37.5%, so there had to be a reason for doing it. It wasn't just as simple as saying there is somebody else here, would you give up a part of the action? So I have to assume that I was familiar at that point with the underwriting issue and that this would solve the problem that Telenor had about the thing, and that it would provide the, I mean, the additional kind of strength that certainly Arve Johansen felt was being questioned in the presentation area.

Q. Would you have known at that stage that it was intended that IIU would send a letter to the Department

A. No.

Q. about this?

A. No.

Q. You didn't?

A. I have no on that letter, I have no recollection of any discussions, of me being involved in any discussion of a letter to the Department or of it being the only time I heard about that was when I was informed that a letter had gone and it had been sent back.

Q. Right. Now, on the 29th September that was the day you went to see Mr. McLaughlin now, I am not sure whether you were confused when you furnished the first

memorandum, but in the first memorandum I think you had said that you were initially sent to see if they'd strengthen up the financial support from the Irish institutions, and you received a phone call from Mr. O'Brien and the meeting coming to an end. I think you probably

A. The phone call from Mr. O'Brien and the meeting coming to an end are both right. But really now what I said initially I think I corrected it in the second one, that the reason I went really was to get the institutions to drop their 20% interest. It's as simple as that.

CHAIRMAN: And that was always your brief on the day, was it, Mr. Callaghan? Because just, your first statement, maybe suggested you might have hoped for an upping of the institutional commitment, but in fact, on having reflected over the entire position, and I appreciate it's quite some years back, you had really one set of instructions for Mr. O'Brien on the day?

A. I would say absolutely that, yes. I would say absolutely that.

Q. MS. O'BRIEN: As far as you were concerned, you were going to Mr. McLaughlin and saying you were being asked for these institutions to step aside?

A. Correct.

Q. And at that stage, the 15% that, if you like, Mr. McLaughlin controlled the 5% was another day's

work, that was Advent, you hadn't quite brought that home yet but Mr. McLaughlin's 15%, that was required for Mr. Desmond?

A. Correct.

Q. Now, Mr. McLaughlin sent a letter about this to Mr. O'Brien on the 22nd November. And I referred you to the first three paragraphs of that. But I just want to refer you to the balance of the letter now, if you wouldn't mind?

I have opened the first three paragraphs, so I'll just go along to the fourth paragraph, if that's all right?

Mr. McLaughlin continued: "When John came to see me on Friday, 19th September, he told me that you had been advised that the financial element of your package was not sufficiently strong to allow Esat Digifone to be awarded the licence, and that you were negotiating with a financial party who could provide the stronger financial backing necessary to be awarded the contract. He did not tell me who had provided this advice, nor the identity of the stronger financial party. He asked me if I would ask the three institutions who had made the previous commitment if they would step aside so that the 20% to which they would have been entitled would be available to the investor who was prepared to provide firmer financial support."

And does that accord with your recollection of which

you stated to him?

A. Yeah.

Q. He says: "Even though we both recognise that this was embarrassing, I did notify each of the three parties that you were asking them to step aside to make way for a financial party which was prepared to put forward a stronger financial commitment. It has now emerged that this investor was IIU, which appears also to have been appointed to handle the sale of the 20% stake.

"A number of questions are likely to arise from the institutions who had made a commitment to Esat Digifone in June.

"(a) why were the original investing group not asked to make a stronger financial commitment along the lines of that offered by IIU if that was necessary, given that by the 29th September a maximum price of £15 million had been established for the licence, and discussions on the application had clearly taken place with the Department and possibly the assessors?

"(b) was information available to IIU that was not available to the original investing group at the time they were asked to step aside?

"(c) at what stage were the Department of Communications and the assessors told of changes in the institutions providing finance to the consortium?

"In addition, the news media have asked us why Davys

is not involved in raising funds, as it is common knowledge that Davys were involved in the original application. I do not discuss our clients with the media, but you will appreciate that the current media presentation may be damaging to our reputation.

"I believe it is important to reassure the financial institutions that made the original commitment, they were treated fairly. They will be particularly concerned if the 20% stake is resold to other investors at a significant profit over a short period of time.

"It would be helpful to me if you could let me know your response to the issues raised so I can provide them with reassurance."

Now, I think in your memorandum you said, and again you may have been confused about it, that you thought it might have been received in draft form, and that it might have been shown to you by Mr. O'Brien, and you might have felt that the letter was simply being written by Mr. McLaughlin to protect his own position, and that there was no necessity to respond to it?

A. The last expression, the first two parts are right. I still believe it was received, but I could be totally wrong in that, I have said that. Indeed, it's interesting to see the copy you have given me. You said it's addressed to Denis O'Brien. It's not addressed to anybody, the copy I have.

Q. Well, it's "Dear Denis"?

A. Well, it could be Denis Murphy or anybody. It's not addressed to anybody. It's not signed by anybody. My

impression at the time was that this came in in draft.

You know, here's a letter I'd want to send you, which would be an astonishing something I had never seen before, asking us questions which I certainly wouldn't be prepared to answer. And my feeling was that this was the kind of thing you actually don't reply to.

And as I said to Denis, we'll go see him if we have to. That's not the kind of I'd like to know a lot more of what's behind that before I'd reply in writing to it.

Q. They'd be troublesome questions to answer in writing, wouldn't they?

A. No, they'd be easy questions to answer in writing.

It's just where was it all going? For whom was it or what was the intention of this letter? Where was the response going to end up would have been my concern.

I don't think the questions were particularly hard to answer, were they?

Q. Well, "(a) why were the original investing group not asked to make a stronger financial commitment?"

A. You see that's probably as good an example of what I'm saying. I go in to see Kyran McLaughlin. He says given now that the 15 million had been established for the licence, I mean, you'll get the chance to ask

Kyran McLaughlin, is he seriously saying that he didn't know and the institutions didn't know that 15 million was the established number for the licence?

Is he seriously saying that?

Q. I suppose we'll have to ask him.

A. Because he is the only one in Dublin that didn't know it.

Q. I think what Mr. Coughlan suggests to me that I indicate to you is that, in fairness to

Mr. McLaughlin, he is not saying why wasn't he told.

He is saying why wasn't he asked after that was fixed?

A. He wasn't asked I'll answer that in two ways, I have had time to reflect on it. He wasn't asked because we had already sought and got as much as was available. I knew that the day I walked into him, and for absolute certainty, he knew that. And you can ask Kyran this, but is he seriously saying, I'll ask again, that if I had said, listen here's what we want, he is saying that he would have got it for me? Sorry, just to I'll answer it again a different way.

We didn't get all of what we wanted from the group that he represented. Dermot Desmond produced what we wanted. Would it be fair to go in and gazump Dermot Desmond by saying, listen we got a much better deal from somebody else, I'll give you a chance to come up to it? They didn't step up to the plate the first time out. Dermot Desmond did. And it would be most

unfair for me to go in and say, I now have a better deal, you wouldn't give it to us the first time out, but now that I have this deal, I'll give you a chance to step up to the plate.

Sorry, can I make a third point? Interesting, my first reaction when I saw that why didn't I ask? My first reaction is why didn't you offer? Wouldn't it be nice if he had said: Good gracious, we really believe in you guys, we were with you and we want to be with you. Tell me what it is you need and I'll see if I can get it for you. Wouldn't that have been nice?

Q. I suppose the difference here, Mr. Callaghan, is that the banks I referred you to the executive summary you have surmised that that request for investment may have been agreed by negotiation with the bank. That we don't know. Certainly Mr. McLaughlin has not suggested that, and we'll ask him. But that was the commitment the institutions were asked for, and that was the commitment that they gave, and it was those commitments that went in with the bid to the Department?

A. Correct.

Q. And I think perhaps the view they might take is that if you wanted something stronger, why didn't you come back to us first and ask for it before you went to Mr. Desmond and asked for it?

A. Well, you'll have to ask the people who negotiated in the first place. It is my understanding that what we got from them was as good as we were going to get. Indeed, what you said earlier yourself, isn't that as much as you might get from these people? The reality is that Dermot Desmond and IIU are much lighter on the ground, more flexible and smarter than the established institutions, and probably were the only ones who would come up with the kind of package that is here. You say the difference is, if that letter were written two days after my meeting with Kyran McLaughlin, if he had said it at the meeting, or he had written it two days afterwards, or if two weeks afterwards he had said, I have been talking to the institutions and we really believe in your guys and we really want to be with you, I could understand it. The difference was, it came in two days or three days after the licence bid was won.

Q. It was the 22nd November, if the date is correct, and it came in three or four days before there were, after there were articles in the newspapers, which may well have been the first time that Mr. McLaughlin had any idea, as indeed most people did, that IIU had any involvement at all with Esat Digifone. So that may well be what prompted it.

Can I refer you to the third question that I raised.

"At what stage were the Department of Communications

and the assessors told of the changes in the institutions providing finance to the consortium?"

Now, wouldn't that have been a very troublesome question to answer, either to Mr. McLaughlin in writing, or indeed, at a meeting at that time?

A. Well, I don't know about a meeting at that stage. My understanding, the only time the Department of Communications were told before the award, not the award but before the result of the competition, my understanding is the only time there was an attempt to tell them was in the letter from IIU. And other than that, that's all they ever got.

Q. Exactly. Until the 17th April, when Mr. Regina Finn asked a question of Mr. O'Connell, isn't that right?

A. Well, whenever in the negotiations of the licence then it became known. But I don't see why it would be difficult to say that, you know. The questions of themselves weren't that difficult to answer. The real question was why we were getting this in the first place and where it was all going.

Q. Well, I have to suggest to you, Mr. Callaghan, that that third question, "At what stage were the Department of Communications and the assessors told of the changes in the institutions providing finance to the consortium," may well have been a very tricky question to answer on the 22nd November?

A. Well, they hadn't been told on the 22nd November is

the answer, isn't it?

Q. No, they hadn't been.

A. Correct. So it's easy enough answered. The point I am making is

Q. That's why I am suggesting to you, Mr. Callaghan, that it would have been a troublesome question to answer.

It is easy enough to answer?

A. I don't want to argue with you. It is a dead easy question to answer. No, they haven't been informed.

Q. Of course it is.

A. The question I would have asked myself, and did ask myself when I got this letter, but why would anybody want to ask this question and where is it all going?

And that's why I wasn't happy to take what I think was a draft letter and start going into this kind of thing, not knowing where what you were saying could eventually end up.

Q. Wouldn't you you would appreciate, I suppose, that this was a little embarrassing for Mr. McLaughlin?

A. I would say the most embarrassing thing for Mr. McLaughlin was the fact that it was IIU.

Q. And the fact that he had been

A. IIU is as you know, IIU is, they have set themselves up or had set themselves up in competition with the established financial business area, and Davys would be very much part of that. And now we have a situation where Davys probably thought they had

dropped the ball and IIU were in the driving seat, if you pardon the mixture of the metaphors.

Q. I suppose it would have been equally embarrassing for Davys that they went to these institutions, AIB, IBI and Standard Chartered sometime after the 29th September to ask them would they step aside and lo and behold, 16 days later, or 25 days later, there was an announcement that Esat Digifone had won the licence?

A. I don't see that being embarrassing at all. I mean, these are very grown up people. They were asked. If they really believed in us, they would have said, no, we are not standing aside. But they didn't, they said sure, no problem.

Q. Well, it would have been exceedingly difficult if they had refused to stand aside, wouldn't it, on the 28th?

A. Absolutely.

Q. Because at this stage weren't you committed to giving their percentage to Mr. Desmond?

A. We would have had to find some other way of dealing with it. If they had kicked up a rumpus, presumably we would have. They didn't. They didn't.

Q. What other way could you have dealt with it? If the banks had said, "no we won't stand aside, we won't"?

At this stage there was a commitment?

A. I can't say how we would have dealt with it, but presumably you would have if, to put it at its simplest, if there is an equity participation that you

can't get out of, in this case 15%, and you have three other parties who have decided on how they are going to split 100%, then if you can't get out of the 15%, which will be the other three parties have got to decide how they share 85 instead of 100. I mean, it's as simple as that.

Q. Now, can I just refer you to Mr. McLaughlin's memorandum, which is there amongst the papers I handed up to you, paragraph 6.

He says, at paragraph 6, that he received no reply to his letter. He said that he met Mr. O'Brien casually before Christmas, 1995. And Mr. O'Brien indicated that he and Mr. John Callaghan would contact Mr. McLaughlin in January in relation to the matters raised in his letter. Mr. O'Brien did not make contact Mr. McLaughlin, nor did any other person on behalf of Esat Digifone Limited. He says that on the 4th July, Mr. McLaughlin, having heard nothing further from Mr. O'Brien, wrote to Mr. O'Brien again and indicated that it would be very helpful to J&E Davy in dealing with the institutions in question to know Esat Digifone's response to the three matters raised in his letter of the 22nd November, 1995.

Can I just refer you to that letter of the 4th July.

It's the second of the documents appended to that memorandum. It's a short letter, Mr. Callaghan, just three paragraphs long. Do you have it there?

A. I do.

Q. It's on the monitor as well. That's addressed to Mr. Denis O'Brien, Chairman of Esat Telecom.

"Dear Denis,

"Every time Esat get extensive coverage in the newspapers we get further queries from the institutional investors who are prepared to commit $\text{€}8.5$ million in support of your GSM licence application in June 1995.

"I wrote to you in November 1995 on some of the issues that have been raised with us. And when I met you in December, you said that John and yourself would come into the office in January to discuss these and other issues.

"The more publicity which focuses on the valuing of the IIU stake in the GSM licence, the more likely the institutions will want to readdress this subject, and it would be very helpful to me to know what is your response.

"Yours sincerely,

Kyran McLaughlin."

Now, can I ask you first; do you recall at all did Mr. O'Brien mention to you sometime around Christmas or after Christmas that he had bumped into Mr. McLaughlin and you'd pop in to see him?

A. I don't, I don't he could have but I don't actually remember.

Q. That's fair enough. Do you recall him showing this letter or discussing this letter with you, and the two of you agreed to go in to see Mr. McLaughlin?

A. I actually, don't, I am sorry to say that. I must have a memory lapse or something. I actually don't even remember the day we went in to see Kyran McLaughlin were it not for the fact that Kyran has this note here about it. I have kind of a vague memory, I suppose. But I generally had no memory until I was jogged with this note. So I didn't have any memory. I don't know if I ever saw that letter, but I don't think I did. But obviously I did go along to the meeting on the 8th August, '96.

Q. Nothing may turn on the fact that you don't remember the letter, because Mr. O'Brien may not have shown it to you. He might have just said, we better go in and see Mr. McLaughlin.

At Paragraph 7 he says: "On the 8th August, 1996, Mr. O'Brien and Mr. Callaghan attended a meeting at Mr. McLaughlin's office in J&E Davy. Mr. McLaughlin kept a note of the meeting. Mr. McLaughlin indicated that in the light of the fact that the institutions were asked to step aside in favour of another party, as they were told that their commitments would not be sufficient to win the award of the licence, they had concerns regarding the following matters:

"A. They had been replaced by IIU, who financially

was not as strong as they were.

"B. They had been replaced after a limit of $\frac{1}{2}$ 15 million on the licence fee had been agreed by the Government.

"C. IIU may have had inside knowledge of Esat's probability of success when they made their investment.

"D. IIU was likely to sell its investment back to institutions at a premium."

Paragraph 8 he said that Mr. O'Brien's explanation with regard to these concerns were as follows:

"A. The Esat Digifone consortium has been told that they needed a firm financial commitment guaranteed by a bank, both for the 20% institutional placing and for their own 40%, and they knew no normal institution would give them that commitment, but that IIU was prepared to do so.

"B. IIU had no inside information as nobody had, although civil servants did say to Esat Digifone afterwards that their written submission was the best received.

"C. IIU was likely to sell its investment back to existing shareholders and not to the market."

And Mr. O'Brien, when asked about this last week, I think, indicated that that roughly approximated to what he would have said to Mr. McLaughlin. And would you agree, that that's roughly in accordance with

either what you remember

A. I don't remember much about it, but it's kind of if we were to say anything, that's what we would have said.

Q. Can I just ask you one or two matters in relation to that. You see at Paragraph 7A there, Mr. McLaughlin said that they would, "that institutions probably raise the following concerns:

"(a) that they had been replaced by IIU, who was financially not as strong as they were."

Now, Mr. McLaughlin and the institutions would have been right in that respect, wouldn't they?

A. Oh, that's a statement of fact, yeah. Totally irrelevant, I should say.

Q. It may be totally irrelevant

A. Because it was not the strength of the institution that was at issue, it was the strength of the support.

I mean, on that basis we could have got a fiver from City Bank who were 20 times the size of these people, and you could argue it was great

Q. If you just bear with me for a moment. It was correct what they were saying, that they were not strong?

A. It's a statement of fact, yeah, a statement of fact.

Q. What they were providing, as you say it was the quality of support, what IIU were prepared to provide was the underwriting of $\frac{1}{2}$ 30 million?

A. Mm-hmm.

Q. Did you know that in February of 1996 IIU didn't have the money to meet their own subscription for 20%?

A. No.

Q. No?

A. Well, I'll turn that on its head. I am not too sure what you are asking me about.

Q. I'm just asking really what I'm coming to is this: what is the worth of a commitment for 30 million when somebody doesn't have the wherewithal to meet that commitment? It's a commitment on paper and nothing more, isn't it?

A. Well, I don't know what the full nature before I'd answer that I'd need to know what exactly the full nature of the underwriting was. In other words, what was the underwriting? Was it that they got a financial institution on their guarantee to do it, or was it just that they said it? I actually don't know it, to tell you the truth.

Q. They didn't. That's the interesting thing, in fact, Mr. Callaghan, and clearly you didn't realise this, but IIU didn't get any financial institution to put underwriting into place. They simply agreed to underwrite.

A. And they supplied I saw a balance sheet somewhere that showed them to have tremendous wealth, I don't know where

Q. I think that was much later, in May of 1996, when the

Department decided that they better look at IIU

finances. I suppose what

A. You are asking me was I aware, did I understand or did

I know, what are you suggesting, that they gave a

guarantee they couldn't meet? That is certainly not

the case.

Q. No, I am not suggesting that. What I'm asking you is

this: would you agree with me that if you get a

completely open-ended commitment for $\$30$ million from

a person that does not have the wherewithal to meet

that, that that commitment is effectively worthless to

you? It's a commitment on paper and nothing more.

A. That's a statement of fact. I mean, you don't need me

to agree with that surely?

Q. You are a financial person

A. If I get a guarantee from somebody with no money, it's

not worth anything. It is, you are quite right, it's

not worth anything if they have no money.

Q. Could I refer you to 8A, Mr. O'Brien's explanation.

"The Esat Digifone consortium has been told that they

needed a firm financial commitment guaranteed by a

bank, both for 20% institutional placing and for their

own 40%. And they knew no normal institution would

give them that commitment, but that IIU was prepared

to do so."

You see that sentence?

A. Mm-hmm.

Q. Can you assist me at all; do you have any knowledge as to who told Esat Digifone that they needed that firm financial commitment?

A. I don't know what words would be used, what words were used when we were saying that. I mean that's Kyran McLaughlin interpreting what was said to him. I am not too sure what words would have been used at the time. There was absolutely no doubt that all our advisers and all the people around us were saying at the time, our partners were saying it and PA in particular I think, and even others like Pdraig O'hUiginn who knows these kinds of things, were all saying, look, we really need to have this strengthened up.

Q. But there was no third party of advisers, that you know of, that told Esat Digifone that?

A. Absolutely. Someone from outside the consortium grouping? No, absolutely not.

Q. And what he was saying there what's needed was a firm financial commitment guaranteed by a bank. Now, in the absence of, you say, underwriting arranged with IIU with a financial institution, if that hadn't been put in place, would you agree that that's not what was made available by IIU?

A. I am sorry, you'll have to ask that question again. You have asked me kind of a double negative question. In the absence of things, things weren't

Q. The document says what was required was a financial commitment guaranteed by a bank?

A. Mm-hmm.

Q. Now, we know that IIU was agreed was agreeable to underwriting Communicorp and was prepared to take 25% itself. We know from the documents, and we know, indeed, from information made available to us, that IIU had not arranged any third party or bank guarantee-type underwriting. So in those circumstances, would you agree that that what is stated in A, if that is what Mr. O'Brien told Mr. McLaughlin at that meeting, was not an accurate statement?

A. You are telling me there was no bank guarantee in place. If that is true, well then clearly that's not an accurate statement. Whether that's precisely what was said, you know, I mean I'd have to say that we were satisfied, perhaps wrongly, perhaps you are telling me wrongly, but we were certainly satisfied that the underwriting given by IIU was solid and you could depend upon it.

Q. Well do you remember ever sitting down with anybody to consider this, whether the underwriting was solid?

A. No.

Q. You don't?

A. No.

Q. You would have been relying on what you were being

told by other people?

A. Yeah.

Q. That's fair enough.

Can I just ask you to look at a letter of the 29th

September for me. This is at Book 48/64.

Now, as you say, you had no input at all into this letter, and you are not sure whether you even knew it was going to be sent until after it was sent back.

It's to the

A. I seem to have the wrong page.

Q. Sorry, it's at Divider 64 of Book 48.

A. Okay, yeah.

Q. And it's addressed to the Department of Transport, Energy and Communications. Attention, Mr. Martin Brennan. 29th September. Re Esat Digifone Limited.

"Dear Sirs,

"We refer to the recent oral presentation made by the consortium to the Department in relation to their proposal for the second GSM cellular mobile phone 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%) not intended to be subscribed for by Telenor.

"However the consortium now has available equity finance in excess of $\frac{1}{2}$ 28 million. We do not foresee any additional need for equity. However, we are confident that if such equity is required, we will not have a difficulty in arranging it.

"Yours faithfully,

Professor Michael Walsh,

Managing Director."

Now, can I refer you just to the middle paragraph:

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

Now, would you agree that's, if you like, the operative part of the letter?

A. Yeah.

Q. That is what the Department is being told?

A. Correct.

Q. Now, it says, I am looking at the words very carefully, but why I am asking for your assistance is that I know that you are a man of undoubted financial credentials, and I know Mr. O'Brien has expressed some concern that the Tribunal is adopting perhaps an excessive pedantic or lawyerly interpretation of documents. So that's why I am asking you to assist the Tribunal on the meaning of what this says.

It says: "We confirm that we have arranged

underwriting on behalf of the consortium for all of the equity not intended to be subscribed for by Telenor."

Would I be correct or incorrect in thinking that the use of the words "arranged underwriting" gives the impression that underwriting has been arranged with some party other than IIU?

A. You could see it being I mean, that would be a kind of a natural conclusion, just from the reading of it.

But you know, arranging something need not necessarily be that I have arranged it with a third party. I mean, if they arranged to put 58 million on deposit in City Bank and said, I mean, then you could argue that a third party hadn't to be involved. So, it could be arranged without a third party, but on reading that, if I read that quickly, I would think you were talking about arranging with a third party.

Q. And in fact, that's what I think you might have understood what was the position?

A. Yeah.

Q. The point you were saying to me earlier, you thought there was a bank guarantee?

A. That was my understanding, it was arranged in the sense in which you have just said. That is true.

That is true.

Q. Am I right that you, as a financial person, when you talk about underwriting, you are thinking about the

kind of underwriting that, say, J&E Davy would put in if they were promoting an offer, that they might go to AIB or Bank of Ireland or some other financial institution and they would be looking for third party underwriting?

A. I have to say, in fairness, that I would not include IIU in that sort of category. Someone like Davy doesn't have money, doesn't have access to money; they are advisers who get people who have money to come in behind them in an arranged fashion, if you want to use the expression that's here. I would have thought, to the degree which I thought about it at all, that IIU would have been on the line for this. In other words, if there was a third party involved, that it would be it wouldn't be the third party taking the risk on it. It is my view that the third party would have been a facilitator, i.e. if I got City Bank, because they are so big and strong, to say, you are as safe as houses, this money is there but they would be only doing that on the basis that they were satisfied that IIU had the strength to meet the kind of commitment they were now making to another party. So I have always had a belief that IIU was at risk for the underwriting. Now, whether they did it by getting somebody else to, as it were, front for them, i.e. a bank that they could convince more easily than some third party, I think that was one matter, or whether

they were doing it themselves, I wouldn't have thought very much about it to tell you the truth.

Q. I can understand that.

A. I wouldn't have really thought it through to any great degree, simply because I would have taken it that if IIU were behind it, that it's okay.

Q. But you agree with me, that on a first reading of that sentence, "We confirm that we have arranged," that the reasonable interpretation of that is that they have in some way arranged with a third party, they have taken steps to spread the risk, that they are not themselves the underwriters.

A. No, I think now that you have been given me a chance actually to say something on it, I'll maybe take back some of stuff I said earlier.

Q. You said an awful lot on it, Mr. Callaghan.

A. No, no, because I think there is one thing that's interesting here, that if Davys had written it, that's the immediate thing you'd come to. If Connolly Corporate Finance had written it, that's the immediate conclusion you'd come to. But IIU is itself a direct participant, it is not a third party that normally let me put it this way; IIU would normally not arrange anything, it does it themselves. So I would have to say, that it would be my view that rather than arranging for someone else to take the risk of underwriting, which is really what we are

talking about here, I have arranged for someone else to take the risk of underwriting. I was never under any impression or any doubt but that IIU were the ones who were on the line for all of the underwriting. So whether they did it by using a third party, or did it just directly themselves, by putting the money on deposit with Bank of Ireland, I was always in my view, I was always clear in my mind that IIU were not arrangers. They were not third parties arranged for other financiers to get involved. They were the financiers. So when one says they arranged something, the word itself is interesting because you can interpret it presumably any way you want. But I would honestly say, in my view, that IIU were the ones on the line and I was happy with that. In other words, they were not dependent on a third party. They were not dependent on City Bank or Bank of America or someone to fill in, as it were, the guarantee side of this.

Q. Is that because you are reading that because you know who IIU are?

A. Yeah, I'd say yeah, I know the way they operate, yes. That is true, that is true.

Q. You know the way they operate?

A. Correct.

Q. If you didn't know who they were and you had no idea who they were and you had no idea how they operated?

A. You could interpret it differently.

Q. Right. Now, it says: "We confirm that we have arranged underwriting on behalf of the consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor."

Am I correct in thinking that in that statement no distinction is being made between the underwriting for the Communicorp subscription and the underwriting for the financial institutions' subscription?

A. Correct.

Q. So there is no way from that sentence that I could distinguish between the nature of the underwriting for Communicorp and the nature of the underwriting for the institutions?

A. If you knew absolutely nothing about anything prior to getting this letter, clearly that's right.

Q. Precisely. You see, for some reason Mr. O'Brien seems to believe that it would be as clear as day to anybody reading that letter that the financial institutions were out and that Mr. Dermot Desmond was in. And it may well be that, as you say, Mr. O'Brien is looking at that letter from the standpoint of somebody who knew exactly what was going on, a bit like yourself. Perhaps that's the explanation for why he believes it would be as clear as day, because as you just said to me, from the standpoint of somebody who knew nothing about what was going on, you couldn't distinguish

there between the underwriting for the Communicorp subscription and the underwriting for the balance of the Irish side?

A. Sorry, are you asking me the question? I mean, we had a situation where 60% of the funding was to come from, 20% from institutions and 40% from Esat, and he is writing in saying he is underwriting the 60%, not intended by Telenor. He could maybe just have easily have said, I am underwriting the 60% that Esat and ourselves are putting in, or Esat and whoever.

Q. He didn't?

A. He didn't.

Q. There is nothing in that letter that could have told somebody that didn't know what was going on, that Mr. Dermot Desmond was now entitled to 25% of the shares, is there, Mr. Callaghan?

A. No.

Q. There is one final matter that I want to ask you about, if you would assist the Tribunal on. And it's in relation to a meeting which I believe took place, probably in William Frys' offices, because Mr. Owen O'Connell kept an attendance of it. The attendance is in Book 49 at Divider 84.

Now, I'm not sure it's a handwritten attendance it's at Divider 84 of Book 49. Now, that's a handwritten note, but we have it reconstituted, and there should be a copy of it

reconstituted in typed form behind that. If there isn't, we can hand one up to you.

A. No, I don't have a typed one.

Q. We'll hand it up to you, because it's difficult to make out.

(Document handed to witness.)

Now, it's dated the 3rd November, 1995. So just to put it in context, it would probably be the week following the announcement of the result. It's a note to file from Owen O'Connell.

"Client: Esat.

Matter: GSM." And then file number:

"Attendance here on DOB" - Denis O'Brien - "LB" -

Leslie Buckley - "PC" - Paul Connolly - and

J Callaghan."

"IIU issue: Bullet point for press release

problem re material change in shareholders versus bid.

Group of institutional and other investors to be

located by underwriters IIU.

Had to upgrade financing arrangements primary

criteria from comfort to underwriting.

"IIU willing to give underwriting commitment and did

so. Clearly gave control of 20% to underwriter.

Understanding is that underwriter will be placing

shares with investors and institutions. Michael Walsh

call?

"Financing options confidential at present; will be

revealed in due course when finalised."

Now, do you recall that meeting, Mr. Callaghan?

A. I can't say I do. I have a vague memory of whether this was this meeting or others of this issue being discussed all right. So I can't say I recall that particular meeting.

Q. But you do recall that

A. I do have a recollection of this issue being discussed, the issue of how do we present the idea that what we had at the start has been changed at the end, yes.

Q. Now, Mr. O'Connell said, that when he keeps a note like this, he is normally recording what people have said to him, or he is recording steps that he has to take. And it looks here as if somebody is saying that there is a concern about a material change in shareholders versus bid, and that that relates to IIU.

And am I correct in thinking, that you were aware that this was a problem that was being discussed within Communicorp and within the consortium around that time?

A. I want to be careful here, because I believe that the issue I don't know whether this is exactly if, I'd have to read it again. But the only problem I remember ever having any involvement in, in relation to this, if "problem" is the right word, is the way in which it would be perceived and written up in the

media. It wasn't a problem other than that, other than how is this going to be perceived when people know? I don't know if that's what that's referring to. But that's the only issue on this that I have any recollection of any involvement in, and I suspect that's what that is, you know. You know, if someone starts asking questions about this, what do we say?

You know.

Q. That's right. Well, it looks as if somebody was putting together bullet points for a press release?

A. Yeah, that type of thing.

Q. As to how to deal with it. If you like, how to explain this information in the best way?

A. Mm-hmm.

Q. Do you recall there being any further discussions?

Because we know in fact, there wasn't a press release, there was no press release until the 16th May, when there was a press release by IIU when the licence was issued. So do you recall this being a recurring theme of discussions or conversations that you would have had or meetings that you'd have attended?

A. No. I'd say it was right at the bottom of the agenda until it came to the final announcement when the whole thing would be known. I would say nobody passed much remarks on it in the in-between time.

Q. I see. You wouldn't have been involved anyway?

A. Not alone would I not be involved, I doubt if anyone

even thought about it, because as an issue, we had so many other important things to do, as an issue it could well be put at the bottom of the agenda to be dealt with when eventually we were saying something, how would we say it.

Q. I think they did think about it quite a lot because certainly Mr. O'Connell and Mr. O'hUiginn very carefully worked out what was described as a line as to how to present this to the Department, not just to deal with it in the media, but how to present it to the Department. But from what you are saying to me, you weren't aware of that, is that correct?

A. That's correct. Let me put it again, it was at the bottom of my agenda.

Q. The bottom of your agenda?

A. Yeah.

Q. What was your involvement primarily after this time in November? As I said, we have a lot of documents, we have a lot of attendances, you don't appear to have been at any of the meetings, you don't appear to have any interaction whatsoever with the Department. If you like, what was your area of responsibility?

A. I would say the main thing that I had to do from there on, I can't get the dates right, but I know the thing that took up most of my time was, we had a very complex set of issues in putting the management team in place. The right to appoint the Chief Executive

was in the hands the agreement was in the hands of Telenor, and I mean, I had a job convincing Barry Maloney to join us. I had a job convincing Telenor to accept him. I had a job getting them together with the kind of package that was necessary to get this guy to come from the States. And a good deal of my time would have been spent on that side of it during that period.

I had no involvement with the relationship with the Department. I had no involvement, other than the bits we have talked about, with the interaction with IIIU.

And sorry, in that period, most of the negotiation from there on was in the licence because, I mean, we can divide this into two very distinct parts. There was the competition to see who was the suitable party to do the thing, and then there was a long period in which the actual terms of the licence under which that would happen were negotiated.

Q. But at that time you were primarily involved with personnel problems?

A. Other things. I certainly wasn't involved in any of those things.

Q. Okay. Could I just take you back to one matter that I want to follow-up with you, if you wouldn't mind.

You may recall in the memorandum, in the questions raised with you in the memorandum, you were asked for details of the offer that was referred to in the

letter of comfort furnished by Advent. That was, in fact, at Question 9 of the memorandum. And that was one of the questions where you dealt with it in terms as a composite answer, and you set out your dealings with Advent and what you understood them to be. Now, you didn't deal with the question relating to details of the offer. And can I take it from that, that you didn't know what the details were

A. No.

Q. of that offer?

A. No. I think the only one who really knew what the terms and conditions of the offer were was Denis. You know, he was in constant communication with Massimo Prelz and they had, in this regard, they had a very good relationship. They knew each other very, very well. And he would be the one that would have known what was intended, if you like, other than just straightforward I am offering you 30 million.

Q. But you know nothing about

A. I know nothing about that and I still don't.

Q. And Mr. O'Brien didn't tell you about it?

A. No.

Q. I think he must have been mistaken, because he indicated in his evidence that he would have told you, Mr. O'hUiginn, and Mr. Connolly about the details of the offer?

A. No. You mean the terms of the offer, the terms and

conditions that would apply that offer of 30 million?

Q. Yes.

A. No, I never knew.

Q. I'll just read to you what you said. It was on Day 249, at page 120.

"Question: Just explain to me now, when you reached an agreement with Advent on terms subject to getting the licence.

Answer: We I agreed all of this in July, June/July with Mr. Prelz over lunches, over many meetings, over telephone calls, but we

Question: Is this documented anywhere?

Answer: No, absolutely nowhere.

Question: Did you inform your fellow directors?

Answer: Yes.

Question: Who?

Answer: All of them.

Question: You informed your fellow directors that you had reached these agreements?

Answer: The people that were involved in the bid, they would have known that I had an arrangement with Massimo that he would fund us.

Question: Mr. O'Brien, just listen to the question:

Did you inform your fellow directors that I want to did you inform your fellow directors that you agreed terms with Advent on behalf of Communicorp?

Answer: The directors that were involved in the bid,

those were the people.

Question: Who were they?

Answer: They were Mr. Callaghan, Mr. O'hUiginn,
Mr. Connolly.

Question: And did you inform those directors that you
had accepted this offer?

Answer: Well this

Question: Did you?

Answer: This is relating to the 12th July agreement,
this letter was written purely to try and show Telenor
that we would accept the offer of 30 million from
Advent.

Question: Did you inform your directors that you had
written a letter, as you say, accepting an offer of
30 million by Advent to Communicorp?

Answer: No."

A. Sorry, you asked me a different question. You asked
me did I know the terms under which the offers were
made. But that's not what he is saying. I said I
didn't, I didn't know the terms, but what he is saying
is that he informed us that he had reached agreement.

Q. And did he inform you that he reached agreement?

A. Oh, yes. We would have known that he had reached
agreement with Massimo to get the money.

Q. Are we talking at cross-purposes now, Mr. Callaghan?

Because you certainly let's talk about the 15th
June to start with. That's the meeting that you were

at on the 15th June. You kept a note of that, and what you recorded there was bridging finance at 3.2 million, and you recorded separately 5% equity, strong letter of comfort, not a commitment, and you put that in parenthesis to, if you like, emphasise that that's what Mr. Prelz was saying.

Now, did you know of some other agreement separate to those agreements?

A. No.

Q. They were the two agreements of which you had knowledge?

A. Correct.

Q. And you had no knowledge of no other agreements, other than those two agreements, that you recorded in your note of the 15th, because I don't want to confuse you now?

A. I just want to make sure. No, I had no involvement in any other matter to do with the funding of Communicorp and Massimo Prelz and Advent, other than those two particular items.

MS. O'BRIEN: Thank you very much.

CHAIRMAN: I suppose it would have been material to know the terms of the offer of Mr. Prelz, after all he was a venture capitalist. He had extracted a pretty stern 30% coupon on the much smaller sum for bridging, and presumably on matters like exit mechanism and the like. He wouldn't have been a pushover for 30

million?

A. No, he would not. And certainly, by the time you were drawing that 30 million down, I'd say there would be a lot of hard negotiating to be, to get the finer points into any shape that would be acceptable.

CHAIRMAN: Yes. Maybe some other counsel may have some other matters to raise with you, Mr. Callaghan.

Mr. Fitzsimons?

MR. FITZSIMONS: Just a few questions Mr. Callaghan.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FITZSIMONS:

Q. MR. FITZSIMONS: Question 6 of your second memorandum,

Mr. Callaghan, and there you refer to your meeting with Mr. McLaughlin, Mr. Kyran McLaughlin on the 29th September. Just, I wonder can you assist us here.

Can you tell us what time of the day it may seem a small detail, but it's of interest to my clients what time of the day? Was it the morning or the afternoon?

A. I honestly can't I'd be guessing, I really I'm sorry, I just can't.

Q. Presumably if you could possibly remember?

A. I can't, really.

Q. Now, if you could move on to Question 26, please. In the second paragraph of your answer there, the last sentence, you say: "They entered discussions that led to the agreement dated 29th September, 1995, under which IIU joined the Esat consortium."

I take it you are referring to the Arrangement Agreement when you speak of "the agreement" there?

A. Yes, when I speak of "the agreement" sorry, I thought you were emphasising "joined", sorry "the agreement", yes, the Arrangement Agreement.

Q. The Arrangement Agreement. That agreement, of course, did not result as a matter of fact or law in IIU joining the Esat consortium; it gave the rights and imposed the obligations in accordance with its terms, isn't that so? I am just wondering

A. Without looking at all the terms of the agreement, my clear understanding was when Denis O'Brien had finished talking to Dermot Desmond on the 29th of September, that the clear understanding was that Dermot was to be part of a, 25% participant in the Esat consortium bidding for the licence.

Q. But the operative words from your last sentence, "to be part of it"?

A. Yeah.

Q. And that was not finally achieved until the 16th May sorry, the 13th May, 1996, isn't that so, when shares were actually issued to a company known as IIU Nominees Limited that had not been in existence in September of 1996?

A. Of course you are absolutely right, that wait now that the legal position is that one doesn't become a participant until you buy the shares. But

surely to goodness, you can see that had we said that to Dermot Desmond in the middle of 1996, if we had said, look, you have no deal, you are not part of this consortium at all, I think he might have told us that he was a part of it and very clearly a part of it and agreed to be apart of it from the 29th. The fact that it legally happened on the date he got the shares is well, to me it's a fact, that is the fact. But the fact that he was part of the consortium is because it was agreed he was part of the consortium. He was a partner in it regardless of whether he got his shares or not, he was definitely a partner in that consortium.

Q. Just a slight correction, the 12/13th April, 1996?

A. The date is irrelevant.

Q. I take your point. Denis O'Brien, in fact, said the same thing in his evidence the other day. But I am putting to you, that on any legal basis, that that is an inaccurate representation of the situation, and I put it to you even stronger; that categorically, as a matter of law, it is incorrect to state that IIU was a member of the Esat consortium as of the 29th September, 1996, and I rely upon the actual terms of the Arrangement Agreement as a part of the argument for that proposition?

A. I mean, you are giving me I am not going to argue the legal position. I am simply saying that so far as

everybody was concerned, from a practical commercial point of view, Dermot Desmond was agreed to be a partner and was a partner in the thing from the time that deal was done. And as proof of that, I am saying that if we had come along in April or May of '96 and said to him, Dermot, I am sorry, we have had Mr. Fitzsimons has told us you are not a partner at all in this thing, go away, we don't want you any more; you can guarantee that he would have found a very good way of describing to us that he was a partner.

Q. I am not suggesting any such thing. I am saying that the agreement, the agreement of the 29th September was an agreement to provide for future steps and actions to be taken, but it did not create the rights that you have described in the way you have described them, and indeed in the way Mr. O'Brien has described them at that point in time. It's as simple as that.

A. I mean, I can only disagree with you. I really have to disagree with you. I am absolutely satisfied that from the point at which we came to an understanding with Dermot Desmond, he was in every respect morally, maybe legally you can get out of it, morally and commercially he was a partner in this operation.

Q. Very well. Now, just to move on to Question 36, investing institutions stepping aside. And you say, you are speaking about Kyran McLaughlin notifying the

three banks the two banks, the insurance company after the 29th September, 1995. And you say, you notify them that "we wanted them to step aside to allow another investor take up their stake," I am using your words, "their stake in Esat Digifone."

Again, I have to suggest to you that the language you choose is, well unhappy, in terms of a choice of word.

I have to suggest that the banks had no stake in Esat Digifone on foot of the totally qualified letters that they had furnished at an earlier stage, they had no stake whatsoever in the proposed company?

A. If we go back to the earlier questioning, I have now been told that Esat Digifone didn't exist until 1996.

So when you say they had no stake in Esat Digifone, you are right.

Q. You are talking about a stake which imports ownership?

A. Correct.

Q. You describe it as "their stake", which imports ownership to a far greater extent.

Now, you know what is in those letters in which the banks have not made any commitment, any commitment to involve themselves as investors in these companies.

And I am just suggesting to you that it is not correct to suggest that they had a stake at any time in the proposed investment. That is part of the reason

A. I am sorry you don't understand what it was, I tried to say. But if it suits, may I replace that word by

saying their proposed interest or their proposed investment? Will that suit you, if you put that in instead?

Q. It's more accurate, Mr. Callaghan.

A. I'd be delighted to replace that, if that suits you.

Q. One of my reasons for trying to clarify these words is as follows: Mr. O'Brien has been giving evidence and has been asserting that in relation to Advent, he had verbal commitments that he could rely upon in relation to what they were going to invest. And Tribunal counsel, very properly for the purpose of inquiry, has been testing in really quite an adverse manner that proposition; in other words, not accepting that such commitments are of any worth. And the point I am making is that these bank letters are equivalent commitments, in inverted commas, and again not worth anything in terms of an investment, other than the hope value that they give. Would you agree with that?

A. I wouldn't agree they are not worth anything. I mean, that's a bit unfair. I mean, there is a, there is a clear intention on the part of the institutions concerned to be part of, given the opportunity, to be part of what emerges out of all of this. This is their clear intention. But they are couching their intention, as institutions will, by saying, but it's our intention, our desire to be part of it. We really want to be part of this, but we are not going to, we

are not going to give you a blank cheque. We are going to wait to see what exactly the terms and conditions are under which we do become part of it, and we are going to put that then, to our investment committee, and then if we are satisfied with all those things, we'll go ahead. But to say they are not worth anything is unfair. They are not absolute. They are not guarantees. They are not complete. But they are worth an awful lot. An institution doesn't commit itself like that without a general intention to deliver on that commitment if things work out well.

Q. Well, maybe I put it too strongly. They are worth something, in the sense that they could be furnished to an interested party such as the Department?

A. Correct.

Q. And they would provide comfort to the Department?

A. That is correct.

Q. They are about the equivalent of letters of comfort?

A. That is correct.

Q. But under the terms of the letters, the institutions are not bound in any way and can, without any legal consequence, walk away from the desire that the letters exhibit?

A. That is correct.

Q. And similarly, Mr. O'Brien and the consortium, if he decides sorry, if Esat Digifone decided to take up a particular line in relation to the terms of any

ultimate agreement that might be proposed in relation to the funding, the subject matter of the letters, he too could, or Esat Digifone could too walk away from any such proposed arrangement, isn't that so?

A. The only thing I would say on that is that what you say is of course correct. There is the whole question of the now we all have to do business in this town, sort of thing. People don't give commitments that they don't genuinely feel eventually they are going to have some they just can't throw them around like confetti and then walk away from them simply because it's legally possible to do so. Where that would really apply, because you raised it; where it would really apply is in the relationship that Denis O'Brien had with Massimo Prelz. They had been in different funding arrangements, and indeed, were to be in funding arrangements afterwards between them, and they had a very good relationship. And I would say that the strength of Denis O'Brien's belief, that the understanding he had where Massimo Prelz would stand up, admittedly not by the terms you are saying, not by a pure legal term, but I would be absolutely confident that his view of the relationship with Massimo Prelz and the kind of relationship they had and how they dealt with it in the past, was sufficient for him to be very firmly of the view that if he wanted that money, it was available to him.

Q. Just so that you

A. That's a bit different to the institutions with whom he wouldn't have had the same relationship.

Q. Just so that you understand where I am coming from, the Tribunal, of course, are seeking to establish the facts. The institutions are described all the time as "investors", they were never investors, isn't that the fact of the matter? That they were simply financial institutions that had written these letters of possible intent, put it that way?

A. Setting out their intention to invest under certain circumstances.

Q. Subject to any decision they might make later on?

A. Correct.

Q. So they were never investors in the project?

A. You can argue as of the time we are now talking about nobody was an investor in it, except Denis O'Brien, he was the only one that spent any money.

Q. And Telenor?

A. I don't think they had spent any money by then.

Q. Telenor had considerable staff through that period engaging in the build-up of the network.

A. Okay.

Q. These letters too have been described as letters of commitment. The term "commitment" is a term that denotes some form of binding arrangement. Now, I suggest to you that it is incorrect to use the term

"commitment" in relation to these letters. These are letters of comfort, and no more than that. Do you agree with that?

A. Well, I can't I suppose I can't disagree with it, but you know yeah, I agree with you.

Q. Now, as you have said, this is a small town, and of course Mr. O'Brien had to think of possibly doing business with these institutions at some later stage?

A. Mm-hmm.

Q. And we know he is on the Board of one of them now, so they didn't take umbrage obviously at their treatment at the time. Could I suggest to you, that when you were sent around to speak to Mr. McLaughlin, that this was Mr. O'Brien was thinking ahead, and it was the courteous and correct thing to do in the circumstances?

A. Mm-hmm. I'd agree with that, yeah.

Q. But he had no obligation to do anything of the sort?

A. He had no legal I know the point you are making.

He had no legal he could have walked away from those letters, that is true, but that was not the spirit, and it certainly would not have been the intention, you know. You just can't do that type of thing in commercial life, it's just not the thing to do.

Q. I can fully understand that indeed, Mr. Callaghan.

But we come to the final situation: At no stage was

there any legal block on Mr. Desmond or IIU or any other company being involved as an arranger or investor or in any other capacity by way of providing funds in this consortium?

A. That is correct.

Q. Isn't that so?

A. That's right. The only thing I would say there is, the 5% issue with Advent which they did argue, they did argue, but we dealt with that. That's the only, as close as you'd get to a legal situation.

Q. And in relation to Mr. Kyran McLaughlin's letter, is it reasonable to suggest that was a letter really to placate the institutions? Again, Dublin is a small place and he has to keep himself right, and he never pursued the parties looking for an answer to his letter, which I think speaks for itself?

A. Yeah. That's correct.

MR. FITZSIMONS: Thank you.

CHAIRMAN: Nothing in conclusion, Ms. O'Brien?

MS. O'BRIEN: No.

CHAIRMAN: Very good. Thanks very much for your attendance and assistance, Mr. Callaghan. Thank you indeed.

A. Thank you.

MR. COUGHLAN: Tuesday afternoon, Sir.

CHAIRMAN: What time?

MR. COUGHLAN: Two o'clock.

CHAIRMAN: Very good. Thank you.

THE TRIBUNAL THEN ADJOURNED UNTIL TUESDAY, 9TH

DECEMBER, 2003, AT 2 P.M.: