

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan, SC

Mr. Jerry Healy, SC

Ms. Jacqueline O'Brien, SC

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FOR THE DEPARTMENT OF

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

Mr. Gerry Kelly, SC

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FOR TELENOR: Mr. Eoghan Fitzsimons, SC

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For Michael Lowry: Mr. Ross Fanning, BL

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I N D E X

Witness: Examination: Question No.:

Denis O'Brien Mr. Coughlan 1 - 252

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY, 10TH

DECEMBER, 2003, AT 11AM:

CHAIRMAN: What has been arranged, Mr. Coughlan, is that, with a view to at least concluding Mr. O'Brien's examination by yourself, that we will sit for a morning session until shortly after one o'clock this morning, and tomorrow for an afternoon session, with a view to completing at least that important portion of matters.

MR. COUGHLAN: Yes. I am still discussing matters with Mr. McGonigal.

CONTINUATION OF EXAMINATION OF DENIS O'BRIEN BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Just before I recommence in the books, I think your solicitors have brought certain documents to the attention of the Tribunal, Mr. O'Brien. We have furnished just a little booklet. You have those?

A. I have, yes, photocopies of them.

Q. And I think the point you want to make, and it's in the context of Mr. Johansen's memo of the 4th May, and perhaps, the subsequent letter he wrote on the 6th May and your response to that, is that you are drawing attention to certain documents which you say point to drafts of the agreement which ultimately became the agreement of the 29th September, 1995, being exchanged with some Telenor people, isn't that right?

A. Yes. When the original book of evidence was put

together, some of these letters didn't appear in it.

So what I really want is to just draw attention to them.

Q. And emphasise that. I think the first one is just I'll go through them just for the moment.

There is a fax from Mr. Gerry Halpenny to you, dated 25th September, 1995, which encloses a fax from Per Simonsen to you, isn't that right?

A. Yes.

Q. And I think that fax from Per Simonsen just reads:

"Dear Denis,

"Please find attached changes in addition to document presented by you on Friday. I have still not got the final comment back from our lawyers, so minor changes can still be expected."

Then there is a page or a portion of a draft and there is various handwritten notes on it, suggested amendments, isn't that right?

A. That's correct.

Q. Then the next document is a file note of Gerry Halpenny recording a telephone attendance on Per Simonsen, dated 26th September, 1995.

And again, there seems to be some discussion around what ultimately became the arrangement agreement, isn't that right?

A. Correct.

Q. The third document then is a fax from Gerry Halpenny

to Michael Walsh, dated 26th September, 1995. And that is in the books I think, at Book 48, Document No. 62.

Then the fourth document is a fax from Gerry Halpenny to Per Simonsen, dated 28th September, 1995. And it reads:

"Per, attached is last draft of agreement with IIU, which has now been agreed with IIU."

I think that's dated the 28/9/1995.

"...which has been agreed which you. We will call you shortly to discuss it. The changes since the last draft are marked. Regards Gerry Halpenny."

Then he encloses the various changes in the draft.

Then there is a fax from Per Simonsen to Gerry Halpenny, dated 28th September, 1995, which is in Book 48, Document No. 63.

And then the sixth is a fax from Gerry Halpenny to Per Simonsen, dated 29th September, 1995. And it the message is: "Per, further to our telephone conversation last night, I enclose a revised draft agreement with IIU. I have marked the amendments made."

Then the final document is a fax from Gerry Halpenny to Michael Walsh, dated 29th September.

"Dear Michael,

"I spoke last night with Per Simonsen of Telenor, who had a number of additional comments in the agreement.

I attach a revised draft of the agreement showing the amendments made, none of which should cause you any problems.

"I understand that we have a meeting later today to finalise matters.

"Yours sincerely."

Those are the documents you wanted to draw the Tribunal's attention to.

A. Thank you.

Q. I don't think that there has ever been, just as I understand it, that there has ever been any dispute raised by Telenor that drafts were not being sent from the 29th on. I think the two points I think, that they made, that there wasn't legal review, and I think we have seen the memo of Mr. Buggy, that he came back to work on the 28th I think, and looked at the matter around the 29th. And I think the second point is that they weren't informed of the Bottin position at that time. Those are the, as I understand, the issues, if I could describe them as that?

A. I think they are wider than that, a little bit wider than that, because he is saying effectively that I negotiated and signed a loan. If you look at tab, in the correspondence, 136, which is the letter

Q. I am going to come to that. I am going to come to that because I want to go back to Mr.

A. I wouldn't limit it on those two points.

Q. Right. I am going to come to that, and I am going back to the memorandum of the 4th so that we can discuss it in greater detail, because I was just looking at those documents again closely last night and just a few things occurred to me to ask you about them.

A. Okay.

Q. And it might be more appropriate if I just continued on, come to the Tab 136 and go back to the memo and we can put it all together

A. Great, okay.

Q. If you I think we were at 135A yesterday. And we know from Mr. O'Connell that this letter was prepared in response to a letter which had been received from the Department on the 1st May of 1995, and a request made of Mr. O'Connell at the meeting with the Department I think, on the 3rd May, 1995. And there were a number of housekeeping matters, which are dealt with in the letter. And I think an explanation of the position was, the current position was sought from the Department. So this draft was prepared in response to those requests.

And it is in this form: "Dear Mr. Brennan,

"I refer to our recent meetings and now enclose the following" we can skip over these are the formal sort of documents that are required, down to Document No. 8.

And then the draft continues: "During our meeting you asked for an explanation for the involvement of International Investment & Underwriting Limited in this transaction, having regard to the prior involvement of Davy Stockbrokers and certain of their clients."

So that's the point being raised.

"As you know, the bid was made jointly by Telenor and Communicorp." He says that that change there was made by you, you see the arrow putting Communicorp before Telenor. Nothing turns. Just he "Who were accordingly responsible for its financing. However, the bid also indicated an intention to place 32% of the company with private and institutional investors (as to 20% immediately and 12% in the short to medium term). At that time, Davys and their clients had given conditional letters of intent in regard to funding 20% of the equity element of the involvement, but there was no legally binding commitment by them.

"Throughout the period prior to and after submission of its bid, Esat Digifone behaved consistently on the assumption that it would be awarded the licence, planning and spending accordingly. It was thought desirable to secure the proposed 20% non-Telenor/Communicorp funding and in addition, Communicorp wished to improve its financing arrangements for its share of the cost of the licence

fee and subsequent construction and launch costs

associated with the successful bid.

"Following a review of the possibilities available in the financial market, IIU indicated a willingness to arrange funding commitments; in exchange it wished to have the placing of shares and sought, in addition, a pre-placing of part of the 12% of Esat Digifone which (as indicated above and in the bid) was to be placed over time. All in all, Esat Digifone and Communicorp felt this to be a very advantageous offer.

"As you know, the bid merely provided that institutional investors, (which IIU is) would be approached to take up the non-Telenor/Communicorp shares, and references to other investors, (AIB, IBI, Advent and Standard Life) were given on an indicative/intent basis. Accordingly, we believe that the present structure is fully in accordance with the bid.

"IIU has agreed initially to take up loan stock in lieu of shares in respect of the pre-placing element of the commitment which will result in the shareholding structure certified in the attached letter from Mr." whoever was going to be "of Esat Digifone Limited.

"In this regard I should make it clear that the shareholding and the 40:40:20 ratio certified in that letter (and also referred to in Mr. Connolly's letter)

relate to the situation which will prevail upon and immediately prior to the grant of the licence; their delivery today should accordingly be regarded as being in anticipation of the issue of the relevant shares.

"I hope that all of the enclosed documents are clear and helpful, but if you have any other queries thereon, please let me know."

Again, I think that's your handwriting, is it, or

A. Yes.

Q. where you have a note back up to that paragraph, "Indeed AIB and Advent are playing a financial role in the project (i.e. now)."

Now, he said that that particular draft was approved by you with the amendments that you suggested. And we know that the document which went to the Department, the letter which went to the Department was only in the form of covering nine numbered paragraphs, the housekeeping matters in effect?

A. Mm-hmm.

Q. And Mr. O'Connell has informed us that it's his belief that he was either asked by the people that he was dealing with in the Department to omit the references or the explanation for IIU, or that he may have requested that that would not be included, and that there is agreement from them in relation to that. Do you remember anything about that?

A. I actually don't, but in reading this letter, I

believe that it's really work in progress because there is a number of things about the letter that change

Q. Yes, taking loan stock .

A. So I think it went to a few other drafts before we actually got there, and I just wonder whether the relevance of loan stock, you know, probably somebody took a view that putting in loan stock and the 12% maybe is just going to complicate matters.

Q. Well, I suppose really the issue, and Mr. O'Connell dealt with this, he was the one in the frontline dealing with the Department on this; the Department had, both in their letter of the 1st May and as Mr. O'Connell records in the meeting of the 3rd May, as he notes here, sought an explanation for the involvement of IIU, and that's what's being provided in the latter portions of this letter, there is no doubt about that. Whatever your view might be or anyone's view might be about the explanation, but that was what was being provided.

We know that when the letter went in its final form, in fact it was carried to the Department with the documentation, that that explanation was not included in the final letter that went, and Mr. O'Connell has informed us that it was either done as a result of the Department's request or as a result of the request on your side, and agreed to by the Department, if you

understand me. Do you have any recollection of that?

A. I actually don't, but it sounds plausible¹ how he's described it.

Q. All right. Well, I suppose when Mr. O'Connell informed us that it was one or the other, either the request from the Department or the request from your side; do you ever remember discussing or making any suggestion to anybody on your side that you would make such a request of the Department? I suppose I am trying to narrow it down as to from which side it may have come.

A. I don't, no. I don't.

Q. I am just looking at the next document, I am not sure that I need to ask you about it. It was a memorandum of Mr. O'Connell's I think or Mr. Halpenny's. And it's a meeting with Mr. Digerud, Mr. Johansen, Mr. Busch, Mr. Moran, Owen O'Connell, Gerry Halpenny.

"Department want licence at Monday. Documents to be delivered to Department today." This is on the 10th May, you see?

A. Yes.

Q. The 10th was a Friday I think.

A. I mean, I think just to put this to help you to put this into context

Q. There were a lot of meetings over that

A. There was a scramble to get everything ready, all the documentation, to get the shareholders agreement

signed, to get everything for the Department, and also to be ready for the press conference. So there were plenty of meetings going on.

Q. Do you know what at this stage what were you can see there, everyone understood the documents were to be delivered to the Department that day. That didn't happen in fact, or I am not sure about that. I just they went on the 13th I think?

A. "Documents to be delivered today." Yeah

Q. That would seem that it was initially thought they'd be delivered on the 10th. But you can see then there is "shareholders, beneficial ownership, funding, 40:40:20 document, underwriting agreement valid, expire on shareholders agreement.

" Telenor not prepared to dilute if necessary not to do the same."

A. There is some scrappy bits about the shareholders agreement which had not been, as far as I am aware, finalised, which is in

Q. There seemed to be some issue around the question the underwriting must be IIU's underwriting that's been spoken about there at that time, I suppose?

A. I don't know about that now. I think ultimately well, I know ultimately both of them underwrote.

Q. I understand that. But that's, the underwriting agreement the only underwriting agreement we know

about was the IIU, the 29th September one?

A. Yes.

Q. There must be some discussion I am just trying to understand what issues were exercising people's minds over this weekend. It was obviously a proposal that when the shareholders agreement was signed, that the underwriting agreement would fall away?

A. And that was to be covered by a new agreement which was the bridge agreement, whereby Telenor and IIU came in and lent us money

Q. A different agreement?

A. Yeah, and also the whole issue about 12.5, 12.4, 12.5 rose its head again. We were getting pressure from the Americans, the CSFB people, which led us to get finality on that, but also the second issue was whether Dermot would actually sell some of his shares to the existing shareholders. And so there was more discussion about that and the timing of that. So all of these things came together, and it was frenetic for about a week or ten days.

Q. Yes, I can see that.

A. And strong words were, you know, at times used, but...

Q. As Mr. O'Connell said, there may even have been many more meetings than the documents disclose because they were going on all the time and people were leaving meetings and going to meetings and he was up and down to the Department as well and

A. Yeah. Well, you see, it was the start of a 180 million investment, so it wouldn't be any different to, say, a public/private partnership, where everybody was signing up with the Department of Finance on one day, and there would be a frenetic period, trying to get everything and all the partners agreeing and all the contracts in place. So it was a major capital project. And because of that, there were a lot of moving parts.

Q. Now, we now go to Tab 136, and we can bring all the, we can bring the memorandum of the 4th May and matters like that into focus and the documents that your solicitor brought to our attention this morning. And of course, you responded to this letter as well. If we just take the letter first.

Was Mr. Johansen, to your knowledge, here for this period of frenetic activity, or for some of it at least anyway?

A. He would have been there for a fair amount of it.

Q. And I think if we look at this letter then.

"Dear Denis,

"I refer to the meeting held today, which I attended, together with Rolf Busch, general counsel of Telenor, Arthur Moran of Matheson Ormsby Prentice, our solicitor, Leslie Buckley and Paul Connolly, and your solicitor, Gerry Halpenny, and Knut Digerud and Owen O'Connell representing Esat Digifone."

That's I think, a reference to that note of

Mr. O'Connell's of that meeting.

"I would like to clarify our position following that meeting.

"The joint venture entered into between Communicorp and Telenor last year in order to bid for to be awarded the licence for the second GSM network in Ireland, was originally based on a 50:50 participation of Communicorp and Telenor. It was subsequently agreed that 20% would be made available to institutional investors (probably at a premium) and that, accordingly, Communicorp and Telenor would each hold 40%. It has subsequently been stressed by Telenor on several occasions that the equal participation of Communicorp and Telenor is a basic condition for Telenor's involvement in the company."

Now, can I take it you don't have any great difficulty with that particular paragraph?

A. I have major difficulty with it.

Q. With that paragraph?

A. Yes.

Q. Well, we will deal with that.

A. Okay. Do you want to do it now?

Q. Yes, just so that we don't lose sight of it.

A. Well, it's totally not true when he says that, "It was subsequently agreed that 20% would be made available to institutional investors (probably at a premium)."

Never defer

Q. At a premium.

A. Yeah, in other words you buy that 20% that they were going to buy was going to cost them more than, say, the share on a per share basis that we were paying.

Q. Can I take it so, that it was your understanding that that 20% would be at par?

A. It was everybody's understanding. And it's not true to say, maybe he has a different version, but never once did we ever seek to bring in investors at a premium. It wasn't credible to do it at the time.

Q. Okay. I take that point you make about that paragraph. It's correct to say, I think, that the joint venture agreement was to be on a 50:50 basis and with the introduction of institutions. Am I correct in understanding Mr. Johansen's position to be, and is he correct that it was made clear by Telenor at all times that their participation was to be on an equal footing with your participation?

A. It was in the joint venture agreement, where it was whatever they had, we had. I mean, it wasn't over-emphasised, because

Q. Would it would your understanding have been similar to his about the position?

A. With the one caveat, that Telenor did say at the very outset that they would like to move on part of their

stake, and they suggested a couple of names at the time.

Q. All right. I think you do respond in due course.

A. Well, the letter it's quite an interesting letter because it captures and sums up an awful lot of things, and in reading this letter, I think that there is a certain amount of rewriting of history here, and but I'm not sure for what purpose it is. And the other thing is, that Telenor was a state company at the time, so most of these people would have been former civil servants or effectively civil servants, and you know, there is an element, rightly or wrongly, of rewriting history to suit a purpose or getting the file right, okay?

Q. All right.

A. And perhaps things were moving so fast that perhaps he didn't quite, one, consider all the documentation, and secondly, tell, because they were a big company and he had many projects, perhaps information didn't feed up to him from his lieutenants, or else, perhaps, that he in turn didn't tell his boss, which was the Chief Executive, fully what was going on. So there is so many things in this letter that I have difficulty with

Q. All right, let's continue on and see where you disagree with the specifics in the letter.

A. Okay.

Q. We'll go to the paragraph: "At today's meeting, Communicorp's representatives confirmed that Communicorp would adhere to such equal participation principles with respect to the control of the company, but that their presently completed financial arrangements necessitated a deviation from that principle with respect to the two parties' economic interest in the company."

Do you think that can, that control would be equal, but that you were perhaps looking for more shares to

A. Yeah. Basically it says "contemplated financing arrangement", yeah. I mean, we were getting pressure from the institutional investors in the US to get more shares so that we could consolidate. Ultimately that was not achieved. But we did have a road map whereby we would increase our holding, which made them a little bit more comfortable.

Q. All right. We'll go onto the next paragraph then. "The bid submitted by Communicorp and Telenor was based on commitments from Allied Irish Banks and other parties to be the institutional investors and Advent's commitment to invest $\frac{1}{2}$ 30 million in Communicorp."

You don't disagree with that I suppose, do you

A. Broadly, it's broadly

Q. as his understanding?

A. It's broadly right.

Q. "In 1995, on an unspecified date, an arrangement agreement was negotiated and signed by you alone on behalf of the company, the effect of which was to dilute Communicorp and Telenor's interest in the company from 40% each to 37.5% each and making available to the counter party to the arrangement agreement, IIU, 25% of the company."

Now, you have brought certain documents let's go through it. It was the 29th September, we know that was the date. It was negotiated and signed on the 29th September. It was signed by you alone on behalf of the company that's correct, isn't it?

A. Yes. But there are with a caveat. I think you have to look at a number of documents, and I am going to list them, because when I was reading this last night, really we have to dispel the notion that the IIU agreement was entered independently by me without Telenor's approval, without their input and without their knowledge, okay? And if you go to Tab 37, Binder 48, I mean there is a letter from Knut Digerud to Michael Walsh welcoming him into the consortium.

Q. I know that letter. That's after the event, isn't that right?

A. Yes, but it all creates the picture of happiness. And on the 12th October, Tab 77, Binder 48, IIU this is Knut Digerud to me, IIU will strengthen the

credibility of the bid I am paraphrasing here.

Q. I know those letters.

A. And Tab 142, Binder 50, my letter to Arve, again killing some of these points. Tab 68, Binder 48, "We are pleased with the plan to have another solid Irish underwriter."

Q. Is that Mr. Johansen?

A. Mr. Johansen

Q. The 22nd of October letter?

A. Yes. And then Tab 63, which we have dealt with, Binder 48, which is Per Simonsen to Gerry Halpenny. Again they were part of looking at the documentation before it was signed. So perhaps, you know, this letter was written in a hurry. It didn't consider those facts, but I was not on a solo run.

Q. We'll continue on so with the letter. He says:

"The effect of signing the agreement was to dilute Communicorp and Telenor's interest in the company from 40% to 37.5."

t's correct, isn't that right? That was the effect

the agreement, and that IIU got 25%?

Well, in isolation you could look at it. But you have

to look back and ask, why did we go to IIU?

ause Telenor were not happy with the Advent
eement.

Q. I know, and I'll come back to that, because you said
t yesterday. I suppose that is the question: Why

you go to IIU? And perhaps that's the question
t Mr. Johansen is raising in his own mind?
But you know, the answer is in his own mind, because
knows well that Advent were still not
py sorry, Telenor were not happy with the Advent
reement, so we had to find somebody new to give them
t financial guarantee from the 3rd June joint
ture.

Q. He goes on in the paragraph: "The purpose of the
angement agreement was to strengthen Communicorp's
lity to finance its obligations in respect of the
ital required for the company."

Not totally true. The purpose was to strengthen and
erwrite the third party institutional investment
have that fully underwritten. But also, to
isfy Advent, we had to strengthen ourselves and
vide a financial guarantee, and that was IIU.

Q. And then he says: "The signing of the arrangement
reement was not authorised by any resolution of the
nt venture partners."

Technically he is probably right. But in reality, his
ple told us on the phone that night, go ahead, sign
They were brought through all the documentation.
fact, as far as I remember, they were brought
ough a number of drafts in the week preceding the
al agreement, if not a bit longer.

Q. So primarily you point to these documents,

Simonsen in particular, is that

Yeah. And then the documents that were made available
this binder as well. So when you mix them up

Q. You take the documents the communication with
Simonsen, you point to the letter from Mr. Haga to
hael Walsh welcoming them on board. And you say
t even if technically, yes, there wasn't a formal
olution under the joint venture agreement, you
nt to these as evidence of Telenor, in effect,
eeing

Yeah, but I was an authorised signatory as Chairman of
company.

Q. I understand the point.

So, if you look at the documentation you were given
s morning, there is enough in that to demonstrate
t they had opportunity to review it and approve it.

Q. Now, can you specifically just to help us
Sure.

Q. Who you would suggest in Telenor either gave the
ahead or accepted the position, I suppose as well,
ld not be an unreasonable way of looking at it?

I think there is a difference between who signed it
and who communicated go ahead. Because it may not
the same person.

Q. Right.

A. So the person who may have signed it off could have
been Knut Haga, I don't know for sure. But maybe

there is something in the documentation that I have missed. Or it could have been somebody else in the legal department of Telenor AS, which is the holding company. But it would have been communicated by somebody who just picked up the phone and said, look, I have spoken to my people, go ahead.

Q. Just so that I have an understanding of the structure, because you were involved with them. You believe that it could have been Knut Haga?

A. That reviewed the documentation.

Q. And/or somebody in the legal department, is your belief at least?

A. Yes, or it could have found its way to the Irish solicitors, I actually don't know.

Q. The communication in the documents you referred to here are all with Mr. Simonsen. Would that have been just a conduit?

A. He was just the conduit.

Q. Right. To whom did you speak to? Was it Mr. Halpenny or? Like, when you signed it, obviously you had to feel comfortable about signing it. Who do you believe you might have spoken to?

A. You see, Per Simonsen is the author of a letter dated the 28th September, and this is I think, the final points were these are comments back from Telenor.

Q. I can see that. I understand that. I'm just trying to to enable you to sign it, do you remember did

you speak to Mr. Haga? Did anybody tell that they had spoken to somebody in Telenor who said it's all right to go ahead and sign it? Do you remember about it?

A. Mr. Simonsen was handling it, okay, and was the conduit. So behind the conduit, I think there were other people in Telenor. So he would have probably come back to me, which I think is what happened, if I remember rightly, and said, go ahead, we are happy. And that would have either been to Gerry Halpenny or directly to me.

Q. All right. And could it have been you can understand, I am just trying to inquire here; could it have been anybody else? You don't have an absolute recollection you don't have a recollection of this. You are just trying to who was more likely to have discussed it with you?

A. All I know is, for sure, somebody from Telenor said, go ahead. The most likely person, I believe, but it's eight years ago, is Per Simonsen or Gerry Halpenny, having spoken to Per Simonsen.

Q. All right. Thank you.

A. We can narrow it to those two.

Q. The letter continues: "Now, we understand that Communicorp has established a further form of financing for its participation in the company, which it is suggested is conditional upon Communicorp obtaining 50% of the shares of the company, leaving

Telenor with 27.5%, and the financing company, IIU, with 12.5%. This arrangement is conditional upon Telenor's consent to the increase in Communicorp's ownership of the company from 37.5 to 50%."

Do you have any disagreement in anything that's stated there?

A. It's broadly correct.

Q. Right.

"As thoroughly explained to your representatives during today's meeting, Telenor cannot accept that Communicorp increase its shareholding from 37.5% to 50% without Telenor having the opportunity equally and on the same terms and conditions to increase to a 50% ownership and maintain equal participation in the company with Communicorp. Telenor considers that this proposed arrangement as a whole jeopardises fundamentally the basis of the joint venture between Communicorp and Telenor."

That was the position he was taking, isn't that right?

A. It looks like it, yes.

Q. "At today's meeting, Communicorp's representatives stated, however, that other sources of financing could be available to Communicorp on the basis of 37.5% ownership and without requirement to breach the equal participation."

Do you know what that's about?

A. Unless he is referring to the Credit Suisse First

Boston placing, I don't know.

Q. All right. Just reading it here myself, it seems to refer to something else, because it's correct that you were arguing for a position that you were under pressure to up your shareholding for the purpose of the CSFB placing. Well, perhaps we can ask Mr. Johansen about that.

A. Well you'll be relieved to hear that there was no Plan D, okay?

Q. Okay. Then, it continues: "Telenor would be willing to discuss a bridging arrangement giving Communicorp some time to put together financing of a 37.5% shareholding. As I hope you will understand, such a bridging arrangement would necessitate firm commitments in relation to the equal participation principle between Communicorp and Telenor and appropriate undertakings in that regard."

Again, he is, again, seems to be offering an olive branch and isn't looking for anything on the face of it

A. It had already been agreed, I believe. So he is just confirming it.

Q. Yes, he is not looking for any advantage for Telenor in that?

A. Probably not, no.

Q. All he is looking for is a commitment to equal participation, as I read it?

A. He didn't even need to write that because he was getting it anyway, because we had offered it. It was always with the approval of Telenor that the 12.5 would come.

Q. "If it would be convenient to you, I can make myself available in Dublin during the weekend of May 11/12 in order to discuss the above arrangements, but I will need to hear from you before 10am tomorrow, as I shall otherwise depart to Oslo."

And he looks forward to hearing from you.

Now, on the it might be useful if I open the document at Tab 137, and then perhaps, unless you want to deal with your response, or the letter you wrote to Arve Johansen, and then go back and look at the memorandum of the 4th May, and let's look at the whole picture?

A. Do it in the sequence

Q. All right. Well, let's open the document at 137.

This is

A. To Michael Walsh.

Q. to Michael Walsh from Arve Johansen. And he said:

"I refer to your letter of 11 May 1996, where you:-

"1. Enclose your letter to Communicorp of 1 May 1996"

that's the document I want to come back to "

outlining the terms and conditions subject to which

IIU would be willing to sell 12.5 percent of its

shareholding in Esat Digifone to Communicorp, bringing

Communicorp's shareholding in Digifone up to 50 percent, and ask Telenor to confirm that it would continue to support the Digifone project in such a case and;

"2. Enclose two draft share transfer agreements, subject to which IIU would transfer 2.5 percent of its share in Digifone each to Communicorp and Telenor.

"First we will comment on the arrangements outlined in your letter of the 1 May 1996 and then comment on the draft share agreement.

"Communicorp and Telenor last year entered into a joint venture bid for the second GSM licence in Ireland. Telenor believed that a joint venture between Communicorp and Telenor would be a strong contender for the second GSM licence in Ireland.

Telenor being an experienced and successful mobile operator and having sufficient financial strength to commit to such a project and Communicorp representing, first of all, the Irish participation in the project.

"Although Telenor would have preferred to have a majority participating interest, Telenor accepted that the joint venture with Communicorp was established on a 50:50 basis. This was accepted, despite the fact that Communicorp did not have the financial strength to carry half of the financial commitment that was necessary to support the joint venture if it was awarded the licence.

"As a consequence of Communicorp's lack of financial strength, Communicorp subsequently has invited institutional investors to participate in the project, necessitating a dilution of the existing shareholders. Communicorp has strongly argued that Telenor under the circumstances must accept a dilution of its participation, despite the fact that the dilution was caused by Communicorp's lack of financial strength.

Telenor was opposed to the reduction of its participating interests below that of Communicorp. On two occasions therefore, Communicorp's and Telenor's participation interest in Digifone has thus been reduced first to 40 percent and then to 37.5 percent.

"The reduction of Telenor's and Communicorp's participating interests from 50 percent to 40 percent each followed a commitment from the AIB and other institutional investors to take a 20 percent stake in Digifone, and Advent's commitment to invest \$30 million in Communicorp. The reduction from 40 percent to 37.5 percent followed as you will know from the arrangement agreement entered into sometime in 1995 between IIU and Denis O'Brien. Subject to this arrangement, IIU also undertook to underwrite Communicorp's financial obligations with respect to the funding of Digifone.

"Communicorp now has established yet another way of financing its share of the funding of Digifone. This

financial arrangement is organised by Credit Suisse

First Boston and would, as we understand from your letter of 1 May 1996 'Ideally require Communicorp to have 50 percent in Digifone.'

"In your letter of 1 May 1996, you state that you would be willing to sell 12.5 percent share in Digifone to Communicorp, bringing Communicorp's share in Digifone up to 50 percent. In return Communicorp would pay to IIU its historical costs related to the said 12.5 share, plus an amount equal to its subscriptions due on IIU's remaining 12.5 percent.

"First, Telenor wish to state that the transfer of 12.5% of the shares in Digifone from IIU to Communicorp would require Telenor's express consent, which, as you will know from the copy you have received of our letter to Denis O'Brien of 10 May 1996, Telenor is not prepared to give.

"Second, Telenor cannot confirm that it would continue to support the Digifone project if as a result of the events and arrangements described above Telenor would end up with the lower participating interest in Digifone than Communicorp.

"However, as you will know from the copy you received of our letter to Communicorp of the 10 May 1996, we have offered to Communicorp to enter into a 'Bridging agreement', subject to which Telenor would carry Communicorp's financial obligations vis-a-vis Digifone

during a limited time period, allowing Communicorp even more time to arrange its financing.

"With respect to your proposal concerning the transfer of 2.5 percent of the shares in Digifone to both Communicorp and Telenor, we consider that your handwritten points on the front page of the draft agreement need to be inserted, and in particular, the mechanism for the transfer of legal title to the shares with immediate effect from the signing of the agreements. We agree that recital A should be expanded to refer to the exact present shareholding of IIU. The two agreements require to be made interdependent on one another and should contain the usual warranty as to title to the shares being sold.

We also require that an undertaking be provided in the Telenor agreement that no further shares or interest in shares shall be offered for sale or otherwise dealt with IIU without those shares or interests being first offered to Telenor. Specifically no shares or interest in shares should be offered to Communicorp or any person or entity acting in concert with Communicorp without the prior written consent of Telenor.

"Finally, we take this opportunity to stress that it is necessary for the parties to sign the shareholders agreement as soon as possible and, at the latest, prior to the award of the licence."

That I think, brings us back to the memorandum of the 4th May, if you wouldn't mind, for a moment.

Sorry, first of all, perhaps I should ask you in relation to that; where do you disagree with the statements made by Mr. Johansen in that letter?

A. Okay. Paragraph 4. "Communicorp and Telenor last year," the very bottom of that it says, "Communicorp representing, first of all, the Irish participation in the project." Sorry, we were much more than just an Irish participation. We were in the telecoms business and the only company in that space at that time.

Q. All right.

A. The second thing is in the next paragraph, "Although Telenor would have preferred to have been a majority..." That was never on the table. We were never giving them majority. So

Q. Sorry, is that the next paragraph?

A. Yeah, he would have preferred to have a majority participation

Q. I think what he is saying, "Although Telenor would have preferred to have a majority participation, Telenor accepted that the joint venture with Communicorp was established on a 50:50.. I think what he is saying is that it might have been their desire before they entered the joint venture to

A. Okay. But I don't recall them ever saying, we want a majority.

Q. All right.

A. And the other thing is, "this was accepted, despite the fact that it did not have the financial strength to carry out

Q. " the financial commitments that was necessary to support the joint venture if it was awarded the licence"?

A. We had the ability, and obviously that has been borne out by what happened later on. We had the ability to meet our commitment on the day. And also, subsequently to raise a significant amount of capital and meet all our commitments.

Q. I think the point he is trying to make here is that you didn't have the ability to carry out 50% of the

A. We did.

Q. At that time. At the time the joint venture agreement was entered into?

A. Well, subject to us winning the licence. I mean... It's all about timing.

Q. All right.

A. You know, then we said, "As a consequence of Communicorp's lack of financial strength, Communicorp subsequently has invited..." Basically the consortium, Esat Digifone invited the institutional investors to participate in the project. I mean, we didn't independently go off and do this. We had the consent of our partner, Telenor, in doing this. And

this is different to what is said in the letter.

Q. As I understand that, just if I can try and Mr. Johansen can answer himself just to get your view on it. As I understand it there, that the moving force on the question of institutional investors was your side rather than Telenor. Telenor were quite happy at 50:50 themselves, but they accepted the position because they were persuaded, I suppose?

A. Well, there were merits actually there was merits in increasing the Irish content, and secondly, they knew and we knew that they were a non-EU country, and being at 50% may cause difficulties, we weren't totally sure of that, but we just felt that that was one thing that maybe we should avoid.

Q. I think in fairness, it was a step that you had taken prior to Telenor's involvement and Mr. Callaghan and yourself had spoken

A. But they thought that was elegant because it was 40:40:20, and that suited them. "Strongly argued that Telenor ... must accept..." Like, there wasn't big argument over bringing in the institutional third-party investors at all. You may think I am nitpicking, but for the sake of the record

Q. I am not.

A. The other thing is, that it says here on the next page: "The reduction of Telenor's/Communicorp's participating interest from 50 to 40 each allowed a

commitment from AIB and other institutional investors to take 20 percent and Advent's commitment to invest 30 million." I mean, they would have known we were incentivising Advent by allowing them in for 50% on the basis that they were going to hit the condition precedent, which was 4.2 in the agreement.

And then it goes on to say that, "The arrangement agreement from the arrangement agreement entered into sometime in 1995 between IIU and Denis O'Brien."

Like, again he is trying to make out that I did this independently. And there is enough evidence, I would have thought at this stage, to show that that is untrue.

The other thing is, that in the next paragraph he says, "Communicorp now has established yet another way of financing its share of the funding." It's not yet another way. We had started this process way back in 1995 before we even submitted our application. And then throughout the process of the application and then post the application, we moved to get closure on it, which it was achieved in the first couple of June of '96. So this, you know, it's not as if we came with another way of financing. This was something we were working on and they were aware of.

And the other point, he goes on: "Telenor cannot confirm that it will continue to support the Digifone project." The reason why that paragraph is in, is to

give a little bit of leverage. As far as I was concerned, it was going nowhere. This was a huge win for Telenor in the context of their international strategy. So I don't believe that for one minute they were ever going to leave the project.

So, then he goes into the detail of the two and a half, and all those conditions about the two and a half I think were always going to be in any agreement anyway, so it was not going to be a difficulty.

Q. Now, I think it's it would be fair to say, I suppose, that what Mr. Johansen was doing here, in writing to Mr. Walsh, was outlining his understanding of the position?

A. Yeah. There is also language difficulties, and we have seen that repeatedly in other elements of documentation. So to be fair, he is probably, in a long letter, coming to the main point, which is the 2.5%.

Q. Yes. But he is recounting there that the joint venture agreement, the institutions, the dilution to 37.5%; he is all the time saying to Mr. Walsh, this was all related to Communicorp's financial, or lack of financial strength. He doesn't seem to indicate anywhere there to Mr. Walsh that any dilution, even the dilution down to 37.5%, was done for the purpose of satisfying Telenor?

A. Well, it was ultimately.

Q. But it seems to be that at least

A. The reason why we brought IIU in was to satisfy Telenor, but also to get a more solid

Q. I know

A. feel around the institutions.

Q. I know your position on that, but here is, even as of the 11th May, 1996, Mr. Johansen, all the time referring to these steps having been taken because they related to the lack of financial strength of Communicorp, and he is not saying anything to Mr. Walsh that, for example, you were brought in because we needed a commitment or we needed a guarantee

A. I think the facts and the evidence that I have given over the last number of weeks would show that perhaps that is not the case.

Q. Very good. This particular letter, I think, was it was copied to you, wasn't it? Yes, it was.

A. Yes, it was. It has CC. I don't know whose file it came out of.

Q. Now, if we go back, now, to Tab 130. This is the memo, because

A. The 4th May.

Q. The 4th May.

A. Yeah.

Q. And you see it commences: "I have below summarised a few points that have become clear to me over the last

24 hours as a consequence of the information acquired regarding Communicorp's attempt to buy back 12.5% of the IIU shares."

So it's in that context he is making this memo, it would appear?

A. I think also, Telenor parachuted their head of legal, or I think he was one of their senior legal people, if not the head, a guy called Rolf Busch, and he appeared out of nowhere, to suddenly participate in a number of meetings.

Q. This was around this time now?

A. Yes.

Q. Was he

A. Because it's puzzling, I don't know who this memo was addressed to. Like, why was it produced? Like, is it a briefing document for somebody new or is it for the file?

Q. Well, I understood I am not sure, but I understood this was sent to Matheson Ormsby Prentice at least anyway.

A. Was it? So I think there is a lot of inaccuracies in it.

Q. All right. I just want to go through, because it's just to try and understand it.

"1. Denis O'Brien came personally over to see me in Oslo probably sometime during September last year. He informed me that based on information from various

important sources, it was necessary to strengthen the Irish profile of the bid and get on board people who would take a much more active role in fighting for Digifone than the neutral banks who basically would like to keep good relations with all consortia."

I am not going over the content. We have done that already.

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

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

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

A. Oh, yeah.

Q. And in fact, Mr. O'Connell, I seem to remember in the course of his evidence, saying that this was a very high price. They effectively took 25% for what they brought to the table that may be just his view?

A. I thought it was a fair price. I mean, you generally don't go into business with somebody unless both sides are happy, and we weren't unhappy. We thought 25, okay it's a little bit rich, but it was fine. But they opened at 30. I mean, and Dermot is a trader.

Q. "Denis had managed to reduce this to 25, but it was

absolutely impossible to move them down further. This was a disappointment to us, since everything we had said and done up to then had been focused on at least 40% ownership of the principal shareholdings at the time of the issuing of the licence."

Then he goes on about you pushing to try and get them more to take pain?

A. Dead right, absolutely. Because I was doing the work.

Q. You say yes, absolutely right. That's all right.

Then he goes on, that this was the first time that he experienced really hard and unpleasant push from Denis.

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

Now, again, if he is correct in his recollection of what you said on the 22nd September, it would have been some days later that it came into light, when the drafts were sent to them, that this was an underwriting agreement, if they weren't told that on the 22nd September?

A. Like, you know, you don't say, look we are bringing in somebody, a third party investor without describing what they are going to do. And when he says here,

"The nature of the agreement comes clear," well, again, this could be a language difficulty, but I explained to him that we were going to get the 20% fully underwritten, and a cast-iron guarantee that the money would be there, which would strengthen that element of it. And I believe also at that time, because we still had this outstanding issue about satisfying the financial agreement element of the joint venture of the 3rd June, that we had to satisfy them, and this was a way of a two for one nearly. So I don't know like, he is forgetting that these were the people who were pushing us and pushing us to get a financial guarantee, and ultimately we then get it and then say, we don't know anything about it, we never saw the document and Denis O'Brien signed this independently. It's untrue.

Q. Whatever about that, he does go on and say that this was unwillingly accepted by Telenor. So, he is saying it was accepted. Whether it was willingly or unwillingly, it was accepted?

A. There was no big there was no barney over this. There was no fight. Like, they were happy to sign it. They thought it was a good idea. And then there is the letter welcoming IIU, a lot of warmth and happiness. Like, there was no unhappiness here.

Q. He says they understood it to be the right step to take from an official Irish standpoint to secure the

licence. So I think what he is saying there is that, look, we weren't happy about it, but this was our understanding; if we were going to have a chance of securing the licence, we had to do this. I think that that's what he is saying there?

A. I just don't accept that they were unwillingly entered into it. That's the only argument I'd have.

Q. He then goes onto the drafting of it. I don't need to open that. He says, "The agreement wasn't signed by Telenor", correct. "Neither an authorised Digifone signature, nor as a shareholder or party to the agreement." Okay, we have dealt with that. He says, sometime shortly after this Advent disappear from the picture.

Then he goes on

A. Again that's not true.

Q. Well, in the context of which he understood them to be, I suppose?

A. I mean, Advent were they were in business with a company that had a substantial shareholding from that and with follow-on investment in June '96, in the institutional round.

Q. No, I don't think there is any dispute that Advent were your partners in Communicorp, they were a major shareholder in Communicorp.

Then he goes on to say in hindsight who benefited from the arrangement. You don't agree with that?

A. No.

Q. Now, it's 6 and 7 which are perhaps matters which give rise to this memorandum and the subsequent letter of the 6th. And he describes at 6, I am not going over it all again about something he has been told or learnt at the Department on the 3rd, isn't that right?

That he understood, or he understood whatever he was told, that there was a problem with IIU from an official, from the Ministry's point of view, from an official point of view; that's what he recorded?

A. I don't believe that to be true.

Q. You don't believe that. Well, it's what he has recorded?

A. Yes, he has recorded that.

Q. That's the first thing. Now, if you go on then to 7, because this is the one. "But the story doesn't end there." Then he goes on: "Two days ago I was informed by Denis that he had entered into an agreement with IIU to buy back 12.5% of the shares now held by IIU. I found it absolutely unbelievable."

And we opened this yesterday.

Now, that's the point that I really wanted to take up with you.

A. Sure.

Q. Because you said that the paper trail showed that you were frank and upfront in relation to this matter with him, or with Telenor. We know that back in late

January and February of 1996 you had sought to obtain

12.6% I think, of IIU's interest in the consortium.

And at that time there was correspondence. IIU had

indicated that they were prepared to do so provided

Telenor consented to that, isn't that right?

A. Yes.

Q. There was correspondence, I think you with IIU and you

with Telenor, about that issue. And there was a

response from Mr. Johansen, which we opened, which

informed you of Telenor's position, that they wanted

to keep things on an equal footing, and they offered

the bridging at that time, isn't that right? That was

how things panned out around January/February?

A. Yeah, the bridging I think was discussed earlier than

that, but... Yeah.

Q. And things seem to rest there, as far as I can see

from the documents, on the Telenor side at least

anyway?

A. Well, there is one thing here that we need to be very

clear on, is that I didn't enter into an agreement. I

didn't sign a document.

Q. Ah, no

A. Or a contract. I have had discussions and there were,

there was agreement in principle; in other words, we

had a list of things on a piece of paper.

Q. And that is the document I now want to come to. If

you go to it's a few documents.

A. It's not accurate to say I had entered into an agreement.

Q. He is saying that you told him. He said, "I was informed by Denis that he had entered into an agreement."

A. I didn't, and I would never have told him that.

Q. If you just go to it's the document at 127. And this is what you were if you go to 127?

A. I have it, yeah. Michael Walsh to me.

Q. This is the 1st May, which is two days prior to sorry, this memorandum of his is dated the 4th.

He says: "Two days ago I was informed by Denis," that would bring him back to the 2nd May, I suppose. Now, you have this document dated 1st May, 1996, which is it's subject to formal agreement. It's headed, "The Document", do you see that? It's from IIU to you, Michael Walsh to you?

A. Mmm. It's an understanding, yeah.

Q. And that document here is Michael Walsh wrote to you: "I write to confirm my understanding of our joint position in relation to IIU's holding in Digifone.

"Under the agreements, Esat Holdings and Telenor both own and have subscribed for 37.5% of the shares in Digifone, and IIU owns 25% and has subscribed capital accordingly.

"You have indicated that the investors being arranged

by CSFB would ideally require Esat to own 50% of Digifone. IIU have agreed with you that it would be prepared to place 12.5% of its shares with Esat for a payment of IR 6.5 million (being 12.5% of 52 million) together with any capital contribution made by IIU in relation to the said 12.5%. Currently based on Digifone's projections, assuming completion during May, this would require an additional payment of 2.25 million (being 12.5% of 18 million).

"Our willingness to place these shares with Esat is conditional inter alia on:-

"1. CSFB confirm that all of the necessary funding for Esat/Communicorp will be in place prior to the 31 May, 1996, and confirmation being received that International Investment and Underwriting Limited has been released from its underwriting obligations.

"2. Confirmation being received from the Department of Transport, Energy and Communications that this revised shareholding structure will have no adverse implications for the GSM licence.

"3. The completion of a shareholders agreement in a form which is acceptable to IIU.

"4. IIU being satisfied that Telenor will continue to fully support the Digifone project.

"5. All necessary consents and confirmation being obtained.

"As I have previously indicated, we are not prepared

to enter into a legally binding agreement in the absence of confirmation from CSFB that Esat will have sufficient funds to meet its obligations in relation to Digifone. In no event are we prepared to place shares with Esat unless all monies due are paid and all conditions are met prior to the 31 May 1996."

Now, that was the understanding that both you and IIU came to and was subject to formal agreement, isn't that right?

A. Yeah, I mean it's headed, and it says, "I write to confirm my understanding of our joint position," but there is item number 4, which is condition precedent really, and that is IIU being satisfied

Q. Telenor would continue to fully support the Digifone project?

A. And 5.

Q. And 5, all necessary consents and confirmations

A. So, I mean, when you roll that on to his memorandum later, it says here that he had entered into an agreement with IIU. Clearly I hadn't. I had an understanding if Telenor were happy.

Q. What I'm trying to tease out here is that, in fact, what Mr. Johansen is saying in this note is that you told him you had an agreement. Now, as I understand matters, it must have been Mr. Johansen's view that this 12.5% matter had been laid to rest way back in January or February, but that he found out on the 2nd

May of 1996, no matter what you told him, that there was something afoot in relation to the 12.5%, and this caused him concern?

A. Yes, but it was always on the basis that Telenor were going to be happy with it. And I think, you know, not that much hangs on this because the original proposal was that we would buy 12.6%. We then got advice from our auditors to say, well if you had 50% you could still consolidate. So we went to 12.5. So it is in that context that we went back to Telenor and said: Look, it's not 50.1, it's 50, plus we'll enter into the same shareholders agreement as if we owned 40. So there is I don't think there is any surprises here. This was festering for many months. It just hadn't been concluded.

Q. Well, it may have been festering, but was it a form of sore that was open to scrutiny by Telenor during this period?

A. Well, first of all, you know, we would have told Telenor, and informed them, subject to you being happy, this is what we'd like to do. So it's

Q. It does seem to record a surprise, doesn't it, by Mr. Johansen when he was informed of this on the 2nd May? If we just continue with say

A. There is so many other things in this memorandum that are inaccurate, that I don't think there is any there is no element of surprise here. This

was

Q. If we look at 7 so.

"But the story doesn't end there. Two days ago I was informed by Denis that he had entered into an agreement with IIU to buy back 12.5% of the share not held by IIU. I found it absolutely unbelievable."

It does seem to indicate a surprise on his part.

"I made it clear that Telenor would not accept anything but equal partnership. Either we buy 6.25 of the shares each or Telenor would take the other 12.5%."

He says: "I have now also seen the letter of agreement between Communicorp and IIU, which strongly supports the scenario outlined above."

That is the document, the letter of the 1st May from Michael Walsh to you.

A. That's quite well, you see, I know you think that this is quite interesting about absolutely unbelievable he uses the words "absolutely unbelievable". But if I had a conversation with you going over many, many months about 12 of 6% and now 12.5%, it wouldn't be that unbelievable.

Q. I agree.

A. If I had if I kept talking about if, you know, there is no surprise here. I think you'd have to ask him, to be fair, what was on his mind.

Q. All right. What he goes on with there, he says:

"IIU apparently has no (or very little at least) money and cannot afford more than 12.5%. The price agreed is a little cryptic, but it looks as though any advances IIU has to make for the disposed 12.5% before the transaction's effective date (31 May 1996) is seen as cost"?

A. How he could get that out of Michael Walsh's letter?

Q. All right.

A. I mean, if somebody sells something, does that mean that they have no money? To me it doesn't.

Q. I don't know.

"It will, if this is the case, serve as a moving target for IIU's eventual gain in the transaction, putting immense pressure on Communicorp to delay capital calls on Digifone until the US placement is finalised."

He goes on: "The return favour from Communicorp is to release IIU from all its underwriting obligations in Digifone."

That was proposed, wasn't it, that the underwriting, that they would be released from the underwriting obligation.

A. This is in the first

Q. Yes, it is.

"1. CSFB confirming all necessary fundings are in place by the 31st May, and confirmation being received that IIU has been released from its underwriting

obligations."

And he asks the question, that is something that an understanding, as you call it, or a position that yourself and IIU had, and he said: Look, there is a favour here from Communicorp and it's to release IIU from its underwriting obligation in Digifone. And he asks the question, which doesn't seem unreasonable, does Digifone have an opinion on this and what about Telenor?

A. Well, you see, if you're selling, if IIU are selling part of their shareholding, the natural thing they'd ask for is that they would get out of some of their obligations. And ultimately what happened was that there was a bridging facility put in place. I mean, possibly, and we could have been thinking that we could close the CSFB funding virtually at the same time on a back-to-back basis, and that would mean that we wouldn't have needed the underwriting.

Q. Then he continues on: "This effectively gives Communicorp back its 12.5% of shares at par (or close to it)"?

A. It doesn't, we were paying for it. And plus, we are paying the balance of their 12.5%. So again, he is wrong there.

Q. "Release IIU from all its underwriting liability" that seems to be correct "which Digifone paid 25% for." That seems to be correct, doesn't it?

A. Well, I wouldn't use the term "paid." I mean

Q. He has "paid" and he has it in quotation marks.

A. Well, you know, there was a fee agreed between IIU and

Communicorp of 3 or 400,000 for the underwriting. So

I don't know where

Q. Was that actually paid?

A. Pardon?

Q. Was that paid?

A. I don't know how it was treated in the end, whether it

was offset against

Q. We have often looked at that and can't find it. It

seemed to wither away or melt away?

A. Maybe we got a tip of the hat from Dermot, I don't

know.

Q. But I think what he is indicating there is the

underwriting, they got 25% for the underwriting, and

what he is saying here is: Look, they have been

released they are being released from it, but it's

Digifone that

A. No. You see, they were selling us 12.5%; that was the

proposal. And then they were saying, okay, if you buy

12.5, although you fund the 12.5%, but you also fund

our capital calls on the remaining 12.5.

Q. Mm-hmm.

A. So

Q. I think that's probably what he means by "cost or

close to", is it?

A. Well, it's not to his cost. It's to our cost. I have a lot of problems with this paragraph.

Q. All right. Then he goes on: "IIU ends up" if they are out of the underwriting position "... ends up having delivered absolutely nothing."

A. Totally untrue.

Q. "Having done nothing but complicated the award of the licence" if his note of the meeting is correct "(if we get it at all) but with some cash and 12.5% of the shares in Digifone which have effectively been deprived from Telenor, at the same time as the Department and the language meet get a little emotive here " our honoured partners, gently ask us to underwrite the whole project"?

A. This is a touch of Robert Ludlum, because it makes no sense, this paragraph, when you look at the evidence.

Q. Then he says: "Fortunately, IIU is at least realistic enough to see that this can not take place unless Telenor continue to support the project. This fact, the time limit and the cooperative spirit shown (by disclosing the letter)" that seems to disclose that it was IIU disclosed the letter "may signal a hope for a sensible solution to the mess."

A. This is, like, in my view, inaccurate.

Q. All right. Now, the reason I came back to this is that rather than being, and you didn't persist in saying that this was a rant by Mr. Johansen, but

rather than being anything fanciful, or plucked out of the air, all of the matters he is referring to, recording and referring to here, and whether you agree or disagree with them and the analysis he makes of them, whether you agree or disagree with the analysis, all does appear to be, at least, have some foundation.

He is looking at something which transpired on the 1st May. He is told, he is told about it on the 2nd May.

He attended a meeting in the Department, he said on the 3rd May, and he hears something else, and it all appears to be, at least, to be a fairly considered

appreciation by Mr. Johansen of the position he found himself in and Telenor found themselves in. And the final paragraph of the memorandum seems to be accepting or resigning himself to that position and proceeding and trying to deal with this, when he says:

"Fortunately IIU is at least realistic enough to see that this cannot take place unless Telenor continues to support the project. This fact, the time limit and the cooperative spirit shown (by disclosing the letter) may signal a hope for a sensible solution to this mess." As he understood it to be.

A. I mean, I think he was definitely physically there at these meetings. But the memorandum has so many inaccuracies in it, you have got to actually question really what this memorandum was really achieving because there are I really have to, you know, pick

up and say, that a lot of the points he is making are totally untrue.

Q. Could I ask you this, and Mr. Johansen will come and give his evidence, and I suppose what I am going to ask you may be a little embarrassing for him, but doesn't it have all the appearance of somebody who has perhaps realised pretty late in the day that things had got out-of-hand on his watch from Telenor's point of view, and it was only now dawning on him, and he was trying to deal with the situation?

A. I would agree with that statement, but he had all the information.

Q. Yes, but would you agree that it's it's a memorandum, if it was going up the line, it was a warts and all memorandum, wasn't it? He was letting it all hang there?

A. Well, he is being

Q. And perhaps you could criticise him for not being, you know, more astute or dealing with you more firmly at certain stages in the business relationship?

A. There is an implied criticism, you know, of a number of different people in this. But it all stems back to the fact that Telenor did not accept Advent. We would never have arrived at that position, as he describes it, even though I'd question what he is saying, if Telenor had accepted the financial guarantees of Advent.

Q. Well, I take your point

A. I mean, in other words, he was the author of the problem.

Q. You are saying he is effectively the author of his own misfortune or problem?

A. Not misfortune.

Q. Or problem?

A. Of the issues that he is being partly responsible for the issues, along with the rest of us.

Q. But the only thing I'd ask you about that is this: I think we both agree for this particular memorandum to go up the line to his superiors, it's Mr. Johansen could be criticised in relation to it?

A. You know, he is saying that there is so many inaccuracies here, but he is kind of saying, look, you know, you, our partners, are trying to pull the wool over our eyes. And that is totally untrue. There is documents everywhere to show that that is not true.

Q. Well, isn't it going a little bit further I agree with you, you could read it on the basis: Look, our partners are perhaps pooling the wool over our eyes, is, perhaps, putting it a little bit hard, but our partners have behaved in a manner which one might describe as put one over on us, or you said, pulling the wool over our eyes?

A. You see, we didn't.

Q. I know what you are saying, but this is what this

memorandum is saying, isn't it, really?

A. Well, if you go

Q. But it's going one step further. It's saying not only have they done it, but if we had kept our eyes open, we should have seen it?

A. But, you see, I don't think anything that we did was wrong. We didn't act in bad faith. They pushed us towards IIU, or somebody like them, to get a financial guarantee. IIU were brought in. They welcomed them. They approved the documentation. They then started working and negotiating with them on the shareholders agreement. They were happy all along. We told them that, listen, we were under pressure from the United States potential investors to own more of Digifone, to try and get it consolidated. We told them of this. We spoke in detail. We then spoke with IIU and said, we don't need 12.6, we need 12.5, but really we note ultimately Telenor have to be happy about this. Now he is trying to make out here that basically all this happened and he didn't know. And there is the files, the binders, and everything is littered with stuff to show that, yes, we were totally up front with him.

Q. Taking your point, when you say, look, this effectively arose because of Telenor's insistence, or refusing to back down on the question of a guarantee or something like that...

A. Well, it arose in a different way as well, Mr. Coughlan, and that is that it was very badly drafted, the 3rd June, because it said a financial guarantee. And we know, we don't know what a financial we have debated what is a financial guarantee. But if it was a bank guarantee, well then, that would have been absolute clarity on what it was. And we felt, if we had somebody strong enough to say, look, we are going to help them meet their commitments, well that would satisfy them. And it was very unusual to spend time like we did with a venture capitalist of the scale of Advent, and for them to come up with something that was very strong, in our view, and for them not to be happy. Because they knew we were involved, and they were also, they were informed of the terms of the agreement. We thought, this is it, we have satisfied them. We then move to Plan B, unfortunately, which was IIU, and I should preface my remarks by saying, IIU were a very good shareholder for Esat Digifone right up until 2000 when they ultimately sold their shares, and so they actually were lucky to have IIU there, because I think if this venture was a 50:50, there would have been World War 3, because there was a clash of cultures. We were dealing with civil servants from Norway, we were entrepreneurial, faster moving, and I think whether we like it or not, it would have been

difficult to keep the whole ship going in the one direction, and IIU stuck in the middle there, didn't take sides and guided us through some fairly choppy waters. So IIU, really, you know, did add something to this project. And they did step in and they did satisfy Telenor, no matter what Telenor says.

Q. Yes, but that's the very point, when you say that if Mr. Johansen was preparing this memorandum for an explanation or going up along the line or whatever the position, and you say these people came from a civil service background, or a semi-state background, or something of that nature, wouldn't you have expected him, because it would have been a total defence to his position or explanation for why this situation now existed, was that, as you know, we insisted on a guarantee and this was how it was brought about; wouldn't you have expected the memorandum to state something like that? It would have been a total defence to Mr. Johansen's own personal position?

A. We are in the dark on where this is going; whether it was to the file to get it right, whether it was going to his superior, or whether it was just an aide-memoire. I don't know. So maybe you are probably right, maybe they should have put in

Q. That's why I just wondered, because the first time the IIU involvement surfaced or focused on it being as a result of Telenor's insistence on a guarantee, was

when Mr. O'Connell gave his evidence here at the Tribunal and speculated along those lines. You have now come and given evidence to say that was why, but you don't see it in any of the documents, as we go along. You don't see it in this memorandum. I would have thought that it would have been, especially somebody coming from the cultural, civil service culture or semi-state culture, it would be the first point or perhaps the last point he made, as you know we insisted on this, so if there is a problem...

A. In fairness to him, he may have forgotten that that was the key cornerstone of where we were and where we got to.

Q. All right.

A. Like, I mean, you have got to be fair to Mr. Johansen, he is running their international division. He has a multitude of projects, in Russia, in Hungary, they had satellite ventures, so for him to be totally on top of the daily machinations as we moved to sign our licence on the 16th May, probably is, would be impossible.

Q. Just to clarify, you know that question, the $\frac{1}{2}$ 300,000 underwriting fee, I think just at

A. I'm not sure if it's precisely 300.

Q. It was around that.

A. Okay.

Q. It's it was proposed all right. It's tab, or Book 48, Tab 46. I think you wrote to Michael Walsh on the

19th September, 1995. And the first thing you said to him was, "We did not agree any underwriting fee. Your reward for underwriting is participating in Esat Digifone Limited." That's probably where

A. I am not sure well then, the subsequent agreement on the 29th September, whether a fee element

Q. We don't see we saw it arising earlier and then it seemed to disappear. You don't know

A. I wouldn't be a hundred percent sure.

Q. All right.

If you go to the next document, Tab 138, I think this is your handwriting?

A. Just one second. Yes.

Q. "Michael Walsh came to Paul Connolly's office." Is that right?

A. Saturday 11th.

Q. Saturday the 11th. He had been to a meeting I think, is it? With Arve, Arthur Moran

A. Arthur Moran.

Q. the Telenor lawyer, Rolf, that is Rolf Busche, at Esat Digifone's office.

"Michael Walsh gave me a copy of a letter from Telenor addressed to IIU." That's the letter we have opened, I think.

"He said Arve was getting more 'entrenched'.

"I told Michael Walsh that I had been to a meeting with Dermot Desmond at 6 o'clock and Dermot Desmond

had proposed the following:-

"1. We would agree to buy 2.5% to add to our 37.5%.

"2. Tell Arve that if he was not going to take up

IIU's offer of the 2.5%, we would be happy to.

"3. We would be agreeable to sign a shareholders

agreement on the 40:40:20 basis."

Is that right?

A. Yeah, probably is.

Q. "4. IIU or DD would give Communicorp Group Limited or

Esat Holdings a loan of the cash required to fund our

40% or 6 million." That's for the licence?

A. Mm-hmm.

Q. "5. DD said that once we had the licence we were 'all

in the one boat'.

"6. DD said he would in one transaction altogether do

the following:-

A. Sell 5% each to Telenor and Communicorp so that we

would have 45% each." This is after the licence, of

course?

A. Yes.

Q. "B: Insist upon Communicorp be"

A. Do you want me to read it?

Q. Yes.

A. "Insist upon Communicorp Group be granted an option

for a further 5% of Esat Digifone, which would bring

CGL's holding to 50%. DD thought that the option

would be exercisable over 12 months later. This

would" something "CGL" "help CGL to consolidate its 50% as per request from Credit Suisse in year 2, i.e. 1997.

"DD said he would be in a position to force the above by the fact that Telenor would know that he had the right to issue once to anyone."

Q. That this was arising out of the arrangement agreement?

A. Yeah.

Q. Do you know if at this time Telenor were aware of this particular

A. He would have well, it's well, it's in sequence really, if you look at the last few bits of correspondence.

Q. Michael Walsh has come from the meeting with Telenor. You had had a meeting with Dermot Desmond, so I take it that it looks that they may not have known about this at this particular stage?

A. Well, I mean it's all the same.

Q. I wonder is it? You see paragraph number 7; that was that you see that point there? This was this one free transfer, isn't it, that DD had? And that there was a discussion going on between you and him to the effect that he could force it through against the wishes of Telenor, perhaps?

A. No, no.

Q. No?

A. No.

Q. All right.

A. Because the shareholders agreement, and there was, I think there was a piece dealing with this, it was an addendum or part of the agreement, that if Dermot was selling two shares, he had to offer one share to Telenor, one to us. It was pari passu all the way through.

Q. He always retained the one he always retained, and it was brought into I think

A. Well, just

Q. By a side letter, it was brought into being that he had that one free transfer?

A. He did, but it provided he wouldn't transfer to ourselves or Telenor. And if you were to roll this all forward to early 2000, he was able to transfer. He now, at that stage, owned 1%, we owned 49.5 and Telenor 49.5, and when Telenor launched their hostile offer for our group, Dermot had that 1%, which he could free transfer, but Telenor forgot that he had that once-off right, and he was able to sell the 1% to British Telecom

Q. In fairness to Telenor, I don't know if they forgot. I think they argued from a different position. Am I not correct in thinking that arising Mr. O'Connell has told us that the reason for this one free transfer arising at all was that originally in the arrangement

agreement it was provided for that Mr. Desmond could place

A. Yes.

Q. with somebody else. Perfectly understandable in those circumstances

A. But he never did.

Q. Yes, I know that. I think when the first of all, there was the sale of the 2.5% each to you, and then there was the transfer to each of you in due course, leaving the situation that you had 49.5% each. I don't think Telenor ever forgot. I think Telenor argued that that had been exercised by Mr. Desmond in one of the previous

A. Not since

Q. He didn't take it any further, but that was the position they argued. I don't think they forgot?

A. It was a weak argument, because he wasn't selling to us. He was selling to a third party, which was BT.

Q. I am not here to adjudicate, nobody is here to adjudicate. We don't know whether it was weak or strong.

A. A lot hung on it because our shareholders would have suffered a loss of about probably 6 or 700 million.

Q. But there was a clear recognition by you and Mr. Desmond, and I have no doubt by Telenor, that as of this stage, that he did have this one free transfer. This is on the 11th May?

A. Yes, but when we entered into or looked at the shareholders agreement closely, you know, I don't know at what stage that part of the document was drafted.

You see, I don't know where we were on that, but he may or may not have been able to, and ultimately we got to a stage I was being put under pressure by Credit Suisse First Boston, get 50%, get 50%. We ultimately failed. And then they said, well the next best thing is, get as much of more equity as possible, which will make it more attractive for institutional investors to invest in you. And there was one sort of very important night where there was lots of conversations and eventually we got agreement where they would sell 2.5 plus the 5, and this was acceptable also to the Department because it was just swapping shareholdings within the consortium; we weren't selling to a third party, which is Article 8.

Q. Well, I suppose the question would have to be asked, when you look at that paragraph there, number 7, that: Does it indicate that there was a closer relationship between you and Mr. Desmond than Mr. Desmond had with Telenor, if you were discussing the fact that he could force through a situation because of this one free transfer to give you 5%, to bring you up to 50%, against the wishes of Telenor? Was there that closer relationship all along?

A. Well, it was debatable.

Q. I know there were harsh words in a moment?

A. There were harsh words on both sides. You know, one minute somebody would be with you, another person would have a different view. So I actually don't know at that time.

Q. There is another page to your note then. It's a note to file. Do you see that? "At 8:00pm Michael Walsh phoned Denis O'Brien to say

" he had spoken to DD.

"1. He did not want any pieces of paper around reflecting what was discussed." Do you know why? I take it, it was always discussed between you and him?

A. I don't know.

Q. "2. That we would have to trust DD.

"3. Denis O'Brien said he wanted to record his understanding of what was said, as DD" "sometimes DD speaks very fast and he wanted to make sure he fully understood Dermot Desmond's proposal re now and the 45:45:10 proposal with a 5% option to CGL.

"4. DOB asked Michael Walsh to confirm that IIU would sell their 10% to Telenor" sorry "would sell" or "would not sell"? " that is so Telenor would go from 45 to 50%. He said that every assurance Telenor would have we should have the same." Is that right?

What's that fourth point about that?

A. I don't know. It doesn't make any sense.

Q. No, it would make sense if it would not sell their 10%

to Telenor.

A. But where does the 55 go? In other words, we had a worry that IJU potentially could sell their remaining 10 to Telenor. Maybe that's it. I actually don't know. It's a long time ago.

Q. Yes, I know that. But this just happens to be your own note. And it looks as if what was being arrived at here was a verbal agreement between yourself and Mr. Desmond. Mr. Desmond didn't want any piece of paper around reflecting it?

A. Well, I think if and I don't know where we were on Article 8, so basically we couldn't do anything that was not compliant to what the licence was saying. So he probably said in his own mind, well, let's not have anything in writing until we know what's in the licence, and then we'll draft something between us once we see when we finalise and settle the licence.

Q. Between you and him, that is?

A. And Telenor.

Q. Well, he'd hardly have been thinking that he could have some agreement with Telenor where he could just say to them, look, whether you like it or not, I'm going to use this one free transfer to give Communicorp 5% and you are not going to

A. It also says here that we had a concern that he would transfer 10 to them and they could go to 55, but all

of this and the key thing here was that it was all conditional on Telenor being happy and cooperating.

Q. Well, I think it was all conditional on Telenor continuing to support the project, because the whole thing would have fallen apart if Telenor didn't support the project; you couldn't have got the licence?

A. It wouldn't have happened.

Q. You couldn't have got the licence?

A. It wouldn't have happened.

Q. Why wouldn't it have happened?

A. Because they were going nowhere.

Q. They were going

A. Nowhere.

Q. That's what I am trying to understand. You and Mr. Desmond had a business fix on this there is nothing wrong with that?

A. No, I believe they were never going to leave the consortium. I mean, this was a massive deal for them in their international strategy. They only owned 15% of a Hungarian licence. This was 40%. And it was a bite-sized investment for them. I mean, they didn't have the balance sheet to go into a country the size, you know, of America, for example. So, this was a nice deal for them.

Q. But, as you say, they also, they couldn't back you understood that, making your business calculation, and

can we take it, that from your discussions with Mr. Desmond, you had a fair understanding between you that Telenor were not going to back out, no matter how they may have been squeezed?

A. They weren't squeezed, first of all. And secondly, everything that we were doing was going to be approved and with their consent. So, there is no there is nothing underneath all of this; this is dealing with them upfront, explaining every step of the way.

Q. Well, did you explain this to them?

A. What?

Q. This understanding you had with Mr. Desmond?

A. Well, you had, this was part of the you need to go on further.

Q. Let's go on.

A. It's the start of a whole big debate before the licence was signed.

Q. If we just go there is a Tab 139 now, I think.

A. Yeah.

Q. This is an attendance, Mr. O'Connell's attendance at Fitzwilliam House: "Neville O'Byrne, Michael Walsh, Arve Johansen, Rolf Busch, Arthur Moran, Owen O'Connell, Gerry Halpenny.

"Need to increase authorised capital to verify issue capital, transfer of capital for 50 million, joint statement."

This is the licence, when they were talking about

here.

"Check board minutes. Increase authorised capital.

Execute two transfers" that's the 2.5%. "IIU to

Telenor and IIU to Esat."

Matters continue along in that vein in this note.

And then if you go over: "Subordinated loan by

Telenor 40%, IIU 60%, with conversion after four

months." This was when the discussion was that the

loan to Communicorp would be funded 40:60, IIU funding

the 60. We know how things evolved subsequently.

Then if you go down: "Dermot Desmond will consider

'placing' a further blank percent, not copied after

licence, offering equally to Communicorp and Telenor

(45:45:10) but no formal agreement to do this.

"Denis O'Brien" it looks as if you may have joined

the meeting or something, or maybe the

telephone "2.5, also wants four months funding.

15 million, wants to see specific terms. Should be

per underwriting i.e. 60:40.

"Still wants 50s %, plus commitment from DD 2 all of

10%.

"If all of this not agreed, could not go forward on

licence. Monday/Tuesday/Wednesday; would wish to

await funding (due 20 May)."

It looks as if that's a separate meeting you are

having with Owen O'Connell to the meeting with the

other people. Because it's unlikely that you would

have been having a discussion with Owen O'Connell in front of the Telenor people.

"Still wants 50%, plus commitment from Dermot Desmond"?

A. No, I don't think so.

Q. All right.

A. I could be totally wrong, but...

Q. All right.

A. Sure, they knew about trying to get to 50, and the 25.5%. So I wouldn't necessarily assume that.

Q. All right. "Michael Walsh, discussion DOB. Telenor not willing re 50% unless they are 50%. IIU not willing to release this. Repeated terms above. IIU will definitely not go below 10%. Will allow DOB in until 30 May to pay for 2% (amount obscured by twenty something).

"Money will have to go in from Telenor and IIU.

"DOB: No longer (words crossed out). Trusts DD or MW will seek injunction to block signing of licence."

What negotiating position was being taken up there,

Mr. O'Brien, do you remember?

A. Listen, everybody had the gloves off at this stage and there was a lot of frustration.

Q. I take it that you weren't going to

A. No, no. I think, just to help you on this, what we were trying to do is get an assurance on the one hand.

We were getting the Americans saying, you need more.

And we needed Dermot to give us a verbal assurance that he would give us more and Telenor more *pari passu*. And ultimately that's what's happened. We had 2.5 to bring it to 40, and then we bought a further 5 each shortly thereafter. And I believe we would have brought the Department into our confidence on the fact that we would have liked to have increased to 45 as well. I think there is some note in some of the files

Q. When you reach cruising altitude, or words to that effect?

A. Yes, that's right. So this was like a long night, I think it went on till two in the morning, and basically when we all got our verbal assurances from each other, everybody was happy.

Q. Mm-hmm. Well, if you go on with the note then:

"DOB response

"2 and a half 40 straightforward need 4 months"?

A. I only needed three weeks, but I asked for four months, just in case.

Q. Fair enough. "Next 5% in writing 45%." You were looking for a right.

"Also Telenor, okay.

"Option for 5% at fair value within 2 years.

Can have same to Telenor, like Telenor offer 3 to 5 years except all subject to confirmation by CSFB by

3pm tomorrow.

Re placing requirements by demonstrating

potential 5%.

IIU to finance 40% by Communicorp."

Can I ask you there: is there any documentation from

CSFB wherein they state that you needed to get to this

50%?

A. The best person to pose that is Paul Connolly because

he would have been we had people parked in New York

working on, and I was going backwards and forwards.

Q. I take it you have no difficulty in us asking CSFB

about this?

A. Not at all, no. You see, a lot of this would have

been there would have conference calls of three or

four investment bankers.

Q. There are lots of calls, there is no doubt about that.

A. And they would have said, look, you know, get 50.

Then we said, we can't get 50. Well, then they said,

try and get 45, which we did.

Q. I agree, there are lots of calls, there is no doubt

about that.

A. Yeah.

Q. Then: "Michael Walsh will discuss DD. 4 months not

acceptable." That is you looking for four months.

"Did deal DD last night" (bad photocopy) far line

is obscured there.

"Won't deal with people who renege" (unknown word).

Is absolutely entrenched. All to be cleared up May.

Mortgage over shares. Right to take them back and sell them.

"Possibly not sell shares now but let DOB come up with money at any time in next 4 months.

"If Denis wants something in writing, he doesn't trust me, he can F off.

"No" f-o "No, 2.5% both sides on terms agreed last night. Even DOB does not trust him, will not undertake to offer 10%."

This is, I suppose, Mr. Desmond complaining that you won't trust him?

A. Well, what happened was that, if I remember rightly, is that the Americans were saying, get something in writing. And Dermot says, well you have got to trust me. So I'm between two people, one wants something in writing and the other person doesn't want to give it in writing, and you know, even though, like, you know, I knew that Dermot, once he had given me his word, that it was cast-iron, for me to turn around to the Americans, there were kind of saying, well why won't he give it to you in writing? Is that such a big deal?

Q. What was the big deal?

A. I actually don't it could have been that Dermot was saying, take my word, but I'm not giving it to you in writing.

Q. Well, as you saw it, it was certainly causing you difficulties with the Americans. It would have been handy to have a little note, wouldn't it?

A. Well, again, you know, the Americans took my word, because I explained the kind of person Dermot is. I also explained to him about the Irish Distillers, where he had that handshake for the purchase of the shares, which he went to the High Court on. And when they got all that, the flavour of what sort of a guy he was, that he would always deliver, well then they ultimately accepted it, but obviously they were holding out for a letter.

Q. The note continues then, it must have got fairly heated because there is a note: "DOB enormous bridges to rebuild if he wants to get anything from DD. DD contactable 15 to 20 minutes." Is this just people playing

A. There is a lot of exaggeration, a lot of emotion. There is no bridges to be rebuilt. And there was no apology. Myself and Dermot had a conversation on the phone. Nobody was shouting at each other. And we eventually found a solution.

Q. Very good. If you go to Document 140.

A. Yeah, this is the

Q. You sent a note to Mr. Desmond, isn't that right?

A. Well, yeah. I mean, he said, give me what your understanding of it is. And I just didn't want to

have any misunderstanding on this particular issue because I had the CSFB people and I wanted to make sure that what my understanding was, was absolutely a hundred percent so that I could tell them the next day. So it talks about the 2.5, then talks about sometime between issuing the licence and ten days later, IIU would sell another 5% to Telenor and Esat, leaving parties at 45. And there would be a gentleman's understanding that IIU would dispose its holding at firm market value after three years. Ultimately they did nine out of the ten, so they lived up to it.

Then I was having another conversation that morning. I may have, it depends what time of night it was, but I may have been, from another room, calling CSFB.

Q. Can I ask you this: I know when you look back at this in hindsight yourself and you can smile at some of the matters, it looks to have been a period when there were some fairly heated exchanges going on, and that there was a certain amount of disarray; in other words, Telenor were in a position to commit and fund. You were in a position where you were trying to get more to satisfy your potential funders, i.e. CSFB, is that right?

A. That's right.

Q. And all of the controversy at that period and all of the debate generated amongst the shareholders was all

related to your position primarily, that is your

position with CSFB?

A. In the period of May.

Q. In this period leading up to just prior to the signing off of the licence, isn't that right? Would that be fair?

A. I think it was the beginning of a clash of culture as well.

Q. But from the documents, at least, you were driving for a position. You say that you were being advised by CSFB that this is what you should be doing, isn't that right, to make it easier for them to do work in raising funds?

A. And I had to call, I had to make a judgement call, whether what they were saying was whether they were just putting pressure on me. So there was a balancing there as well.

Q. I can understand that.

A. Because they went from 50 to 45.

Q. It would have been of course it would have been easier if it was at 50. There doesn't seem to be any doubt about that. But it was all to do with the need for you to generate funds, wasn't it?

A. Not entirely, no. Not entirely.

Q. What was what other issues were arising?

A. Well, there was an issue of sort of signing up to an acceptable shareholders agreement, because if you have

one partner with a very big balance sheet and you have a partner that is getting its balance sheet together, you don't want to be forced in a situation where there is a cash-call and you don't get notice, and you need to have a curing mechanism if you don't put up your money on the day, and you know, what happens then after a period of time when it's not cured? I mean, these were all big issues for us to agree.

Q. I can understand that, but I'm just, again, looking at the documents, the whole way along. As far as I can see, Telenor, from early on, recognising your need to raise funds back in January and February of 1996 offered bridging without imposing any penalty in relation to it?

A. No, no.

Q. Even after Mr. Johansen's memorandum of the 4th May, and in his letter of the 6th May, he is still offering bridging in those circumstances, and all that he is looking for is that you'd participate equally in the

A. And we weren't denying his right to that. We were making arguments that maybe how he might change his mind, but they weren't successful.

Q. But it doesn't seem to be, on the documents at least anyway, and I haven't heard from anybody in the witness-box, that Telenor were putting any pressure on about this or behaving in any form of predatory manner

about it. It looks to me as if they were behaving, that they were quite content with giving you breathing space, even in the shareholders agreement?

A. I think they recognised that we were an essential element in the whole consortium, and that there was an understanding that we would be together in the investment. So it's quite normal in business where, if you have a partner that has a delay in coming up with its money, that you actually fund them, I have done this a number of occasions, and then ultimately the partner comes up with the money.

Q. Why do you think that they had began to realise that you were an essential element?

A. Because we were in all over the bid. We led the charge.

Q. So were they, and they had the funds and they had the technical capacity to do it?

A. We were central. We had worked on the bid for two and a half, three years. We had put the whole thing together; hired the consultants, hired all the staff, and they felt that there was a good fusion of two cultures. One is a fast moving entrepreneurial culture, and one was a large organisation that had a lot of technical competence.

Q. But you think that around this time, around the middle of May

A. Maybe it had been forgotten a little bit.

Q. that the clash was beginning to exert some sort of

A. It happened much later.

Q. pressure?

A. Well, it happened because the project went from 120 to 186 million, and that put me in a very serious position because I had closed my financing with Credit Suisse First Boston and only weeks later I had to go back on a plane to New York and say, listen, the business plan that you invested in is now costing an extra 60 million. And that left me in a really serious situation in terms of credibility; that you say to investors, come in on this basis, it's 120 million, and next thing it's up by 60-odd million. And I actually, to show good faith, I actually said to them, the partner in Credit Suisse First Boston, that I would cede more shares and give them more shares because I would not want them to think that I was leading them astray, that I had this information before we closed our June '96 placing.

Q. I think Mr. Walsh carried out an analysis and prepared a report on his side

A. One of his colleagues, yes.

Q. about that matter?

A. Yes.

Q. I just wonder, if we go to Book 50 for a moment

CHAIRMAN: You must be pretty close to winding-up,

Mr. Coughlan?

Q. MR. COUGHLAN: I just thought in fairness to Mr. O'Brien, perhaps to deal with your letter, in response to Mr. Johansen.

A. Yes. What tab is that again?

Q. It's at Tab 142. Now, I take it you agree with me, we don't need to consider the letter, insofar as it deals with the appointment of Barry Maloney and Knut Digerud?

A. No, is this letter on the record already

Q. It's on the record.

A. in the Tribunal? It's been read out, has it?

Q. Yes.

A. Great, okay.

Q. But you can see there, that you are referring to his letter to you, and you say that you are, "disturbed by the content and inaccuracy of both these letters.

Furthermore, your continued personal comments throughout the meeting to my colleagues on Friday at the office of MOP, when you also questioned the integrity of Dermot Desmond, IIU and myself, was outrageous and totally unacceptable.

"Just to remind you of some of the things you said which were noted and minuted at the meeting.

" The IIU agreement prior to the awarding of the licence 'was a method for Denis O'Brien to get backdoor control of the business,'

" The IIU agreement was entered into without the knowledge of Telenor.

" On a number of occasions you clearly cast dispersions (sic) on my character, having repeated these both Leslie Buckley and Paul Connolly stated that they were not prepared to accept the personal nature and basis of your allegations.

"This kind of behaviour is not acceptable to us as partners and prevents reasonable discussion and debate taking place."

Then you say: "May I remind you of the sequence of events.

"IIU conspiracy theory:

"1. On Friday, 22nd September, 1995, I travelled to Oslo to meet with Kieran Mahon and yourself to discuss the GSM bid and participation of IIU in the consortium. Per Simonsen also joined us later on in the meeting.

"I had received a letter dated 15 September (copy attached) from Knut Haga stating that Advent's letter of the financial support was not acceptable. IIU's participation for 25% of the equity in Esat Digifone was brought about for two reasons. Firstly, it was viewed that the consortium needed more firmly committed Irish investment content, as the other institutional letters from IBI, AIB, Standard Life and letters of intent were not legally binding. The other

reason was that Telenor had rejected Advent's letter of financial support.

"In your letter dated 2 October 1995 which I enclose, you state in order to reassure the Ministry and give an even stronger signal to the Irish community in general, we are pleased with the plan to have another solid underwriter.

"It was also viewed that by having 62.5% Irish content, the bid would be greatly enhanced.

Later in the same letter you state: "But on the basis of the JV and draft shareholders agreement, we feel obliged and accept a pro rata dilution by 37.5%. Any further dilution would be in conflict with the principles of our participation and board resolution of Telenor AS.

"The Norwegian content (non-EU) was deemed to be high at 40%, particularly since Kieran Mahon and Per Simonsen told me on the 27 April 1995 that Telenor would be selling off half its interest within 12 months to Tele Danmark from an EU member.

"At our meeting on the 22 September 1995 in Oslo I made two requests:

"1. Communicorp Group did not want to reduce its holding to 27.5% because we were the lead consortium."

I don't think I need continue the rest of that.

That's fine.

"2. Telenor had refused to go pari passu on the bid

costs, which at the time were running at 1.5 million to 1.6 million. I had asked you to go pari passu and you refused, despite reasoned arguments by me on behalf of Communicorp. However, your letter on the 2 October 1995 did say that Telenor, based on the agreement, will absorb its equitable share of these costs. If, however, you feel that Communicorp for some reason is not fully compensated we are willing to discuss this problem in further detail. Both myself and my colleagues did raise the matter with yourself and Knut Haga, but we were told that Telenor was not prepared to go pari passu. In essence, Communicorp risks 1.1 million on the licence bid, while Telenor were only prepared to risk $\frac{1}{2}$ 2.5 million. This is not the behaviour of a partner.

"To finish on this point, I feel it incomprehensible that you are still arguing that IIU have a 20% holding and that you want Communicorp to cede 5% to IIU. You also claimed that Telenor never approved IIU's participation in our consortium. This is in direct contradiction to your letter of the 2 October. In fact, you told the meeting on Friday last, minutes of which have been passed to me, that 'I do not accept the arrangement with IIU.' All documents between IIU and Esat Digifone were reviewed and cleared in advance of signing by Telenor executives.

"Clearly you now have arrived at a situation, despite

your letter of the 2 October, that you disagree with both partners, Communicorp and IIU."

Then you go on to deal with the 12.5% shareholding issue.

"IIU hosted an Esat Digifone shareholders' breakfast meeting on the 9 February. At this meeting I formally asked both Telenor and IIU whether they'd be interested in selling Communicorp 12.5%, as our investment advisers in New York, CSFB, had advised us that US investors would want us to consolidate our holdings in Esat Digifone. Initially we thought we would need 12.6% in order to consolidate our holdings for accounting reasons, but subsequently we were informed by KPMG that only 50% was required. We informed IIU of this. Subsequently Telenor wrote to us to say that they were not interested in selling any shares. On the 27 February, we wrote to Knut Digerud to say that we were pursuing a deal with IIU to purchase 12.5% from them.

"At all stages we were frank about our pressing need to purchase 12.5% in order to complete our US placing. Richard O'Toole, representing Communicorp, had also been open with Knut Haga during the detailed shareholders agreement negotiations.

"In fact, we did not ask for any changes in the shareholders agreement to reflect a 60% shareholding. We negotiated in good faith on the basis of equality,

with no one partner dominating the other. We wanted the shareholders agreement to reflect this basic principle and pushed for the outcome.

"Since the 27 February you knew that we were going ahead with the purchase of 12.5% from IIU and with the placing in US with CSFB to finance 50% economic interest in Esat Digifone. At our meeting on 2 May, I updated you on the CSFB placing and drew out a financing chart. You expressed some concern about Communicorp increasing to 50%, but I again explained the rationale for this, as we needed this economic interest to close the placing. You also told me before you left my office to go to the Canadian Ambassador's residence to sign the Nortel contract, that there would not have been a licence without Denis O'Brien."

Can I take it that was on the 2nd May, that he was going to sign the Nortel contract?

A. I believe it was, yeah.

Q. "At 7.30pm I received a conference call from Scott Seaton, Managing Director of CSFB, who is in charge while replacing Sean Twomey. They told me that you had contacted them to ask about Communicorp's placing, and whether we needed to consolidate our 50% shareholding in Esat Digifone. They asked whether I had given you permission to talk to them directly about the placing. I told them absolutely no.

"Arve, you interfered without my permission in calling my company's investment bank, CSFB, to seek information regarding our forthcoming placement. You have absolutely no right, nor did you receive my consent to do this."

And the rest of the letter deals with Barry Maloney and Knut Digerud. Isn't that right?

Now, I think we have dealt with the period from January, February, right up to the 2nd May, Mr. Johansen issues. This was your position being stated here in this letter on this issue, isn't that right?

A. Yes.

Q. And you also deal with the question of the meeting of the 22nd September, 1995, in Oslo, and references to the correspondence from Mr. Johansen in respect of that?

A. Yes.

Q. And that's your position in relation to that.

Could I just ask you one question: When Mr. Johansen, as you noted here, rang CSFB, you could be annoyed about it, that's understandable, but if the matter was so crucial at that stage, what was the difficulty in allowing Mr. Johansen, or somebody from Telenor, to talk to CSFB about this 50%?

A. It was none, it's none of his business. I mean, it was very irregular for somebody to pick up the phone

and ring somebody else's bank

Q. I take your point about that.

A. I mean, it was off the wall behaviour. The Americans rang me that night and said, who is this guy?

Q. I take your point about that. But if this was so crucial, and this is the position that you were pushing for here, wouldn't it have been very simple to say, well look, you know, maybe he doesn't understand exactly the position about it, that maybe he shouldn't have rung the bank, but would you ever mind giving him and ring and saying, look, this is the situation?

Wouldn't it have helped your position here with Dermot Desmond and with Telenor?

A. Well, I mean, we were giving them feedback as to how the placing was going, and they had no reason not to accept that feedback.

Q. No, but around this time things had got a bit heated, hadn't it, between the shareholders?

A. I have been in business a long time. What he did that night was very, very irregular.

Q. You were annoyed about that. I understand that.

But

A. It's like me ringing your bank and saying, listen, does this gentleman have, you know, how's his placing going? And you know, is that condition in the placing, you know, is that holding up or

Q. I understand that

A. You'd hit the roof.

Q. I understand the annoyance. But I am just wondering, when positions were reasonably fraught here in Dublin on the dealings between the shareholders leading up to the signing of the shareholders agreement, and you wanted to achieve a position which you believed to be as a result of pressure coming from CSFB, wouldn't it

A. Nobody was questioning that, though.

Q. Wouldn't it have just eased the thing dramatically if you had said, ring Arve Johansen. Would you tell him what you are saying to me?

A. I suppose if you are looking back eight years later, I mean it would have been maybe one of a number of things I would have done.

Q. Pardon?

A. In looking back eight years later, you can say, well practically could that not have been done? But I suppose it wasn't an issue because people were being fed information about, you know, how things were going.

Q. Well, it certainly must have been an issue in the mind of Mr. Johansen, if he thought that he should pick up the phone and make a phone call?

A. I mean, there is a lot of irregular things that he did do, so this was just one of them.

CHAIRMAN: Mr. Coughlan, what time did we fix for

tomorrow? Two o'clock.

MR. COUGHLAN: Two o'clock.

MR. McGONIGAL: Two, and sit late if necessary.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,

THURSDAY, 11TH DECEMBER, 2003, AT 2 P.M..