

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan, SC

Mr. Jerry Healy, SC

Ms. Jacqueline O'Brien, SC

Instructed by: Michael Heneghan

Solicitor

FOR THE DEPARTMENT OF

COMMUNICATIONS, MARINE &

NATURAL RESOURCES:

Mr. Richard Law Nesbitt, SC

Mr. Diarmuid Rossa Phelan, BL

Instructed by Matthew Shaw

Chief State Solicitors Office

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

Mr. Gerry Kelly, SC

Mr. James O'Callaghan, BL

Instructed by: Owen O'Sullivan

William Fry Solicitors

FOR TELENOR: Mr. Eoghan Fitzsimons, SC

Ms. Blathna Ruane, BL

Instructed by: Kilroy Solicitors

OFFICIAL REPORTER: Mary McKeon SCOPIST: Ralph Sproxton

I N D E X

Witness: Examination: Question No.:

Knut Digerud Mr. Nesbitt 1 - 22

Mr. McGonigal 23 - 39

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY,

11TH FEBRUARY, 2004 AT 11AM:

CONTINUATION OF EXAMINATION OF MR. DIGERUD

BY MR. NESBITT:

Q. MR. NESBITT: Mr. Digerud, yesterday I was dealing with the issue of the funding of the joint venture and the interplay between the technical expertise to get the venture up and running and successful, and the other issue, which was funding the venture, assuming you won the licence.

Now, I think this is something that you may not have known about at the time the competition was entered into, or may not recall, but there is a number of documents that I wanted to draw your attention to in relation to the application, or the competition entry by the joint venture you were involved with. I am handing in those now. There is three separate bundles of documentation.

The first document you have is entitled "Esat Digifone" and has the number "2" at the top of the page. Do you have that?

A. Yes.

Q. And what I wanted to just draw your attention to was the information contained under the heading "Ownership and Equity Holding", and I wanted to

MR. HEALY: I just wonder if Mr. Nesbitt could identify the documents in the book. I don't know what

it is. I don't have a copy of it.

MR. NESBITT: I am not certain this document ever found its way into the books, and we have been working on loose copies, I think, for the entire of the Tribunal. And we'll hand you loose copies.

Now, this document, Mr. Digerud, is part of the entry application, and we are looking at the document that has the number "2" at the top. And it describes the ownership and equity holding in Esat Digifone, and it tells the reader that it's a limited company registered in Ireland. And the section I want to draw your attention to and then ask you some questions about is the third paragraph, which reads as follows:

"The shareholders agreement states that Communicorp Group and Telenor will each initially hold 50% of the equity of Esat Digifone. In the period leading up to award of the licence, 20% of the equity, 10% from each partner, will be formally placed with Davy Stockbrokers, Ireland's largest stockbroker."

And it indicates that "As of the submission of the application, Davy Stockbrokers had received written investment commitments from four people", you will see there, and then it continues: "Letters of commitment are presented in management Appendix D."

Now, the point I want to ask you about is yesterday you said you considered this was a joint venture, a venture between Communicorp Group and Telenor; is that

what you wish to say?

A. Yes, it certainly was.

Q. And were you aware, when you were dealing with negotiating the licence terms, that it was intended to have investors coming in to add to the interests of Communicorp and Telenor?

A. Yes. As I said yesterday, I did not have, during the process of the bid or in the autumn of '95, I didn't have any knowledge of the details of the bid; but when I became CEO of Esat Digifone, obviously the documents and the bids, I became aware of the details.

Q. Now, the second document, or part of the application I want you to look at is the second extract, and the page number at the top is 10, and at the bottom of the page you see "Digifone". So if you could find that document of the three handed to you, I want to ask you some questions about it.

A. Can you refer back to which document was it?

Q. This document it has Number 10 at the top, page number 10.

A. Yes.

Q. And I want to bring you down to the heading against paragraph 3.3, where it talks about "Institutional investors". And I'll just read from what it says.

"Esat Telecom and Telenor are committed to free enterprise in the telecommunications service provision. Each has a direct experience of

stimulating effective competition on telecommunications market growth. Each is also committed to reinforcing industrial, commercial and institutional awareness of the potential of modern telecommunications. Modern telecommunications is an engine of organisation efficiency and economic growth. The business planning of Esat Digifone has been set against a backdrop of strong growth in the knowledge-intensive information-driven sector of the overall economy of the European Union and the economy of Ireland; in particular, Esat Digifone is committed to economic development and expansion. These considerations led Esat Telecom and Telenor to invite extended participation in the ownership of the Esat Digifone. Up to 20% of Esat Digifone's equity will be made available to institutional investors in the period prior to the service launch. The initiative has already generated considerable interest in the Dublin investment community. Commitments have been secured from AIB, Investment Bank of Ireland, from Standard Life, in addition to Advent International plc. Such interest was stimulated by excellent standing of both the parent companies and by the realisation of the potential of telecommunications business in a deregulated environment. It was strongly supported by research regarding respective performances of second GSM operators through Europe.

Now, I am aware that when you became involved in the bid vehicle, you were there to negotiate the licence terms; but in relation to institutional investors, was the statement that was contained in 3.3 your understanding of why you were looking for institutional investors and how much might be invested?

A. Yes.

Q. Now, the final document I want you to look at is the third pinned-together bundle, and at the top you'll see the number, page number 21. The heading "Financing".

A. I have got it.

Q. And it's just the end of that document, 8.4 under the heading "Equity."

CHAIRMAN: Mr. Nesbitt, is this all the one document?

I seem to recall having read something into it that you are highlighting these particular extracts from.

MR. NESBITT: Yes, it's I don't actually have it here. It is a longer document. I just want to these are bits that we consider touch upon the issue of the 20% equity which appears to have been an issue for the counsel for the Tribunal.

Q. Now, in relation to paragraph 8.4, under the heading "Equity", we see there information, and I'll just read the few paragraphs.

"The maximum equity requirement will be IRi;½52 million.

The business plan envisages that 26 million will be invested upon award of the licence to fund the up-front licence fee and to cover initial capital investment and operating costs. A further 26 million will be injected in 1996 when the first debt finance will also be drawn down. The 26 million in 1996 contains 4 million for performance guarantee.

"The shareholders agreement states that Communicorp and Telenor will each initially hold 50% of the equity of Esat Digifone in the period leading up to the award of licence. 20% of the equity, 10% from each partner, will be formally placed with Davy Stockbrokers, Ireland's largest stockbrokers.

"As of submission of this application, Davy Stockbrokers have received written commitments of 21.35% of the equity from" and they list the four institutions. "These payments of share capital be activated immediately after award of the licence.

Letters of commitment are presented in Finance Appendix C.

"Within three years of launch, the Communicorp Group and Telenor will each make a further share of their equity available for independent investors in order to reach the position whereby the equity in Esat Digifone is shared between Communicorp, Telenor and institutional investors on a 34:34:32% basis."

Now, again, were you aware of that aspiration when you

were negotiating the terms of the licence?

A. Yes, I was.

Q. Now, I want to bring you back to a distinction I was trying to make yesterday to see if I can get your comment on it. The two partners who are 50:50, to be slimmed down to 40:40, had the technical expertise to deliver this project; isn't that right?

A. That's right.

Q. The institutional investors, or I think in one part of the document they are described as third-party investors, they were not going to bring any technical expertise?

A. No.

Q. And they were simply

A. Absolutely not.

Q. They were simply putting in their money as an investment?

A. Yeah, which is absolutely normal in any operations, that you get financial institutions in to support you financially.

Q. And throughout the whole time that you had dealings with the Department negotiating the licence, were you ever suggesting that there was any other type of investment other than an investor coming in with money as opposed to technical expertise?

A. No. We didn't need any other expertise. We had the knowledge of the team of Communicorp and Esat Telecom,

and we had Telenor, and that was absolutely sufficient.

Q. Now, I think near the end of the negotiations to get the licence, as I understand your evidence, the Department were making it clear that the makeup of the bid vehicle had to be 40:40:20. They weren't prepared to see any larger investment or institutional investment percentage at that time?

A. No, that was true. That was my understanding of the Department's wishes, on the understanding that it should be 40:40:20.

Q. That's exactly, as far as you were concerned, what was delivered at the date the licence was granted?

A. Yes.

Q. Now, in relation to investors, again from the point of view of your experience in putting together these projects and bringing them to successful operational status, would those investors be anxious to be able to trade their investment?

A. Oh, yeah. I mean, they are there for their institutional thinking on the funding. They want to make available cash to an operation and pull out at a certain time, so they would certainly negotiate an exit clause related to that. But otherwise, they are in to help out on the financial side.

Q. And I think in relation to the negotiation of the licence terms with the Department, there was a very

strong concern by the Department to control, as best they could, the makeup of the licensee after grant of licence?

A. Yeah, and that was one of the negotiations we actually did have, was what sort of control should the Department have. Of course, from an operational point of view, you would like to have this as easy as possible for yourself so they actually can negotiate good price from the financial investors. Otherwise they wouldn't come in, or they will come in at much later price.

Q. And I think at the end of the negotiations, at the time the licence was granted, the Department had obtained the licence condition they wanted in relation to the ability to buy and sell into the licensee?

A. Sorry, can you repeat that.

Q. At the end of the licence negotiations, the Department put into the licence agreement the conditions they wanted to see to protect the trading in shares in the company after the licence had issued?

A. Yeah, they came in, but it was quite much more easier than it started up with.

Q. Very good. Just, again, in general terms, your experience in the market, is the type of involvement of investors that we have described in the bid document and you have described being the position at the time of the licence was granted, was that an

unusual structure for this type of enterprise?

A. No, absolutely not. It's very, very normal that you have operational parties, and particularly that you have local partners which financially normally on the second or third operator are not that particular strong. So it's a need for financial ability to help out. And it's normal financial discussions going on in any project.

Q. Thank you very much.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. MCGONIGAL:

Q. MR. MCGONIGAL: There is just one matter, Mr. Digerud, and it's more clarification than anything else.

You will recollect yesterday that Mr. Healy was asking you about letters of the 13th May of 1986 sorry, 1996. Do you remember that?

A. 13th

Q. Of May, 1996.

A. Can you give a reference

Q. I'll get you a reference now. In 214, and there was one before that as well. These are the two letters, one of which was a draft and one

MR. HEALY: 49, 135A.

MR. MCGONIGAL: Thanks very much.

A. I am not still able to get hold of which document shall I look into.

Q. MR. MCGONIGAL: The one on Book 44, 214.

A. Okay.

Q. Do you remember, Mr. Healy was asking you about those letters; these are letters which Mr. O'Connell was involved in, and your recollection was that Mr. O'Connell was involved in all of this?

A. Yes, he certainly was.

Q. Do you remember that?

A. Yes, he certainly was.

Q. There is just one matter that I don't think has been drawn to your attention, and I would like to draw it to your attention, and that is, there is a letter of the 13th May, 1996, from William Fry.

MR. McGONIGAL: And I am not sure if it's in the books, Chairman, but I have given a copy of it to Mr. McCullough, who can put it on the thing, and I have given a copy to the Chairman, to you. And it's the letter of the 13th May, 1996, and to Denis O'Brien, Michael Walsh, from Owen O'Connell. And it's Re: the licence.

Q. Do you see it there, Mr. Digerud? And it's "Dear Denis, Michael and Leslie"

MR. HEALY: Book 50, 144.

MR. McGONIGAL: Thank you very much.

Q. "I enclose the final draft letter to the Department which has been prepared by Knut and myself and seen by Arve Johansen and Paul Connolly. I also enclose copies of its enclosures."

Do you recollect that?

A. No, not really. I wouldn't be surprised

Q. I can understand you not recollecting after the length of time that has passed, but I just want to draw it to your attention so that you have an opportunity to remark on it.

A. Yeah, but I would guess it's all about the shareholders issues, and if you are referring to the 13th, it's about these documents, isn't it?

Q. The only thing I am trying to point out, Mr. Digerud, is a couple of things. First of all, it would seem to suggest that the letter, "the draft letter to the Department which has been prepared by Knut and myself", that would seem to suggest that both you and Mr. O'Connell had a hand in preparing it, whatever way that happened?

A. Yeah, well, certainly

Q. You don't recollect it?

A. Yeah, I was aware, and I had knowledge of what was happening; but of the details, it was all Owen O'Connell's who had the necessary references and the ability to go into it and did the work.

Q. And it's also clear it would appear clear from that letter that the draft was seen by Arve and Paul Connolly; do you see that?

A. Yeah, if Owen O'Connell has sent it to Arve and Paul, he probably did.

Q. Well, one has given his evidence; the other will give

his evidence.

The other bit I just want to draw your attention to is the PS.

A. Yes.

Q. Do you see that: "Martin Brennan has asked Knut to deliver the letter personally at 12.30pm."

A. Yes, which Owen and myself did.

Q. I am just asking whether you delivered it personally on your own and therefore had a meeting with Martin Brennan before the meeting that you had with Owen O'Connell and Fintan Towey and Martin Brennan.

A. No, I never went to the Department without either Owen O'Connell or Peter O'Donoghue or anyone else.

Q. Well, that's all, Mr. Digerud. I just wanted to draw those to your attention. Thank you very much.

CHAIRMAN: It seems no appearance on behalf of Mr. Lowry today. So nothing to raise, Mr. Fitzsimons.

Anything in conclusion, Mr. Healy?

MR. HEALY: No, I don't think so, Sir.

CHAIRMAN: Very good. No, I think the only queries I had are probably more appropriate to remaining witnesses.

Thank you very much indeed, Mr. Digerud, for your attendance.

THE WITNESS THEN WITHDREW

CHAIRMAN: Mr. Healy, I think some efforts were made to see if schedules could be re-jigged.

MR. HEALY: I am afraid not. It's tomorrow morning at
11 o'clock.

CHAIRMAN: Tomorrow at 11:00 and a further witness on
Friday. Accordingly, that concludes this short day.

Thank you very much indeed.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
THURSDAY, 12TH FEBRUARY, 2004 AT 11AM.