

A P P E A R A N C E S

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Ms. Jacqueline O'Brien, SC

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FOR MICHAEL LOWRY: Mr. Rossa Fanning, BL

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FOR ARTHUR MORAN: Mr. Oisín Quinn, BL

Instructed by: Michael Tyrrell

Matheson Ormsby & Prentice

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I N D E X

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THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY,
13TH FEBRUARY, 2004 AT 11AM:

MS. O'BRIEN: Mr. Arthur Moran, please.

MR. QUINN: Good morning, Judge, just before Mr. Moran goes up, my name is Oisin Quinn, I am the junior counsel instructed for Mr. Moran by Michael Tyrrell of Matheson Ormsby Prentice.

CHAIRMAN: I recall Mr. Tyrrell having mentioned the matter at an earlier stage. In relation to representation, Mr. Quinn, my dilemma at the moment is this: First of all, there is absolutely no doubt that some basis of remuneration is necessitated, of course. Your client has voluntarily assisted, and you and Mr. Tyrrell have taken instructions and have been required to go over some old historic papers, and there is no doubt there must be some remuneration for that. My only concern is with the actual concept of making a full representation order, because normally, that is

in the context of somebody who may face some personal criticisms or the like.

At the moment, it seems to me, from Mr. Moran's memorandum of intended evidence, that his account deals pretty uncontroversially with matters of instructions taken when he became Telenor's solicitor in the course of the process of advices given by him and of steps taken.

And what I would propose to do for the moment is this:

to permit you and Mr. Tyrrell to take part in the hearing, if needs be, and to reserve my determination as to whether or not an actual representation order is needed. Obviously, if anything controversial transpires in the course of the hearing, the position will change; but I think I have made it clear that I am not expecting the you know, the legal input to be gratuitous, but I am just concerned about making an actual representation order at this stage.

So we'll proceed on that basis.

MR. QUINN: Thank you. That's very helpful.

CHAIRMAN: Thank you, Mr. Moran. Please sit down.

ARTHUR MORAN, HAVING BEEN SWORN, WAS EXAMINED AS

FOLLOWS BY MS. O'BRIEN:

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

Mr. Moran, I think you are a member of the firm of Matheson Ormsby Prentice Solicitors?

A. Yes.

Q. And you were instructed to act on behalf of Telenor in October of 1995 to assist in the drafting, negotiation, and finalisation of a shareholders agreement?

A. That's right.

Q. And I think that shareholders agreement was finalised on the 16th May of 1996?

A. That's correct.

Q. You have provided the Tribunal with a memorandum of intended evidence which primarily relates to various meetings that you attended and correspondence that you may have prepared for your clients. And what I propose doing, if it's agreeable to you, is taking you through that memorandum and asking you to confirm the accuracy of its contents, and then returning to one or two matters which you referred to, just to discuss them with you in a little bit more detail. And in doing that, I would propose referring you to the actual documents which are the subject matter of the various aspects of your memorandum.

I don't know, do you have a copy of it with you?

A. Yes, I have a copy.

Q. It's in Book 38, at Divider 2, I think, for anyone else's assistance.

And you were asked initially for details of the instructions furnished to you on the 10th October, 1995, by Telenor. You informed the Tribunal that you

received instructions from Mr. Per Simonsen, project manager of Telenor International, at a meeting on the 10th October 1995. Mr. Simonsen confirmed that Telenor were part of a consortium which had submitted a bid to the Department of Transport, Energy and Communications in writing and had made a verbal proposal to officials of the Department. The joint venture company would be called Esat Digifone Limited, and Telenor's in-house counsel had drafted a shareholders agreement between the three proposed shareholders holding the following percentages: firstly, Communicorp at 37.5%; secondly, Telenor at 37.5%; and thirdly, IIU at 25%.

Mr. Simonsen confirmed that IIU was a company which would be represented by Michael Walsh and Dermot Desmond and that as well as being a shareholder, it would underwrite the financing of the Irish part of the bid. Telenor had been told that IIU had political contacts in Ireland.

Mr. Simonsen confirmed that Messrs. William Fry Solicitors were instructed by Communicorp, and the partner was Mr. Gerry Halpenny. It was confirmed that IIU had written a letter to the Department and that there was an understanding between Telenor and IIU. It was confirmed by Mr. Simonsen that instructions to Mr. Moran were to complete and negotiate the joint venture agreement within a two-week period pending the

award of the a second mobile licence in Ireland. It was indicated that in the event that the Esat Digifone consortium were successful, that Telenor would talk to three firms of solicitors before appointing ongoing lawyers in Ireland. It was indicated by Mr. Simonsen that a decision from the Department was likely by the end of November 1995, but in fact, a decision could be made within as short a period as two to three weeks.

Mr. Simonsen indicated that Andersen Consulting in Denmark had been involved in the process of evaluating bids and that the EU procurement rules had been strictly observed, which had given rise to a ceiling on the bid of $\text{€}15$ million.

Finally as IIU indicated that their interests might be held in the name of a company called Bottin International Investments Limited, Mr. Moran was instructed to carry out a Companies Registration Office search against at that company. Mr. Simonsen left with you a copy of a draft joint venture agreement, the arrangement agreement correspondence between IIU and the company and the Department. Draft articles of association of Esat Digifone Limited and draft shareholders agreement between Telenor and Communicorp.

And if you could just confirm that the answer to that is correct?

A. That is correct.

Q. Paragraph 2, you were asked for the date on which and the person by whom you were informed that the Esat Digifone consortium had won the second GSM competition process. And you have answered that you heard about the Esat Digifone consortium's success in winning the second GSM competition on the Radio Eireann news while driving home from work; is that correct?

A. That's correct.

Q. Paragraph 3, you were asked, in relation to your attendance of the 31st October 1995 on Mr. Per Simonsen, to indicate in what respect you considered "It would of course be damaging if there were to be any comment in relation to IIU and the side letter, although it is hard to see how it would become public."

You answered that the competition process for the second GSM licence was hotly contested, and competitors would be likely to highlight any perceived financial weakness of any consortium in order to weaken any consortium. Hence speculation in relation to consortium members' funding could be damaging. Is that correct?

A. That's correct.

Q. Paragraph 4, you were asked for details of a meeting on the 9th November, including firstly the persons present. And you answered that your note of a meeting held on the 9th November indicates that you attended a

meeting with representatives from Telenor Mr. Knut Haga, Per Simonsen, and Knut Digerud and Communicorp representatives Peter O'Donoghue, Richard O'Toole and Gerry Halpenny of William Fry.

In relation to the purpose of the meeting, you have informed the Tribunal that the purpose was to discuss and negotiate the draft shareholders agreement circulated on the 7th November 1995.

And thirdly, in relation to the matters discussed, and in particular your understanding as to the state of knowledge of the Department regarding the involvement of IIU in the Esat Digifone consortium and the basis of your understanding, you have answered that in addition to detailed discussion of issues to be reflected in the shareholders agreement and the parties to the shareholders agreement, that is whether Communicorp or Esat Telecom will be party and the position of IIU, one of the Telenor representatives asked the question whether the Department were aware of IIU's involvement. The response to that question was that a letter had been sent by IIU to the Department on the 29th September, 1995, which apparently was not taken into account by the Department. And is that correct?

A. That's correct.

Q. Paragraph 5, you were asked for details of a meeting on the 21st November 1995, including firstly, the

persons present. And you have informed the Tribunal that your note indicates that the persons present at the meeting on the 21st November representing Communicorp were Gerry Halpenny of William Fry Solicitors, Richard O'Toole and Peter O'Donoghue; and representing Telenor were Per Simonsen, Knut Haga and yourself.

Secondly you were asked for the purpose of the meeting; and thirdly, the matters under discussion, and in particular, your understanding as to the Department's knowledge of the involvement of IIU Limited in the Esat Digifone consortium and the Department's attitude to such involvement and including the source or sources of your knowledge.

And you have answered the purpose of the meeting was to discuss and negotiate the shareholders agreement, a draft of which had been circulated by you on the previous day. The meeting also discussed the entities which would be parties to the shareholders agreement, the percentage shareholdings in Esat Digifone and the fundraising by Esat Holdings Limited and the shareholders of that company. You had no new knowledge in relation to the involvement of IIU or any knowledge of the Department's attitude to the involvement of IIU. Is that correct?

A. That's correct.

Q. At paragraph 6, you were asked for details of the

meeting of the 10th January, including firstly the identity of the persons present. And you have informed the Tribunal that your note shows that persons present at the meeting on the 10th January were Gerry Halpenny of William Fry, Peter O'Donoghue and Richard O'Toole representing Communicorp,/Esat Telecom Holdings Limited; and Per Simonsen and Knut Haga and Mr. Moran representing Telenor. The meeting was later joined by Michael Walsh, John Bateson and Neville O'Byrne of William Fry and Sonia Price of William Fry representing IIU.

Secondly, in relation to the purpose of the meeting, you have informed the Tribunal that the purpose was to negotiate the terms of the shareholders agreement to discuss the position of IIU in the shareholders arrangements.

Thirdly, you were asked for the matter under discussion. And you have informed the Tribunal that the matters discussed were outstanding difficulties from previous drafts and the points which IIU made to Esat Telecom's representatives to discuss the financing of the Esat Telecom's capital payment in view of the necessity to put monies into Esat Digifone Limited in the near future, and discussing the percentage shareholdings in Esat Digifone.

And finally you were asked for your understanding of the Department's state of knowledge of the intended

capital configuration of Esat Digifone and the source or sources of your understanding.

And in that regard you have informed the Tribunal that your understanding was that the parties agreed to a 37.5:37.5:25% split among shareholders, whereas the bid submitted to the Department had referred to a 40:40:20 split. And it was noted at the meeting that the Department still understood that a 40:40:20 split was intended. You were unconcerned as to who confirmed the Department's understanding to the meeting.

And is that correct?

A. That is correct.

Q. Paragraph 7, you were asked to provide the following details arising from the contents of a letter dated 16th April from you to Mr. Neville O'Byrne of William Fry Solicitors.

Firstly, you were asked to indicate the purpose for which you understood that a side letter was required.

I think, just to put that in context, that's the side letter in relation to the transferability of shares held by IIU Nominees Limited; isn't that correct?

A. That's right.

Q. You have answered that you understood that a side letter was required to permit IIU to transfer shares of Esat Digifone Limited which it was understood IIU was holding as nominee on behalf of up to four unnamed

investors. A side letter was required as the shareholders agreement expressly prohibited transfers of shares by registered holders such as IIU.

Secondly, you were asked whether the draft letter dated 19 April 1996 and forwarded by William Fry Solicitors to you under cover of a fax dated 19th April was prepared in response to your question of the 16 April 1996. And you have informed the Tribunal that the draft letter dated 19th April 1996 referred to is the draft of the side letter referred to in your earlier letter of the 16th April, 1996.

Thirdly, you were asked whether the letter of the 16th May 1996, executed by shareholders, was the sole side letter signed by the parties to reflect the transferability of shares held by IIU or whether to your knowledge, direct or indirect, any further side letters were executed.

And you have answered that it is your belief that the letter dated 16th May 1996, executed by the parties to the shareholders agreement made between Telenor Invest AS, Esat Telecom Holdings limited, IIU Nominees Limited and Esat Digifone Limited, was the sole side letter signed by those parties to reflect the transferability of the shares held by IIU.

And finally you were asked for the query raised in a letter dated finally you referred to a separate query that had been raised by the Tribunal in a letter

of the 16th October 2002. And you have stated in your memorandum, in reply to the Tribunal's letter dated 16 October, 2002, the side letter referred to was designed to permit IIIU in future to transfer shares to up to four investors without the necessity to obtain consent from the other shareholders. The identity of up to four investors, or whether they existed at the time, was not known to you. Accordingly, the Tribunal's interpretation of the reference to the four investors was not shared by you.

And if you could just confirm that your answers to those various questions are correct?

A. Those answers are correct.

Q. Paragraph 8, you were asked for your knowledge, direct or indirect, of a meeting which took place at the Department on the 3rd May 1996, attended by Mr. Knut Digerud, Mr. Arve Johansen, Mr. Peter O'Donoghue, Mr. Michael Walsh, Mr. Paul Connolly, and Mr. Owen O'Connell; and in particular, firstly, the purpose for which the meeting was held. Secondly, the matters discussed. Thirdly, the queries or issues raised by the Department. Fourthly, the requirements of the Department, and finally, the requests made by the Department to Telenor to underwrite the entire of the equity and operational expenses of Esat Digifone and your understanding of the reasons for such request. And in brackets after that question, it was stated it

may be of assistance to you in dealing with the request to refer to your attendance of a meeting or telephone contact with Mr. Knut Digerud on the 8th May, 1996. And that was drawn to your attention. And you have answered as follows: Mr. Moran's only knowledge of a meeting which took place at the Department on the 3rd May 1996 is based upon a report given to you by Mr. Arve Johansen immediately after the meeting when he confirmed the attendees at the meeting; the fact that the Department required audited financial statements of the shareholders; that the European Commission was reviewing challenges from other bidders, in relation to which the Minister would travel to Brussels on the 8th May; and in particular a request from Mr. Martin Brennan of the Department for Telenor's support in underwriting the venture.

You state that on the 8th May 1996, you were updated by Knut Digerud in relation to the likely availability of licence on the following Friday. The disparity of shareholdings between those indicated in the bid and those now discussed with the Department were a cause for some concern, and you were asked to examine how the percentage shareholdings might be changed to 40:40:20 from 37.5:37.5:25.

And you state that you understood that the Department was seeking Telenor's assistance in underwriting the project as a result of perceived financial weakness

compared with Telenor of the other shareholders.

And is that correct?

A. That's correct.

Q. Paragraph 9, you were asked for details of the meeting on the 10th May between the shareholders in Esat Digifone, and in particular, firstly, the identity of all persons present. And you have informed the Tribunal that your note shows that the persons present at the meeting held on the 10th May 1996 were Arve Johansen and Rolf Busch and you representing Telenor; Knut Digerud as general manager of Esat Digifone; Gerry Halpenny, William Fry, representing Communicorp/Esat Telecom Holdings; and Owen O'Connell, William Fry, representing Esat Digifone Limited.

The meeting was joined by Paul Connolly and Leslie Buckley, representing Communicorp/Esat Telecom Holdings.

Secondly, in relation to the purpose of the meeting, and thirdly, in relation to the matters under discussion, you have informed the Tribunal that the meeting was held to discuss the percentage shareholdings in the company.

And you were informed by Knut Digerud on the 8th May that the Department required to revert to the 40:40:20 capital configuration, as did Telenor. Is that correct?

A. That's correct.

Q. Paragraph 10, you were asked for the date on which and person by whom you were informed that the Department had requested that the configuration of the issued share capital of Esat Digifone should be restored to the capital configuration of the consortium which applied for the license that is, restored to the 40:40:20 together with your understanding as to the Department's reason or reasons for such request.

And you have anticipated that during your conversation with Knut Digerud on the 8th May 1996, it was indicated that Department and Telenor wished to revert to the original 40:40:0 shareholdings. Your understanding was that the Department would wish for conformity between the consortia members and their percentage shareholding who had applied for the licence in the bid process, and the recipients. Is that correct?

A. That's correct.

Q. Now, paragraph 11, you were asked for your knowledge, direct or indirect, of all dealings, discussions and negotiations between Telenor, IIU Limited and Communicorp regarding the request made by the Department that the capital configuration of Esat Digifone should be restored to 40:40:20. And you were asked for various specific matters in relation to your knowledge, and in each instance, I think, you have indicated that you weren't involved; you had no direct

knowledge, and you had no input or knowledge as to the manner in which the valuation of the 5% was fixed. Is that correct?

A. That is correct.

Q. Now, at paragraph 12, you were asked for your knowledge, direct or indirect, of a meeting which took place at the Department on the 13 May 1996 attended by Mr. Knut Digerud, Mr. Owen O'Connell, Mr. Martin Brennan, and Mr. Fintan Towey and in particular, firstly, the purpose for which the meeting was held; secondly, the matters under discussion; thirdly, the requests made by the Department that Esat Digifone identify key questions likely to be raised at the press conference to announce the issue of the licence to draft answers to such questions and to explain to the Department the reasons for such answers.

You have answered that your knowledge of a meeting at the Department on the 13th May 1996 was gained at a meeting on that day which, according to your notes, was attended by Mr. Rolf Busch, Mr. Arve Johansen and yourself representing Telenor; Neville O'Byrne of William Fry, Sonya Price of William Fry; Michael Walsh, representing IIU; Paul Connolly and Gerry Halpenny of William Fry, representing Communicorp/Esat Telecom; and Knut Digerud and Owen O'Connell, also of William Fry, representing Esat Digifone.

At that meeting, Knut Digerud reported to the meeting

that the Department, who were represented by Mr. Brennan and Mr. Towey. The Department officials had started with a brief review and indicated that they would want more information in relation to IIU. It was indicated that Mr. O'Connell would draw a minute of the meeting. Attention was drawn to the draft licence in paragraph 8 in particular, which provided that any transfer or allotment of shares of Esat Digifone Limited would need the consent of the Minister. It was confirmed to the meeting that senior counsel was assisting in the drafting of the licence. It was confirmed that a joint press conference would be held on a date to be agreed.

The question was raised as to when IIU when would IIU be discussed with the press. A list of key questions was to be made available, together with answers and reasons. It was proposed that the licence be handed over on the following Thursday.

Capitalisation by way of subordinated loans was to be confirmed. Finally, the Department was anxious to know what money IIU was using, by which you understood, were IIU investing themselves or on behalf of other parties? Is that correct?

A. That's correct.

Q. And then finally, in relation to that meeting, you were asked about the request made by the Department that a meeting be arranged between the Minister and

Mr. Digerud, together with "one or two others", at which the press conference would be discussed/rehearsed.

And you have answered that you are unclear as to any request made by the Department that a meeting be arranged between the Minister and Mr. Digerud, together with one or two others, at which the press conference would be discussed/rehearsed. Is that correct?

A. That's correct.

Q. You were then asked about your knowledge of the steps taken by Esat Digifone to identify the questions, the answers, the reason for them and the identity of all persons who had any input. And you have indicated that you had no knowledge of those matters.

Similarly, you have indicated that you had no knowledge, direct or indirect, of meetings, discussions or contacts between Esat Digifone and the Minister or Department in connection with the identification of those questions and the preparation of those answers. Is that correct?

A. That's correct.

Q. You have also indicated that you have no knowledge, direct or indirect, of any discussions or meetings between Mr. Digerud or any other person on behalf of or associated with Esat Digifone and the Minister on foot of the request to arrange or to discuss and

rehearse the press conference. Is that correct?

A. That's correct.

Q. Now, you were asked to provide details of at paragraph 16 of the meeting on the 13th May and 15th May, of which you kept written attendances, and in the case of each meeting to indicate firstly, the identities of the persons present. And you say as to the meeting I think the meeting of the 13th, you had already dealt with in your earlier answers.

And in relation to the meeting of the 15th, you state that your note shows that the following persons were present: Mr. Halpenny of William Fry, representing Communicorp/Esat Telecom; Neville O'Byrne of William Fry, Michael Walsh representing IIU; Owen O'Connell of William Fry, Barry Maloney, Knut Digerud, and Peter O'Donoghue representing Esat Digifone; and you representing Telenor. Mr. Johansen and Mr. Busch representing Telenor were telephoned during the meeting; is that correct?

A. That's correct.

Q. And secondly, you were asked about the purpose of the meeting of the 15th; and thirdly, the matters under discussion. And you stated that the meeting was held to review the position in relation to the grant of the licence and the steps necessary to comply with the Department's requirements and to review the steps necessary to be taken to finalise the shareholders

agreement and the articles of association of Esat Digifone Limited, complete the transfer of 2.5% shareholdings to each of Telenor and Communicorp/Esat Telecom Holdings; the financing of Esat Telecom Holdings and capitalisation and financing of Esat Digifone Limited generally.

During the day, Mr. O'Connell went to the Department to review a letter to be issued by Esat Digifone to the Department; and later in the evening, on his return from the Department, Mr. O'Connell informed the meeting as to the Department's requirements in relation to the draft shareholders agreement and articles. The lawyers present agreed the outstanding documents and other matters required to be in place before the licence could be accepted. And is that correct?

A. That's correct.

Q. I think that completes your memorandum of intended evidence.

I think we know that you first received instructions in this matter, Mr. Moran, on the 10th October of 1995?

A. That's right.

Q. Before I refer you to that attendance, can I just ask you whether you had any more knowledge about this second GSM process than any reasonably well-informed member of the public?

A. No, I wouldn't have known anything other than what I read in the press.

Q. Precisely. I take it you would have known that the process was proceeding and that there was a competitive process for the grant of a second GSM licence; would that be fair enough?

A. Yes, I would have known that.

Q. Would you have known that it was intended that that process be completely free of any political input and that it be conducted by civil servants with the assistance of expert consultants?

A. I would have had no view on that, I think.

Q. Right. Very good.

Now, can I just I don't think you have Book 48; I think you have a book yourself?

A. I have. And it's paginated the same as yours.

Q. Can I just take you to Divider 73. I think Dividers 73 and 74 are the initial attendances which you kept. And just before opening them to you, can I ask you, you say that you had no view as to how it was intended that the process would be carried out. If you didn't have a view, what did you think, yourself, as to how this process was going to be conducted by the Department?

A. Well, I assumed it was going to be dealt with by the Department, but I had no reason to have a view as to how the process would be carried out.

Q. As an ordinary reasonably well-informed member of the public, did you think this was going to be a political decision?

A. No, I did not.

Q. Now, there are two attendances. Were both the attendances kept by yourself? One is at Divider 73 and one is at Divider 74.

A. And the first attendance is pages 2426 and 2427, and that was kept by my partner, Michael Irvine. And the attendances at pages 2428 and 2429 are my attendance.

Q. You were present, though, presumably, throughout these meetings, were you?

A. I was.

Q. Good. Now, the first of the attendances, what we call the first, is at Divider 73?

A. It was one meeting only.

Q. I see. I presume, when Mr. Irvine kept the attendance, you were perhaps more active as a participant in the meeting; would that be the case?

A. That would be correct.

Q. Now, if I just open the first one to you, and I think that's Mr. Irvine's note, is it?

A. Yes.

Q. And the Tribunal has had that typed up. It's probably easier to read.

"Shareholders agreement,

IIU Dermot Desmond.

37.5 Telenor.

37.5 Communicorp,

25 IUU part of shareholders agreement.

"IUU have written letter to Department.

Joint venture

in-house lawyer William Fry Communicorp.

Gerard Halpenny 98FM Denis O'Brien" arrow up

there as well.

"Complete agreements award of licence choose one

for long term cooperation". Presumably that's the

shareholders agreement?

A. No, I think that's a lawyers a firm of lawyers in

Dublin.

Q. Oh I see. "Communicorp.

"Finalise this within two weeks.

Minister's decision within 2/3 weeks his

recommendation."

I think there is a line below that which is

indistinct; I don't know if you can help us with it.

A. No, I don't have anything.

Q. Can I take you on to the second attendance, which is

your own attendance of Per Simonsen with presumably

Michael Irvine?

A. Correct.

Q. "Esat Digifone Limited. Michael Walsh, Dermot

Desmond, International Investments" with an

asterisk "will underwrite the Irish part of the

bid.

bid to the Department in writing and verbal proposal.

"Communicorp". On the right you have "Political contacts."

"Motorola less jobs".

Below that again, "Shareholders agreement Telenor drafted, William Fry, Gerry Halpenny".

Again, you have set out the intended percentage shareholdings. Again you have also recorded IIU letter to Department and understanding between Telenor and IIU.

"Complete and negotiate agreements on award of contract. Would you talk to three firms of solicitors.

"Schedule finalise agreement within with 2 weeks.

"Decision end November 1995 in fact decision 2/3 weeks.

"Andersen Consulting Denmark. EU procurement rules observe $\frac{1}{2}$ 15 million cash ceiling.

"Fax underline Thursday am."

Below that, there is a line that's obscured. Can you assist the Tribunal?

A. No, I can't read it.

Q. All right. So this is effectively your first meeting with your client?

A. Yes.

Q. And I think your client, Mr. Simonsen, who was representing Telenor, brought with him a number of documents?

A. He did.

Q. And he brought the draft shareholders agreement, is that correct, that had been worked up by the Telenor in-house lawyers?

A. Yes.

Q. And I think he brought a copy of the arrangement agreement?

A. Yes.

Q. I think he seems to have brought a copy of a side letter of the 29th September of 1995?

A. Yes.

Q. And was that the side letter that provided for the assignment of the IIU rights and obligations to Bottin?

A. Correct.

Q. And I think he probably also brought to you a copy of the letter of the 29th September from Michael Walsh of IIU addressed to the Department?

A. Yes.

Q. And he was giving you the information that you would require need to set the ball rolling in order to start negotiations to finalise a draft shareholders agreement, and there was nothing particularly unusual about that?

A. That's right.

Q. In your memorandum you have informed the Tribunal, and you have confirmed in your evidence now, that Mr.

Simonsen informed you that they had been told IIU had political contacts.

A. That's right.

Q. Do you remember, did he expand on that at all?

A. No. I don't recall. I don't believe he expanded on it, and I don't believe I made any comment.

Q. Did he indicate to you at all what the source of his information was regarding IIU's political contacts?

A. Not so as far as I recollect.

Q. You would have been aware, I take it, from the documents that were brought to your attention, that IIU had only become legally part of this and formally part of this consortium on the previous 29th September?

A. I wasn't told the date on which IIU joined the consortium. I was merely told that they were part of the consortium.

Q. It would have been apparent to you subsequent to that meeting, though, wouldn't it, from a consideration of the arrangement agreement, that legally, in any event, perhaps informally earlier on, but from a technical legal point of view, they had only come on board on the 29th September?

A. Yes, I suppose that would have become clear when I saw

the arrangement agreement.

Q. You would have known, I take it, that IIU was effectively Mr. Walsh and Mr. Desmond, or I suppose Mr. Desmond and Mr. Walsh as his managing director as the technical person?

A. Yes.

Q. Do you recall whether you made any comment to Mr. Simonsen at the time in relation to Mr. Desmond and his previous dealings with various authorities, and in particular, in relation to that Department?

A. No, we did not discuss anything of that nature.

Q. You would have known at that stage about the Glackin Report, wouldn't you?

A. I would.

Q. You wouldn't have thought it appropriate to perhaps mark his cards in relation to the findings of the Glackin Report?

A. No, I didn't.

Q. Were you a little surprised, having regard to the findings of the Glackin Report, that you were now being told that IIU, who was effectively Mr. Desmond, was part of this consortium looking for the second GSM licence?

A. No.

Q. You weren't?

A. I was not.

Q. Now, you were told by Mr. Simonsen that the result was

due at the end of November?

A. Yes.

Q. But he also told you that in fact, it could be as soon as two to three weeks?

A. Yes.

Q. Did he indicate to you at all what his source of knowledge was?

A. No, he did not. He was responding to a question which I put to him: Could it be an earlier date? Because I would need to schedule my diary appropriately to undertake the task which I was being asked to perform.

Q. The shareholders agreement in fact didn't materialise, did it, until the 16th May?

A. It didn't, but the intention on the 10th October, 1995, was it would be in place before an announcement from the Department as to the winning consortium.

Q. Why would

A. Naive it may have been, but that was the case.

Q. Why would that be? Why would shareholders in a limited liability company that really had no reason to exist but for the fact that it might secure a second GSM licence at some stage in the future, why would they be so anxious to finalise a shareholders agreement in advance of the announcement?

A. Well, I really can't answer that. Except that it was a wish to for good housekeeping purposes, possibly, so that there would be no change in the relations

between the parties to the consortium in the period after the announcement of the winning consortium.

Q. If that was their Telenor's thinking on the matter, are you surprised that they didn't come to you a lot earlier? The bid, we know, was submitted on the 4th August. We know they had a joint venture agreement, for what it was worth; it was a very sparse agreement that really just provided for some formality on the affairs of the participants coming up to the submission of the bid. If that was their intention, that there be good housekeeping, are you surprised they didn't come to you a little earlier?

A. No, I don't think I was surprised.

Q. It was leaving you very little time, wasn't it?

A. It was.

Q. Now, you were also told by Mr. Simonsen at that meeting that the decision I want to be careful now because I want to read directly from your note "Minister's decision within 2/3 weeks his recommendation."

Do you see that's in Mr. Irvine's note? It's at Flag 43.

A. Minister's decision within two to three weeks.

Q. "His recommendation"; do you see that?

A. I am sorry, I don't have the word "recommendation" on my copy.

Q. It's just the very bottom line. We can hand one up to

you.

A. If you could.

Q. Maybe the original, not the typed version. It's just the very last line on the first page.

A. Yes, I do. I do not understand what that means.

Q. At the time, what did you understand it to mean?

A. Well, that is not my note. I can't answer the question.

Q. I presume you'd accept that there is no reason to suspect that Mr. Irvine didn't keep an accurate note of what happened at the meeting?

A. I have no reason to suspect that.

Q. Do you recall that being said?

A. No.

Q. Now, if I can just take you on to Divider 76 of the same book. You sent a fax to Mr. Simonsen dated 12th October, and it was further to your meeting of the 10th October. You referred to the various documents that had been left with you, and you made some points regarding it. Now, if I could just take you to the second page of it, at Point 5, there, you say in relation to the side letter that's the side letter, presumably, assigning the interest to Bottin?

A. Yes, that's correct.

Q. "I have checked the Companies Registration Office and find that no such company as Bottin International Investments Limited has been registered in Ireland. I

cannot therefore comment on whether it is a wholly-owned subsidiary of IIU or otherwise." Presumably Mr. Simonsen had said to you that it was Telenor's understanding that it was a wholly-owned subsidiary of IIU?

A. I don't think they knew what it was, and that's why I was asked to do a Companies Office search.

Q. You say: "I have considered your draft shareholders agreement and would make the following general comments. I do not propose at present to deal in detail with the draft agreement.

"1. IIU or Bottin would have to be added to the agreement.

You say secondly "Generally I think the draft would need considerable work to remove some provisions which apply by operation of law.

Thirdly, you say: "Please let me know how you wish to proceed with the drafting of the shareholders agreement, assuming that the draft which I have seen is the only draft in existence".

Then you say "I have considered the content of the side letter dated 29th September, 1995, which seems to me clear evidence of a breach of good faith with the Department. However, because it is not strictly illegal, I do not think that you can object to it on legal grounds but rather on good-faith grounds, which I appreciate does not assist you in your discussions

with Communicorp/IIU."

You say: "I would be glad to hear from you as to how you wish to me to proceed and whether in particular you wish me to draft the shareholders agreement." You sign the letter, "Yours sincerely, Arthur Moran."

You say there that you have considered the side letter, and it seems to you to be clear evidence of a breach of good faith with the Department. Now, could you explain to me what you by that?

A. Well, I meant that a letter dated the 29th September had been issued to the Department by IIU, and a letter, a separate letter had been issued containing a materially, in my view, different fact to Esat Digifone, and I was asked whether or not that was so fundamentally illegal that it would lead to the arrangement agreement being null and void. And that was my answer that you have read.

Q. That was your answer to that net question?

A. That's correct.

Q. So your view with regard to lack of good faith, and I just want to clarify it with you, was that on the 29th September, IIU had written to the Department and said that "We are going to underwrite the entire of the Irish side, circa 60% of the shareholding in Esat Digifone Limited".

At the same time, in a side letter between I think Esat and IIU, IIU assigned all of its rights and

obligations, rights under the arrangement agreement and obligations, both to the other shareholders in Esat Digifone, the other consortia members and the Department to Bottin International Investments.

A. That's right.

Q. So in effect, IIU, as regards those agreements, wasn't assuming any obligations at all in its own right.

A. That appeared to be the intention.

Q. And yet the representation was being made to the Department that IIU was assuming these obligations?

A. That's right.

Q. You know of course that the arrangement agreement had never been sent to the Department on the 29th September?

A. Well, it's not shown as an attachment to the letter to the Department, so I assume that I knew that.

Q. Does that surprise you, that if the Department was going to be informed and it was going to be disclosed to the Department that IIU was going to underwrite circa 60%, the Department wasn't also sent the arrangement agreement?

A. I didn't consider the point. It really probably wasn't relevant to my task, so I wouldn't have had a view. If I had a view, I possibly would have expected the Department to ask for the agreement if that was what they required.

Q. Looking at it now with the benefit of hindsight, are

you surprised that all of these agreements weren't sent to the Department?

A. Yes, I suppose I am.

Q. Were you aware of the provisions of the RFP form that was issued by the Department in advance of the evaluation process?

A. No.

Q. You wouldn't have been aware, then, that I think it's under paragraph 3 of the RFP form, that applicants were required, I think the terminology is, "shall disclose" the intended ownership of the proposed licensee. But you weren't aware of that?

A. I had no knowledge.

Q. Now, in that letter, you indicated to Mr. Simonsen that you were asking him how he wished you to proceed. Now, we know that there was no shareholders agreement within two and a half weeks of the 10th October. In fact we know there wasn't one finally agreed until the 16th May, due to various technicalities and difficulties. But do you recall when you heard back from Telenor after you sent them this letter?

A. I don't recall.

Q. I suppose what I'm trying to explore with you is, do you recall whether you were pressed at all, after you sent that letter, to proceed with the shareholders agreement?

A. After all these years, I don't recall.

Q. Right, okay.

I am just moving onto the next book, Book 49, but I think you usefully have all of the documents in one book?

A. Hopefully.

Q. Just before I ask you to consider the next document, can I ask you this, Mr. Moran: The result I think was announced on the 25th October, and that was spot on the two to three weeks that Mr. Moran had indicated to you at your first meeting?

A. Mr. Simonsen.

Q. Sorry, Mr. Simonsen, I do apologise, Mr. Simonsen had indicated to you.

I take it you weren't in the least bit surprised, then, when it was announced, if you like, earlier than was publicly thought?

A. I was quite surprised.

Q. Well...

A. Because when Mr. Simonsen had replied to me that it might be announced within two to three weeks, I didn't form the opinion that he had any particular knowledge, and I still don't think that he had any particular knowledge.

Q. Why is that?

A. He was simply giving me the earliest possible date that he thought that there could be an announcement. He had, in my view, no particular basis for making the

statement that he did make.

Q. Well that's true; based on what was in the public domain, he had no basis at all, because in fact, as far as the public was concerned, there was to be no announcement until the end of November. And I think in fact, as recently as the day before the announcement was made, there were reports in various national newspapers that the announcement wasn't due until the end of November. So if he had no particular knowledge, he made a very good guess, didn't he?

A. He did.

Q. Can I refer you now just to the next document, which is your attendance on Mr. Simonsen, dated 31st October, 1995. I think it's a telephone attendance; would I be correct in assuming that? I think Mr. Simonsen, and then there is a telephone number?

A. Can you give me the page number? Sorry.

Q. I can, of course. Your page number

A. The Tribunal's page number.

Q. Book 49, Flag 82. 2438.

A. 2438. I have it here.

Q. Do you have it there?

A. I do.

Q. Again I think we have it in typed form.

"Per Simonsen"; I think that's a telephone number, is it?

A. It is.

Q. "1. Your fax of today.

"2. Re: ESB threatened action: Expressed the view that from my knowledge of the facts there is not a good cause of action against the consortium whatever about against Esat itself."

Then you go on to say: "It would of course be damaging if there were to be any comment in relation to IIU and the side letter although it is hard to see how it would become public."

Then you say "I will send you a fax shortly.

"Meet next week, Knut, discuss tomorrow morning."

Now, I think in your memorandum, when you were asked what you were referring to in the final part of paragraph 2, you indicated that it was your view that speculation regarding financing of consortia members would be damaging.

I wonder, are you entirely correct, Mr. Moran, if you just look at the words that you wrote in your memo.

You wrote: "It would of course be damaging if there was any comment in relation to IIU and the side letter, although it would be hard to see how it would become public."

I think what I probably have to suggest to you is that it appears more probable that your concern related firstly to the involvement of IIU, which of course at that stage was not publicly known; and secondly to the assignment of IIU's interest to Bottin International?

A. Well, it was of no interest to me whether or not IIU was known publicly to be part of the consortium. My instructions were that they were a 25% to be a 25% shareholder in Esat Digifone. So I took that on face value.

In relation to the assignment to Bottin, that, I think, was my concern, that a disclosure of that assignment might weaken the financial perception of the Esat Digifone consortium.

Q. Well, it wouldn't do that, would it; it would reflect rather poorly on the consortium itself, that this was a matter which wasn't disclosed to the Department?

A. Possibly.

Q. Were you aware at that stage that your clients, Telenor I am sure you were had written, I think, firstly, Mr. Haga had written to Mr. O'Brien on the 6th October 1995, looking for details in relation to Bottin; who they were, looking for I think accounts in relation to them, what they were. He hadn't had a response. The matter was then taken up by Mr. Knut Digerud, who wrote directly to Mr. Walsh looking for this information, and that this information had not been forthcoming. Were you aware of that at this stage?

A. At that stage I was not aware of that.

Q. Now, can I ask you to move on to the Divider 86 in Book 49. The number, the Tribunal number on the

document itself is 2447, and it's your attendance of a meeting on the 9th November of 1995. Do you have that?

A. Yes, I have that.

Q. It appears from the attendance that you initially met with Mr. Haga, Mr. Simonsen and Mr. Digerud of Telenor. And you were then joined at the Davenport Hotel by Mr. O'Donoghue, Mr. O'Toole and Mr. Gerry Halpenny, all of Communicorp/Esat Telecom, and Mr. Halpenny representing Communicorp/Esat Telecom; is that correct?

A. Well, the first meeting may have taken place in the Davenport, and we may have met in William Fry's office or somewhere else.

Q. Yes. Now, can I refer you to the bottom part of the the lower part of the first page of your attendance. You see it's there, "Davenport 126.

Peter O'Donoghue and Richard O'Toole plus Gerry Halpenny.

"Communicorp/? or Esat/Telecom request not conceded.

"Funding has secured. 88% Communicorp, 12% executives C and Esat."

Then you go on to record "IIU are Department aware?

Yes, 29/9/95 letter to Department. Department replied that letter not taken into account. Copy to be supplied with us."

Now, in your memorandum, I think you informed the Tribunal that the question about IIU, and the Department's awareness was raised by Telenor; isn't that correct?

A. I believe so, yes.

Q. And Telenor were concerned, clearly, as to whether the Department was aware of IIU's involvement?

A. That's correct.

Q. Had they discussed that matter with you in advance of the meeting itself?

A. No, I don't believe so. I think we discussed only items that were germane to the shareholders agreement, the draft shareholders agreement.

Q. Now, the answer they received was: "Yes, 29/9/95 letter to the Department. Department replied that letter not taken into account. Copy to be supplied to us."

Now, can you recall who it was at that meeting who provided the answer to the question raised by Telenor?

A. No, I cannot.

Q. Obviously it must have been either Mr. O'Toole, Mr. O'Donoghue or Mr. Halpenny. It could only have been one of those three

A. Probably.

Q. If Telenor were asking the question.

The information must have been coming from the other side; would you agree?

A. Very likely.

Q. The letter of the 29th September, 1995, to which reference was being made was the letter, a copy of

which had been provided to you on the 10th October.

That was the letter notifying the Department about IIU underwriting the Irish side of the bid.

A. That's right.

Q. Was this the first occasion on which you became aware that that letter had been rejected by the Department?

A. Yes.

Q. Do you know was it the first occasion on which your clients, the Telenor personnel, were aware that it had been rejected?

A. I believe so. And I think that's why I have noted "copy to be supplied to us". That would be a copy of the Department's reply, which clearly my clients had not seen.

Q. That's a copy of the letter of the 2nd October?

A. If that's the date, yes.

Q. Do you recall whether you ever received that or whether your clients ever received it?

A. Well, I don't believe I ever received it. I don't recall receiving it, and I don't know about my clients.

Q. Do you recall at all whether your clients discussed that matter with you after the meeting, the fact that the letter of the 2nd October had or the letter of

the 29th September had been returned and rejected?

A. I don't recall any discussion.

Q. Were you concerned when you heard that the letter had been rejected?

A. No, because I was, as I said, focused on developing a shareholders agreement.

Q. That was your concern at the time?

A. That was

Q. Not the dealings of the consortium with the Department?

A. That is correct.

Q. You would have had an indirect concern because of your clients' membership of the consortium?

A. Indirect, but very secondary in my thinking.

Q. If I could just ask you to turn over the page, there is an attendance of Mr. Halpenny in relation to selfsame meeting. It's at Divider 87 of the Tribunal's books, and I don't know if there is any numbering on the document that was served on you. Do you have it there?

A. I have an unnumbered attendance of the 9th November on William Fry, yes.

Q. And in fact, it appears that that's Mr. Halpenny's attendance of the same meeting. I should say the meeting once he and Mr. O'Donoghue and Mr. O'Toole joined the meeting.

A. Yes.

Q. Now, I just want to draw your attention to something at an early part of the attendance. He records who is in attendance; then he goes on:

"Esat Telecom rather than Communicorp.

" Bottin IIU appearance.

" Telenor unhappy re Bottin.

" letter from the Department re IIU."

Now, you note that Mr. Halpenny and of course it is Mr. Halpenny's note; it's not your note but he records a discussion about Telenor being unhappy regarding Bottin; do you see that?

A. Yes, I do.

Q. Now, do you recall at the time, can you assist the Tribunal as to what your understanding was of Telenor's unhappiness regarding Bottin?

A. I don't specifically recall what the reason for their unhappiness was, or whether they were unhappy.

Q. Well, we know that you had already marked their cards; there was a potential breach of good faith with the Department arising from the failure to disclose to the Department the side letter of the 29th. So I suppose that could have been one of the sources of their unhappiness; would you agree?

A. Yes. It could also have been that they didn't have any financial or other information about Bottin.

Q. Absolutely, absolutely. It could have been one or the other, or perhaps both?

A. It could have been both.

Q. But you don't recall a discussion at that meeting of Telenor's views regarding the involvement of Bottin?

A. No, I do not. Other than what I have noted about IIU and the awareness, state of awareness of the Department.

Q. Now, Divider 90, in Book 49, is again an attendance kept by Mr. Halpenny of a meeting which you appear to have attended on the 21st November. Have you been able to turn that up?

A. Yes, I have that.

Q. And the Tribunal has also arranged for that to be typed up. And again I think you have informed the Tribunal that the purpose of this meeting, and indeed virtually all of the meetings that you attended, was to advance the shareholders agreement negotiations. And there were a lot of technical matters that you were discussing at that meeting. Isn't that correct?

A. That's correct.

Q. Apart from that, at the very beginning of the meeting, you see there is a note "Position re the Department IIU.

"Not a problem for M. Brennan in the Department.

Main concern that DOB and Telenor mainly involved in the operational side.

"Present the agreement to IIU ASAP.

"CSFB position paper was being marked good

reason so far.

"Replace" it's not clear "between DOB and Advent with new agreement cleaner agreement all round.

"Carve out the radio division.

"40:40:20 issue should not be a problem

Telenor party could be Telenor Invest or new Irish company letter of support/comfort."

So again at this meeting it appears at the very beginning of the meeting, before you even proceed to talk about any technicalities relating to the shareholders agreement, the topic of IIU is raised again; doesn't that appear to be the position?

A. It appears from Mr. Halpenny's note, yes.

Q. Do you remember at all around that time, and you may not, that there was some media coverage in relation to the involvement of IIU in the Esat Digifone consortium? Do you have any recollection of that?

A. I don't.

Q. I think there had been articles in the Independent and the Times on the previous Saturday, the 19th November, this was a Tuesday, and there had also been a report on RTE radio news on the Friday evening, which confirmed in fact Mr. O'Brien confirmed that IIU had been asked to assist the consortium in the placement of shares; and there had been speculation, both in the radio report and the newspaper reports, that Mr. Desmond would take some of those shares for

himself. Do you have any recollection of that

coverage around that time?

A. No, I don't.

Q. That's fair enough.

Now, what it says is: "Position re Department.

IIU not a problem for Mr. Brennan. Main concern that

DOB and TN may be involved on the operational side."

Now, do you recall at all at that meeting whether it

was the Telenor people or the Esat Telecom/Communicorp

side that raised the IIU topic?

A. I don't recall.

Q. Are you in a position to assist the Tribunal at all as

to what it was at the meeting that was able to relate

that IIU was not a problem for M. Brennan in the

Department?

A. I can't recall that.

Q. On the basis of your knowledge of your own clients,

that's the Telenor executives who were instructing you

and who you were attending meetings with, was it your

understanding that they were having regular dealings

with the Department at all?

A. I didn't know anything about that, whether they were

meeting the Department or not.

Q. Did they ever mention to you that they were meeting

the Department?

A. Not at that stage, I think.

Q. Right. There was also discussion there about the

restructuring of Communicorp, the carving out of the radio division, and then the 40:40:20 issue "should not be a problem." Were you aware at that stage that the initial bid had proposed a capital configuration of the licensee of 40:40:20, and that following the involvement of Mr. Desmond and the arrangement agreement, that was being restructured to 37.5:37.5:25? Would you have been aware at that time?

A. I wasn't aware of what was in the bid. My instructions had been that it was 37.5, 37.5, and 25.

Q. So this would have come as a surprise to you when it was raised on the 21st November?

A. I think it would.

Q. Can I assist the Tribunal who it was at the meeting might have been in a position to say that it should not be a problem?

A. No.

Q. Now, the next thing I just want to discuss with you is your attendance of a meeting on the 10th January, and that's in behind Divider 105 of the same Tribunal Book 49. And the numbering on that, to assist you, is 2475, and 2476.

A. I have no pages.

Q. And this is another meeting pretty well with the same personnel. I think most of your meetings were Mr. O'Donoghue, Mr. O'Toole, Mr. Simonsen, with possibly Mr. Haga or Mr. Digerud, or possibly they weren't

there, and the same two solicitors. And you were thrashing out, trying to thrash out the technical provisions of the shareholders agreement.

Again you were referring to I think clause 14.2 of the drafts. The IIU points in relation to a budget. The board decide on delegation to management.

"Telenor lends to Esat Digifone.

"Esat Digifone issues to Esat on a 1p paid basis."

Can I take it that that related to discussion about a possible bridging loan from Telenor to Communicorp?

A. I think that's a mechanism, yes, which would have provided bridging finance.

Q. Then it records: "Department still believes in 40:40:20 split.

"Cash call likely soon, i.e. 1/2 12 million 20/1/96".

So again somebody is in a position to inform the meeting that the Department was still of the impression that the capital configuration was 40:40:20?

A. Yes.

Q. Do you recall at all as to who that might have been?

A. No.

Q. Below that, would I be correct in thinking that Mr. Walsh, Mr. Bateson, Mr. O'Byrne and Ms. Price joined the meeting; it seems to indicate that?

A. That appears to be the case.

Q. Then it says "Recital E on whose behalf are IIU

acting? IIU Nominees listed. Need to talk to the Department."

Now, I take it that there was it seems to suggest that there was discussion, after Mr. Walsh joined the meeting with the other lawyers from William Fry, as to who IIU were acting on behalf of.

A. Yes.

Q. And that would have been on foot of the arrangement agreement where they had an entitlement, I think, to place with up to four separate investors?

A. Yes.

Q. Would I be correct in thinking, therefore, that it was still your impression and Telenor's impression that Mr. Desmond/IIU might place these shares?

A. Yes.

Q. That would be important, obviously, from the point of view of the shareholders agreement, to get that straight?

A. Yes.

Q. Then it says "IIU Nominees listed need to talk to the Department." Do you see that?

A. Yes.

Q. Do you recall what that note might relate to?

A. I don't.

Q. Would I be correct in thinking that it might suggest that somebody was indicating to the Department or to the meeting that the Department should be told on

whose behalf IIU Nominees were going to act?

A. That's possible.

Q. Did you have any knowledge of anybody approaching the Department to inform them on whose behalf IIU were acting?

A. No.

Q. Now, can I just ask you to turn to Divider 113 of the same book. This was a letter which Mr. O'Brien wrote to Mr. Digerud, and the only reason I am referring you to it is that I know you advised Mr. Simonsen in relation to certain steps which should be taken arising out of that letter.

A. Do I have a number for that?

Q. 2185. Do you have that there?

A. Yes, I have it here.

Q. It's from Mr. O'Brien to Mr. Digerud. It says: "I want to thank you for getting back to me so promptly on the suggestion which I put to Telenor Invest through you and to IIU through Michael Walsh at our meeting on the 9th February that you might consider selling a portion of your share in Esat Digifone to Esat Telecom. I have noted your response that Telenor has no interest in reducing its shareholding in Esat Digifone at this time.

"As I mentioned when I talked with you and Michael Walsh, our financial adviser, CS First Boston have told me that prospective investors in Holdings would

be more attracted to our current private placement offer if Holdings could consolidate its investment in Esat Digifone on the basis that it would own more than 50% of the company. This has been confirmed to me even more strongly during my current meetings with prospective investors in the course of our roadshow in the United States. I believe that such an adjustment would also be acceptable to the Department of Communications. Accordingly, I will pursue the matter further with Michael Walsh of IIU, and I will keep you informed if it should emerge that IIU might be willing to do an acceptable deal with Holdings to this effect.

"In the meantime we shall continue to work with Telenor Invest and IIU on the basis of the existing shareholding proportions."

And if you just turn over the page, the number on the Tribunal copy is 2489; it's behind Divider 114, and it's your letter of the 1st March to Mr. Simonsen. Do you have a copy of that?

A. Yes, I have it here.

Q. And in the first I think four paragraphs, you refer to various provisions of the shareholders agreement, the draft you were working on.

Then in the fifth paragraph, you go on to state: "In relation to the letter from Denis O'Brien dated 27 February 1996, I believe that that letter is putting you on notice of the fact that Holdings wishes to

increase its interest in Digifone above the previously agreed figures. I believe that Telenor must respond to the letter to remind Holdings of the fundamental understanding that Holdings and Telenor would hold equal interests and that you would require to retain the option at all times of achieving that objective.

This would of course mean that Holdings cannot have more than 50% without your agreement to take rather less than 50%.

"In relation to IIU and Dermot Desmond, I expect you are aware that Mr. Desmond is at all times a dealer, and accordingly, if the price is right, he will be quite happy to deal with Denis O'Brien. Indeed, it is not inconceivable that there is already an understanding in place as to what would constitute an acceptable deal.

"For this reason I think it extremely important that in the articles of association of Digifone provide that it will amount to a transfer of shares of Digifone if the beneficial interest of any shares registered in the name of IIU Nominees changes, so that we should require IIU Nominees to let us know the parties on behalf of whom they hold shares and how many shares they hold for each such party, to ensure that there is no buildup of shares in any person (especially Holdings) which is not known to us. I will consider whether this point should also be put in

the shareholders agreement as well as the articles."

Now, I think it's clear there from your final paragraph that you still didn't know on whose behalf IIU Nominees were going to hold these shares, even though you were asking about this and it was being discussed at the meeting way back on the 10th January.

A. That's right.

Q. Now, you were giving, I suppose, what I would describe as careful but strong advice to your client in this letter, weren't you?

A. Yes.

Q. You were saying that they should respond to Mr. O'Brien's letter to make it clear that parity was fundamental to their conception of Esat Digifone Limited?

A. That's right.

Q. You were putting them on notice that, if you like, Mr. Desmond is an investor; he is a person who buys shares and sells shares and buys companies and sells them with a view to a profit, not with a view to operating them, necessarily?

A. That's right.

Q. And then finally you were saying to them that it was important that they now ascertain on whose behalf IIU Nominees was acting?

A. That's right.

Q. Now, they certainly took your advice in relation to

notifying responding to Mr. O'Brien's letter. And there are two further letters; I don't know if you have been furnished with copies of them this morning. We found them in your own file. We can hand them up to you.

A. I don't think I saw them this morning, but...

Q. I think they may be in the next divider.

They are.

A. Is it 2497?

Q. 2496 and 2497, that's correct. In fact they are in the next divider in our books, Divider 115.

A. I have those.

Q. We just got additional copies of them this morning.

And the first one of those is dated the 7th March, 1996. It's from Mr. Johansen to Mr. O'Brien.

"I refer to your letter to Knut Digerud of the 27th February which I have received a copy. We appreciate your efforts in respect to finding the best possible financial solution for Esat Telecom Holdings.

However, I must emphasise our strong need for participating in the GSM project on an equal basis with Esat Telecom Holdings. This has always been Telenor's basis for participation, both in the bid joint venture as well as in the establishment of Esat Digifone.

"As we recognise that Esat Telecom Holdings may obtain financing at more favourable conditions with a higher

ownership stake in Esat Digifone, we would be willing to look at a solution with a proportional increase of both Esat and Telenor's stake.

"Until this can be agreed I fully support your proposal on continuing working on the basis of our current shareholding proportions."

Did you actually draft that letter with Mr. Johansen, or

A. No, I don't believe I did.

Q. And I think he also took the precaution of writing to Mr. Walsh on the 12th March; do you have that letter before you?

A. Yes, I do.

Q. That's "Dear Michael,

"Please find attached a letter to Denis O'Brien stating that an equal basis is the principle behind our participation in and development of Esat Digifone to secure all investors' interest. It is vital to maintain the balance between the operating partners.

"Should part of your 25% stake be available currently, I feel confident that we will be offered such shares on a pro rata basis. Please don't hesitate to contact me should you wish to discuss this in further detail.

"I look forward to meeting you soon.

"Yours sincerely,

Arve Johansen,

Chairman."

So quite clearly, your clients and Mr. Johansen were happy to follow your advice in relation to sending letters that parity and equality of shareholding was fundamental as far as they were concerned; but what I find surprising, Mr. Moran, is that I don't see any correspondence originating with Telenor to either Mr. Walsh, to IIU, to William Fry Solicitors or directly to Mr. O'Brien looking at this stage for details of or the identity of the investors on whose behalf IIU Nominees were going to take the shares.

A. Well, I think that would have been a secondary consideration. Remember, the side letter which was permitting IIU to transfer to up to four investors, I mean, that was still there in the background. So fixing exactly who the beneficial owners were at this stage I don't think was a major concern.

Q. Well, it was something that you referred to in your letter, and I know it was something that was discussed at the meeting in January of 1996, and the need to inform the Department.

You see, in the final paragraph of your letter of the 1st March, you say: "For this reason I think it extremely important that in the articles of association of Digifone we provide what will amount to a transfer of shares of Digifone if the beneficial interest of any shares registered in the name of IIU changes so that we should require IIU Nominees to let

us know the parties on behalf of whom they hold the shares and how many shares they hold for each such party to ensure that there is no buildup of shares".

Particularly given that in this letter you have adverted to the possibility that there might have already been an arrangement between IIU and Communicorp for the transfer of shares, and I am just surprised that there doesn't appear to be any action by Telenor to progress this matter at that time.

A. I think that that would have been a concern more into the future, around the date when the licence was actually issued, rather than an immediate action point at 1st March or shortly thereafter.

Q. But there was a concern, wasn't there, and you had pointed it out in this letter, that there could conceivably already be an understanding in place as to what would constitute an acceptable deal between Mr. Desmond and Mr. O'Brien? Because that appears to have been Telenor's concern at this stage, that behind the scenes, unknown to them, a deal was being done between Mr. Desmond and Mr. O'Brien whereby Mr. O'Brien would be able to augment and increase his shareholding over parity with Telenor by acquiring the beneficial interest in some of the IIU shares. Wouldn't that be fair to say?

A. That was always possible, that that could occur, or could have been arranged.

Q. It was a very real concern, though, wasn't it, at this stage?

A. Well, it was a concern, because Telenor wished to have an equal shareholding at all times.

Q. And that's perfectly understandable?

A. With Communicorp/Esat Telecom.

Q. Yes, okay. But you don't know, anyway, of any efforts that Telenor made at that stage to progress the identity of the beneficial owners?

A. No, I don't.

Q. Now, can I take you to your attendance of the 3rd April, 1996, the book we are working off. It's behind Divider 119, and the numbering system that you have, it's Number 2523. And it's your note.

A. Yes, I have that.

Q. And that attendance seems to actually perhaps two separate two or three separate contacts with your clients. The top, you record: "Per Simonsen, Arve Johansen, Knut Digerud", and I think in relation to Arve Johansen, Chairman Telenor International.

I take it this was the first time you had met Mr.

Johansen, was it?

A. Yes.

Q. "IIU everything to be designed in the shareholders agreement

" shareholders agreement underwriting agreement

will fall away on signature of the shareholders

agreement.

"No transfer of any interest in the shares registered in the name of IIU as registered.

You have "Per Simonsen", again the same telephone number; presumably it was a telephone contact you had with him.

"1. Shares held by whom?

"2. Board minutes

"Jan Edvard Thygesen, Chief Executive Telenor Invest AS"; that was obviously Mr. Thygesen's fax number?

A. Yes, apparently.

Q. I see, is it below "Per Simonsen" where you have "1, shares held by whom?"

Can you assist me as to whether that was a question that you were posing, or was that a question that Mr. Simonsen was posing?

A. I can't recall.

Q. I suppose I am correct in concluding that as of the 3rd April, both you and certainly Mr. Simonsen were still in the dark as to the intended beneficial interest of the IIU shares?

A. I think so.

Q. Now, if you just go to Divider 123 in Book 49, I am afraid yes, I do have a number. It's Number 2537 from the number system that you are working from.

It's your letter to Mr. O'Byrne.

"Dear Neville.

"Further to my letter of yesterday attaching draft 12 of the shareholders agreement I attach suggested wording for the resolution of the board pursuant to Clause 4.3.

"I think that if you were to draft a side letter in relation to IIU's initial involvement in the company and to permit a transfer to the four investors without triggering the transfer and preemption provisions.

Can you let me have a draft of the side letter."

I think this side letter arose from the provisions of the arrangement agreement.

A. Yes.

Q. And would I be correct in thinking that the intention was that the preemption rights under the shareholders agreement would not apply to a transfer by IIU Nominees Limited to the beneficial owners of its shares?

A. I think they were to be permitted to transfer to up to four persons.

Q. So that would have arisen, if you like, the basis for that side letter was within the arrangement?

A. I think so.

Q. If you just go over the page, Divider 124, it looks as if Mr. O'Byrne sent you a draft on the 19th April.

And in fact, in our books, that's an enclosure with a document behind the next divider, Divider 125, which is a fax from Mr. O'Byrne of William Fry to Mr.

Michael Walsh. And we can just take you to the side letter and look at it briefly.

Do you have that? It's number 2549 in the numbering system that you are following.

A. I have that.

Q. And it's a draft here.

"Dear Sirs,

"We Refer to the agreement, in particular the provisions of Clause 12.2 and Clause blank thereof.

"In accordance with our discussions, we are writing to you to confirm that the shareholding of 25% in Esat Digifone Limited (the company) held by us is beneficially owned in the following manner:

Name: IIU Limited

Bottin International Limited

"this letter is further to record our agreement that any transfer of beneficial ownership listed above will be subject to the terms and conditions regarding transfer contained in the agreement and the memorandum and articles of the company, save and except the shares held in our name may be freely transferred on a once-off basis without the requirement to abide by the terms and conditions of the agreement or the company's memorandum and articles.

"To signify your agreement, please sign below."

And you see there, I think it's a fairly standard draft side letter, but do you see there what I'd

like to draw your attention to is that Bottin International Limited is still being referred to as a potential beneficiary.

A. Yes.

Q. And that's as of the 19th April, 1996?

A. Yes.

Q. Now, I think on the 25th April, you forwarded a copy of that draft side letter to Mr. Johansen, together with advices in relation to the draft shareholders agreement. And I don't think I need to go through those with you in any detail.

Now, I think the next matter that I want to ask you about is the meeting your knowledge of the meeting of the 3rd May. And I think you weren't at the meeting of the 3rd May, so you were dependent on what you were told about the meeting by your clients. And I think you have dealt with your knowledge at page number 5 of your memorandum in response to the question at paragraph 8. It's in the first paragraph.

You say that your only knowledge of the meeting which took place at the Department on the 3rd May is based upon a report given to you by Mr. Johansen immediately after the meeting when he confirmed the attendees at the meeting. The fact that the Department required audited financial statements of shareholders, that the European Commission was reviewing challenges from other bidders, in relation to which the Minister will

travel to Brussels on the 8th May, and in particular, a request from Mr. Martin Brennan of the Department for Telenor's support in underwriting the venture."

Do you see that?

A. Yes.

Q. Now, I want to draw your attention as well to a memorandum of the 4th, the contents of a memorandum of the 4th May, which I understand Mr. Johansen may have lodged with you; certainly on the basis of what the Tribunal has been informed by Telenor, that's what happened to it. Isn't that correct?

A. It was on my file. I have actually no recollection of being given that memorandum.

Q. Right. Can you assist the Tribunal at all as to why Mr. Johansen, having prepared this, which is a personal memorandum setting out his view of the history of dealings between the parties, he prepared the memorandum in English. Why would he have left it with you, I am just wondering, can you assist at all?

A. I have no idea.

Q. I suppose it's possible that he felt that it might contain matters that you might need to have access to at some stage in the future; that could be one reason, could it?

A. Possibly.

Q. Can I just draw your attention to paragraph 6 of the memorandum. Mr. Johansen says: "As we go along we

learn more, but it all serves to disclose more details which again more and more prove the above scenario. In a meeting with the Department of Communications Friday May 3rd, it became evidently clear that IIU was not a favourable name from 'Irish public' point of view. On the contrary, the Ministry basically asked for help for how to explain why we had substituted Advent, Davys Stockbrokers and the other recognised named institutional investors in the bid, AIB, Investment Bank of Ireland, Standard Life Ireland. Eventually the project coordinator to the Ministry, Mr. Martin Brennan, actually appealed off the record to Telenor to write a letter of comfort that we would serve as a last resort for the Digifone company for funds and operational support. My feeling was that if Telenor had owned it alone, he would have been more comfortable than with the current shareholders."

Do you see that paragraph there?

A. Yes.

Q. And in particular, the third paragraph in section 6, where he refers to it becoming evident to him at the meeting on the 3rd that IIU was not a favourable name from an Irish public point of view and that the Ministry were asking for help as to how to explain that Davy Stockbrokers, Advent, AIB, Investment Bank of Ireland and Standard Life had been substituted by IIU. Do you see that?

A. Yes.

Q. Now, do you recall whether, in addition to the matters that you have set out in your memorandum, that Mr.

Johansen told you about that?

A. I don't recall him telling me such a thing.

Q. He did tell you, though, that the Department had asked Telenor, if you like, to underwrite the entire project?

A. Yes, I was aware of that.

Q. Right. Now, you had a meeting with Mr. Digerud, I think, then on the 8th May, and that's at Divider 132 in the Tribunal Book 49. And it's number, I think, 2376 in the numbering system that you're using.

A. I have that. I think it was a telephone conversation.

Q. In fact it seems to record a number of different contacts with both your client and with Mr. O'Connell ranging over both the 8th and 9th May; would that be correct?

A. Yes.

Q. You see there: "Licence likely to be ready." This is your initial contact with Mr. Digerud.

"Licence likely to be ready Friday.

"EU has considered Persona appeal and indicated Department can go. What about shareholdings? Can we unravel the IIU involvement?

How? we attack the arrangement agreement?"

Now, can you tell me what was being discussed when you

made that note?

A. I really can't go beyond my note. Obviously there was a wish to unravel the arrangement agreement. I really don't recall any further discussion as to what that would mean.

Q. Well, on the basis of your knowledge of your own client and the basis of your knowledge of your client's concerns, and on the basis of what you had been told at the meeting on the 3rd May, what do you think was the source of your client's desire to unravel the IIU involvement?

A. I really don't know.

Q. Now, below that, then:,

"Knut Digerud Minister and Department seeking the support of Telenor by way of letter of comfort."

That's echoing what Mr. Johansen already told you?

A. Yes.

Q. It's possible, isn't it, that if Telenor were being asked to underwrite the entire of the Esat Digifone, that they might not unreasonably feel that IIU had really brought nothing to this consortium and to this company, and yet they were still being entitled to 25% of the shares. That could be one reason, isn't it?

A. That would be reasonable, yes.

Q. I suppose based on Mr. Arve Johansen's memorandum, where he recorded on the 4th May that apparently IIU was not a favourable name from the point of view of

the Irish public, that they were being asked by the Department to assist the Department in explaining why they were substituted for Davys, that could equally be another reason that they'd want to unravel it?

A. It could be, yes.

Q. You then spoke to Mr. Johansen in relation to the 40:40:20. It looks like you telephoned Mr. O'Connell, that he was to call you back. You spoke again to Mr. Johansen about the 5%, the IIU 5%.

And then at the very foot of the page, you record:

"Owen O'Connell you indicated Telenor position that the shareholding structure revert to that agreed at time of signing of the licence. Owen O'Connell pointed out that" I presume its IIU "were not a party to the 40:40:20 arrangement and that they had been given 25% by virtue of the" there is a line there that's not visible, but presumably it's "by virtue of the arrangement agreement"?

A. Yes.

Q. Now, if you just go over the page, I think you received a fax from Mr. Johansen on the 10th May, which was just one week, I think, before the licence was granted, the Friday before; and it appears that by this time, Mr. Johansen was back here in Dublin. Do you see that?

A. Yes.

Q. And I take it that at this stage, one week before the

grant of the licence, you would have been aware that there were effectively two shareholder issues: There was firstly that Telenor was insistent on maintaining parity with Communicorp. And there was, secondly, by that time, the Department requirement that they revert to 40:40:20 from the 37.5:37.5:25?

A. That's right.

Q. So you would have been conscious of those two issues?

A. Yes.

Q. Now, Mr. Moran, I think, sent to you a copy of a memorandum that I think had been prepared by Mr. Walsh dated 9th May, which were the IIU proposals for resolving those two issues that had arisen between the shareholders. Do you see that?

A. Yes, I do.

Q. I am not going to read it all out, but can I just refer you to the bottom half of the first page, below the "Telenor 37.5, Esat 37.5, IIU 25", it records:

"The IIU shares are ultimately beneficially owned by Dermot F. Desmond." Do you see that?

A. Yes, I do.

Q. Now, that was the first time that you were aware that Mr. Desmond was to hold these shares beneficially?

A. So far as I recall.

Q. What about your clients?

A. I don't know.

Q. Would there not have been some discussion between you

and your clients about the fact that under the arrangement agreement, he was going to place these or was entitled to place them with up to four investors, that you had gone to all the trouble of the side letters, that you'd been making all the inquiries about Bottin that had been bothering Telenor all the way along, and that suddenly you are being told, if you like, virtually at the 11th hour, that Mr. Desmond is going to own these shares. Would you not recall that kind of discussion or that kind of response?

A. Well, I don't think it was a matter of any great surprise.

Q. Right. It wasn't a matter of any great surprise?

A. I don't think so.

Q. Right. Was it your well, was it your view from the outset that the probability was that Mr. Desmond was going to hold these shares for himself?

A. I never formed any view about who the shareholders might be or whether there would be one shareholder only.

Q. But it was certainly no surprise to you when you were told here on the 10th May that they were for Mr. Desmond?

A. No.

Q. And you don't recall any great surprise on the part of your client?

A. No, I don't.

Q. Now, can I refer you to Divider 135B, which is a note by made by Mr. Halpenny of a meeting which you attended on the same day, the Friday. Mr. Digerud, Mr. Johansen, Mr. Busch, Mr. Moran, Owen O'Connell, Gerry Halpenny were in attendance.

A. Sorry, what date is that?

Q. It's the 10th May. It's at the Tribunal Divider 135B, and I am afraid I don't think the copies you have have the same numbering system.

A. I think I have the page here.

Q. It records: "Documents to be delivered to Department today.

" shareholders

" beneficial ownership

" funding

"40:40:20 document.

"Underwriting agreement valid. Expire on shareholders agreement, Telenor not prepared to dilute if Esat not do the same."

That's again your client's fundamental position.

"Present position equal negotiations with IIU conditional on Telenor approval.

"Telenor go on the basis of the underwriting agreement.

"Telenor accept 40:40:20 provided"

Then there is a number of different calculations

there, presumably on what it was going to cost you for

the 2.5% or whatever. I don't think very much turns on it.

Now, in your memorandum you informed the Tribunal that Mr. Buckley and Mr. Leslie Buckley and Mr. Paul Connolly joined that meeting, and I think you are correct in what you state, although it's not recorded in Mr. Halpenny's note. I think you are correct that Mr. Buckley and Mr. Connolly joined that meeting, and in fact they have both given evidence in relation to that meeting.

There is just one thing I want to ask you about that meeting. Do you recall, first of all, was that a meeting in William Fry, or in your own offices?

A. I honestly don't recall.

CHAIRMAN: That's certainly fair enough; I can well understand that.

MS. O'BRIEN: Do you recall anything and this is why I asked you where it was; I just wondered if you had any recollection of it, because do you recall at all what the atmosphere was like at that meeting on the 10th.

A. No, I don't recall.

Q. If the atmosphere had been bad, had been a very bad atmosphere, if this had been, if you like, insults being exchanged across the table, would I take that you would recall a meeting like that?

A. No, not necessarily.

Q. But you certainly don't have a recollection of any very unpleasant meeting between Mr. Buckley, Mr. Connolly and your clients shortly before the licence was granted, do you?

A. Do I have to answer that question?

CHAIRMAN: I think as best you can, Mr. Moran.

A. Well, I mean, there were some tensions before the licence was picked up.

Q. MS. O'BRIEN: All right. The reason for it is that there is a reference in a letter from Mr. O'Brien of the 12th May, that I'll refer you to in a minute.

That's why I was asking you at this stage if you had any recollection about it.

If you go over the page to Divider 136, which is your letter numbering system, 2592, that's a letter from Mr. O'Brien sorry, from Mr. Arve Johansen to Mr. O'Brien, effectively referring to the meeting today.

You will see that. Referring to the presence of Mr. Buckley and Mr. Connolly, Mr. Gerry Halpenny, Knut Digerud and Owen O'Connell. And clarifying, like, Telenor's position following that meeting. Again emphasising that they were insisting on parity, but also I think offering that if there was a difficulty in terms of bridging, that they would be prepared to assist Communicorp in relation to bridging. Would that be correct?

A. Yes.

Q. And is that a letter that you would have drafted or which you would have had input into?

A. I don't believe I drafted it. It was, however, typed up in my office.

Q. Right. Would it have been drafted by somebody else in your office, or do you think it was Mr. Johansen himself?

A. No, I believe it was Mr. Johansen's drafting.

Q. I see. Now, we know he also wrote to Mr. Walsh on the Saturday, the 11th May, and that's over the page, at Divider 137. And again, all I really want to ask you about that is do you think Mr. Johansen prepared that letter himself, or did you might have had any input into it?

A. Sorry, what page is that?

Q. 2597 on your numbering system.

A. No, I don't recall assisting in drafting that letter.

Q. Right. Now, we know there were a number of meetings between shareholders on the Saturday and Sunday over the weekend, and you, I think, attended some of these meetings, particularly on the Sunday. And I think we know that the issues between the shareholders were effectively resolved, in substance, at least, by the Sunday evening, the 12th May; isn't that correct?

A. That's my general recollection, yes.

Q. I don't think we need to go into the details of that at all. But what I want to refer you to now, if you

wouldn't mind, is the letter which Mr. Johansen received from Mr. O'Brien dated 12th May. And it's for that reason that I was asking you about the atmosphere at the meeting on the 10th May.

It's in Book Tribunal Book 50, Divider 142. And on your numbering system, it's I think 2600; is that right? It's quite faint on the copy I have.

A. Yes, that's it. Or 09, actually.

Q. I am not going to open this letter in any detail. But Mr. O'Brien started off by referring to the meeting of the previous Friday with Mr. Buckley and Mr. Connolly, and apparently Mr. Buckley and Mr. Connolly, according to Mr. O'Brien, took exception to certain of the personal comments that Mr. Johansen made.

Then went on to deal, effectively, with Mr. O'Brien's version of the events that had occurred dating from I think the 22nd September of 1995 upwards to about that date. Right, would that be correct?

A. Yes, it seems to be.

Q. I don't think you need me to read out the whole letter, do you?

Now, I think a response was prepared by you to that letter?

A. I drafted a response together with Rolf Busch, the Telenor in-house counsel, and you have a draft.

Q. We have a draft?

A. Written by Mr. Busch.

Q. And I'll just refer you to it. This wasn't your draft; this was Mr. Busch's draft?

A. That was Mr. Busch's draft.

Q. And I think we did circulate a copy of the draft?

A. Yes.

Q. We'll try and get one on the overhead projector.

"Dear Mr. O'Brien,

"Your letter dated 12 May 1996 addressed to Mr.

Johansen of Telenor International AS has been passed to us for reply.

"We do not propose at this stage to comment on the

specific contents of your letter other than to state

that our clients consider the letter to be full of

misrepresentations both in its details and in its

general terms. On behalf of our client, however, we

reserve the right produce evidence of this if required

at a later stage.

"In view of the fact that the shareholders are well on

the way to reaching agreement regarding their

shareholdings in Esat Digifone Limited and that Esat

Digifone is close to receiving its licence, we have

been specifically instructed by Arve Johansen to say

that it is hoped that the parties can now look to the

future and concentrate on the substantial efforts

needed to make the Esat Digifone project a successful

one".

Do you recall when that was drafted? Was it shortly

after the letter of the 12th was received?

A. Yes, I think it was.

Q. Do you think it might have been on the 12th itself?

A. It could well have been on the 12th itself.

Q. I think it wasn't sent on the 12th; is that right?

A. No, it wasn't.

Q. But I think there was a letter sent in response to the letter of the 12th May?

A. There was, on the 23rd May.

Q. Do you have a copy of that there?

A. Yes, I do. It's actually in the Tribunal's booklet, 2657.

Q. We'll just take a copy of that to put up on the overhead projector, because I don't think we have isolated that in our own books.

And it's dated 23rd May.

"Dear Mr. O'Brien,

"Your letter dated 12 May 1996 addressed to Mr.

Johansen of Telenor has been passed to us for reply.

We do not propose at this stage to comment on the

specific contents of your letter other than to state

that our clients consider the letter to be full of

misrepresentations both in its details and in its

general terms. On behalf of our client, however, we

reserve the right to produce evidence of this if

required at a later stage.

"In view of the fact that the shareholders have now

reached agreement regarding their shareholdings in Esat Digifone Limited and that Esat Digifone has received its licence, we have been specifically instructed by Arve Johansen to say that it is hoped that the parties can now look to the future and concentrate on the substantial efforts needed to make the Esat Digifone project a successful one."

And that's actually signed by Matheson Ormsby Prentice Solicitors on behalf of Telenor, and I take it that you had instructions from your clients in relation to the contents of that letter?

A. That's correct.

Q. And in particular, in relation to the or including, I should say, rather than in particular, including the first paragraph of the letter, in which you stated that your clients consider the letter to be full of misrepresentations both in its detail and in its general terms.

A. Yes.

Q. They were your client's instructions?

A. Yes.

Q. Can you just explain to me why that letter in response wasn't sent till the 23rd May?

A. I can't recall that.

Q. Do you think it might have been considered politic, perhaps, given that matters were in substance resolved between the parties on the evening of the 12th, that

that response be postponed until after the licence was issued?

A. That's quite possible.

Q. And in relatively friendly terms; would you agree with me?

A. Yes.

CHAIRMAN: It's very similar to the draft that was prepared almost immediately after Mr. O'Brien's letter was received.

A. That's right, Judge.

MS. O'BRIEN: Now, you were asked also in your memorandum, or in the memorandum, of your knowledge of the meeting on Monday, 13th May; that was the day after you had finally resolved, in principle, the shareholder difficulties when Mr. Digerud, Mr.

O'Connell went to the Department. And you dealt with that in your reply to Question 12.

You stated that the knowledge your knowledge of a meeting of the Department of the 13th May was gained at a meeting on that day which, according to your notes, was attended by Mr. Busch, Mr. Johansen and Mr. Moran, representing Telenor; Neville O'Byrne, William Fry, Ms. Sonya Price you listed the persons in attendance at the meeting.

You say at that meeting Mr. Digerud reported on the meeting with the Department. The Department officials had started with a brief review and indicated that

they would want more information in relation to IIU.

It was indicated that Mr. O'Connell would draw a minute of that meeting. Attention was drawn to the draft licence, and paragraph 8 in particular, which provided that any transfer or allotment of shares of Esat Digifone Limited would need the consent of the Minister. It was confirmed at the meeting that senior counsel was assisting in the drafting of the licence. And it was confirmed that a joint press conference would be held on a date to be agreed. The question was to be raised as to when IIU would be discussed with the press. It then went on to refer to the key questions that would be prepared and answers with reasons. It was proposed that the licence be handed over on the following Thursday. Capitalisation by way of subordinated loans to be confirmed. Finally, the Department was anxious to know what money IIU was using, by which you understood were IIU investing themselves or on behalf of other parties.

Now, can I just refer to you your actual note, which is I think at 50, 144 of the Tribunal's book, 2620 in the numbering system that you are keeping.

A. I have it here.

Q. I think this is your note of the meeting itself, and what Mr. Digerud and Mr. O'Connell were reporting to the meeting. And can I just refer you to one small portion of that note, which you have largely expanded

upon in your reply.

Do you see in relation to IIU in the middle of the page, you have said "IIU what money is being used?

Department wants to know." Do you see that?

A. Yes.

Q. I am just wondering why you interpreted that note as meaning the Department wanted to know whether it was IIU investing itself or somebody else.

A. Well, I think because there had always been a question as to whether IIU was the beneficial owner or whether it was a nominee merely for up to four other investors.

Q. If that was the question that the Department were getting at, wouldn't you have expected the Department, or Mr. Digerud or Mr. O'Connell, to simply say "The Department wants to know who are the beneficiaries of the IIU shares"?

A. Possibly.

Q. It would be a more direct way of asking that question, wouldn't it?

A. It would, it would.

Q. Just what I want to ask you is this: Would you agree with me that those words that you have recorded, "What money is being used? Department wants to know", that they may be either more consistent or at least equally consistent with Mr. Digerud or Mr. O'Connell informing the meeting that the Department wanted to

know what the source of the money was that Mr. Desmond was going to use?

A. Well, I mean, I can't expand on my note. It is a note of a report of a meeting, you know, at which I wasn't in attendance. So you know, I wasn't I didn't ask any questions, as I recall, as to what exactly this meant. I simply recorded the words.

Q. But you'd agree with me that it's equally consistent with that query?

A. Yes.

Q. What money is being used?

A. Yes.

Q. What's the source of the money?

A. Both interpretations are correct or possible.

CHAIRMAN: I think, Ms. O'Brien, you are getting pretty near the end of your examination, but perhaps at five to one, with the possibility of other counsel having questions, it may be optimistic to seek to conclude matters altogether.

MS. O'BRIEN: I am just trying to ascertain whether counsel have any questions.

CHAIRMAN: It might be sensible, in ease of Mr. Moran, to stand out.

MR. NESBITT: Whatever questions I have, I think there will be very few, Mr. Chairman.

CHAIRMAN: Then there could be something said to be pressing on.

MS. O'BRIEN: I am virtually finished, Sir.

Q. I think the last matter you were asked about was a meeting of the 15th May, where again Mr. O'Connell had been meeting with the Department, and he was reporting back to you, to the Telenor people, to Mr. Halpenny, to Barry Maloney, to Knut Digerud, Peter O'Donoghue and so forth, about his dealings with the Department on that day, and that was the actual day before the licence was ultimately issued. And most of what's in the note are technical matters which I don't propose taking you through, unless there is something you want to draw my attention to, and effectively, I think the position was as stated in your memorandum, that you were reviewing the steps to be taken vis-a-vis the Department's requirements, and you were finalising the shareholders agreement?

A. Yes.

Q. Would I be correct in thinking, Mr. Moran, that you didn't know anything about the various documents that were furnished to the Department by Esat Digifone on the 13th May?

A. No, I had no knowledge of that. My focus was the shareholders agreement.

Q. Finally we note the shareholders agreement was signed on the 16th September, and I think it was submitted to the Department, and I think there were various negotiations, last-minute negotiations regarding the

drafting of Article 8, which was in the licence. But again, that wasn't a matter that you had any concern; you weren't concerned in relation to the drafting of the licence?

A. No.

Q. And then finally, I just wanted to refer you to the side letter, which was the side letter you have executed, and that's at Divider 160 of the same book that we are working from. And it's in much the same terms as the draft which had been prepared by Mr. O'Byrne, and it identifies Mr. Desmond as being the beneficial owner of the shares?

A. Yes.

Q. And apart from that, and some small additions to it, it's in substance the same as the draft which Mr. O'Byrne prepared; would that be correct?

A. That's right.

Q. Thank you very much, Mr. Moran.

A. Thank you.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. NESBITT:

Q. MR. NESBITT: Mr. Moran, just very few questions. As I understand your position, you had nothing to do with any part of this process during the time the competition was in train to see who would be given the right to negotiate?

A. That's right.

Q. So you had no real idea exactly what had been said by

the applicants that you were representing one of the investors of?

A. No, I had no knowledge of that at all.

Q. And I think it was in September that you became interested, and you saw the letter of the 29th September from IIU?

A. Well, it was on the 10th October when I was instructed.

Q. And I understand that you sought the letter of the 29th, and formed the view it was an indication of underwriting being provided by IIU?

A. That's correct.

Q. Did it surprise you that IIU would be in the business of underwriting? Had you heard of them before?

A. I can't recall whether I had heard of them underwriting before, but certainly I had heard of them.

Q. And just the second paragraph of the letter says: "We confirm that we have arranged underwriting on behalf of the consortium for all of the equity circa 60%".

And the consortium had been described earlier as the individuals investing for Communicorp.

So am I right in thinking that at that point in time you'd have simply understood IIU as being part of the arrangers for the equity investment that was required?

A. That's right.

Q. Was that a surprising thing?

A. No.

Q. And were you aware, having learned that information, that what was then taking place was the period in which there would be negotiation as to the final terms of the licence?

A. I am sorry, can you repeat the question.

Q. When you became involved, were you aware that what was then taking place was negotiations with the Department as to the final terms of the licence that might issue?

A. No, I didn't focus on the licence at all.

Q. So what you were concerned with was the arrangements between the person you represented and the other persons that they were negotiating with?

A. The other shareholders in the consortium; that's correct.

Q. And so your whole effort was to see that that arrangement was as your clients wished it to be?

A. That's correct.

Q. And as I understand it, as it became nearer and nearer the time that the licence might issue, it became more important to make sure that arrangement was finally in place?

A. That's right.

Q. And that's because you had to tell the Department who was getting the licence?

A. Correct.

Q. Thank you.

CHAIRMAN: Mr. McGonigal?

MR. MCGONIGAL: No questions.

CHAIRMAN: Mr. Fitzsimons?

MR. FITZSIMONS: Just a few small questions.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FITZSIMONS:

Q. MR. FITZSIMONS: Reference has been made to the side letter of the 16th May, 1996; that's at book 47, 9.

Do you recall that side letter, Mr. Moran? This is the side letter which confirmed the fact that the shareholding of 20% in Esat Digifone was held beneficially in the following manner, "Name: Dermot F. Desmond, 100%". Do you recall that letter?

A. I have that letter here. It's from IIU Nominees to Telenor Invest and Esat Telecom Holdings.

Q. I should say held by IIU Nominees Limited beneficially which was a company beneficially owned by Dermot F. Desmond.

Now, isn't it a fact that in that letter it was also provided that IIU Nominees could dispose of those shares without being bound by any prevention or preemption provision?

A. Yes.

Q. So they had a once-off right to transfer the shares to whoever they wished?

A. Yes.

Q. And effectively, this permitted them to place the shares after the issue of the licence in whatever way

they wished without any control being exercised by the other shareholders?

A. That was the intention.

Q. Now, in that connection, could I refer you to the Department letter to Telenor dated 16th May, 1996 that's in Book 47, Divider 2; do you have that letter?

A. That's a letter I am not sure that I do, actually.

Q. It's to Mr. Digerud.

A. Is it 2651 in the Tribunal's numbering?

Q. I don't have the

A. Maybe if you just start to read it, it will become clear.

Q. "Dear Mr. Digerud,

"I refer to" this is one of the series of letters that were exchanged by the various parties, including the Department, when the licence was granted

"Dear Mr. Digerud,

"I refer to the grant of the licence to your company.

This letter is written for the benefit of present and future direct shareholders of the licensee."

A. Yes, I have that letter.

Q. I'll just pause for a moment there. The Department, even at this stage, was anticipating the possibility that there could be disposals of shareholdings by the licence holders.

Going on: "The Minister hereby confirms that consent

in respect of applications made for consent under Article 8 of the licence will be forthcoming provided the circumstances described below apply thereto.

"The circumstances referred to above are that the application relates either:-

"1. To issues of shares by the licensee to direct shareholders; or

"2. To transfers of shares in the licensee by direct shareholders.

"Provided that no such issue or transfer (either individually or cumulatively) results in the aggregate shareholdings of Telenor Invest AS and Esat Telecom Holdings Limited ceasing to amount to voting control of the licensee."

Now, doesn't that indicate what the Department's real concern was at this time; they wanted to make sure that whatever shares, sales or placements took place at any time afterwards, that all they were concerned with was that the two main shareholders, Telenor and Esat Telecom, should, between them, or even individually, retain control of the voting control of the licensee?

A. That appears from this letter, yes, to be the case.

Q. And is it possible that that primary concern of the Department, they didn't care who got the shares provided in the future, provided these two companies retained voting control, is it possible that

this departmental concern is an explanation for the comments at the meeting of the 13th May, 1996, "IIU what money is being used? Department want to know"? They were concerned that there was something going on that might result in the control of the licensee going to some other party of whom they were not aware; is it possible?

A. I suppose it is possible.

Q. I mean, at that point in time, all parties, including the Department, were trying to think of every possibility that could occur, and everyone was trying to make sure that they didn't make any mistake or error and that, if you like, their backs were protected in case there was fallout later?

A. Yeah.

Q. Just one final question. The letter of from IIU Nominees Limited of the 16th May, 1996, at Book 47, Divider 9, it states that Mr. Desmond was the beneficial, effectively the beneficial owner of IIU Nominees Limited. Bottin was gone. When and how did Bottin vanish from the playing field?

A. I have no idea.

Q. Thanks very much, Mr. Moran.

CHAIRMAN: Mr. Fanning?

MR. FANNING: Chairman, although I accept it's ultimately a matter for you to decide, it would seem to me that Mr. Moran's evidence does not in any way

implicate my client, Mr. Lowry, or for that matter, in my respectful submission, the Terms of Reference. And in those circumstances, I have no questions for him.

CHAIRMAN: Well, I think I have noted your submission in that regard reasonably cogently, Mr. Fanning.

Mr. Quinn?

MS. O'BRIEN: Just one or two matters

CHAIRMAN: Sorry, Ms. O'Brien, I should offer Mr. Quinn an opportunity if there is anything he wanted to clarify.

MR. QUINN: I have no questions.

MS. O'BRIEN: Just one or two matters, Sir.

THE WITNESS WAS FURTHER EXAMINED AS FOLLOWS BY MS.

O'BRIEN:

Q. MS. O'BRIEN: Mr. Moran, Mr. Fitzsimons has just referred you to a letter from the Department in which on the basis of which he is suggesting that the Department's sole concern in relation to ownership was that at least 50% be held by the operating partners; isn't that right?

MR. FITZSIMONS: Sorry, voting control, voting control is critical.

MS. O'BRIEN: Yes, voting control.

MR. FITZSIMONS: Individually or collectively.

A. That's what's written in the letter.

Q. MS. O'BRIEN: Wouldn't that be at variance with what was in the letter of the 29th September, which

provided for underwriting by IIU of circa 60%, that is the entire of the Irish side of the investment in Esat Digifone? Because if that underwriting was called upon, isn't the reality that 60% of the voting power, minimum, or perhaps a little more, because it was described as "circa", would pass to a party who was not one of the operating partners?

A. Yes, but at the time this Department letter issued, the underwriting agreement was history.

Q. The underwriting agreement I think was only history, I think, when the shareholders agreement was executed.

A. Yes, but the shareholders agreement was executed on the 16th May also. The date it was signed just before the licence was issued, and subsequent to the issue of the licence, this letter which Mr. Fitzsimons referred to issued to Esat Digifone.

Q. I see.

A. As I understand it.

Q. Can I just ask you one other matter. I asked you about IIU and your knowledge of them on the 10th October. You say that you would have associated you were being told, anyway, that it was Mr. Desmond or Mr. Walsh, but you would have had associated IIU with them; is that correct?

A. Yes, I would have known that.

Q. What did you understand was IIU's business as of the 10th October?

A. An investment company.

Q. They had only very recently been incorporated, hadn't they?

A. I don't know when they were incorporated.

Q. I think they were incorporated about perhaps within a year of the 10th October of 1995.

A. Possibly.

Q. Would you have seen them as an investment company similar to J&E Davy?

A. No. J&E Davy are stockbrokers.

Q. You'd have seen them as a private investment company, would you?

A. Yes, I think so.

Q. Thank you very much, Mr. Moran.

A. Thank you.

CHAIRMAN: Just in conclusion, then, Mr. Moran, whilst

it's a trivial enough matter, one of the recent

Telenor witnesses stated that he thought that your

somewhat belated involvement on behalf of your firm in

acting for Telenor came about probably as a result of

a number of the other large Dublin law firms having

been engaged by rival consortia, and also was it the

case that in fact Matheson Ormsby Prentice had acted

for one or more rather large Norwegian firms?

A. Yes, that's I think that's the case.

CHAIRMAN: Lastly, in regard to the terms of the

letter of the 29th September from Dr. Michael Walsh

and we can have it briefly up on the screen if it's needed to refresh your memory if it had been the case, and I accept this is hypothetical, that you had been asked to vet or review that letter in draft form for Telenor, might you have slightly queried the use of the terminology "circa 60%" as seeming somewhat imprecise for a document of some

A. Well, a lawyer probably would have put the exact percentage, I suppose. But of course, one didn't know how much one wouldn't have known how much resources Communicorp would in fact put in. So "circa 60%" might not have been that inaccurate.

CHAIRMAN: Mr. Moran, thank you very much for your assistance today.

I think that's the only evidence, Ms. O'Brien?

MS. O'BRIEN: Yes. It's hoped that a witness from Norway be available on Wednesday of next week, but there will certainly be witnesses on Thursday or Friday, so perhaps if we post it on the website.

CHAIRMAN: Yes, provisionally for the usual time on Tuesday, but if there is necessitated any alteration, it will be posted on the website.

MS. O'BRIEN: I think provisionally for the usual time on Wednesday. It's just been a difficulty in getting witnesses from abroad. So it will be provisionally for Wednesday; otherwise it will be posted on the website.

CHAIRMAN: Mr. Quinn, I did briefly discuss the costs issue, and I'll give you any further opportunity, either in hearing or in writing, to consider the matter further; but I think I have made it clear that I am certainly not expecting the involvement and the help that Mr. Moran has given to be entirely gratuitous.

MR. QUINN: Thank you very much, Mr. Chairman.

THE TRIBUNAL THEN ADJOURNED UNTIL WEDNESDAY, 18TH FEBRUARY, 2004 AT 11AM.