

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY,

19TH FEBRUARY, 2004 AT 11AM:

MS. O'BRIEN: Mr. Gerry Halpenny, please.

GERRY HALPENNY, HAVING BEEN SWORN, WAS EXAMINED AS

FOLLOWS BY MS. O'BRIEN:

Q. MS. O'BRIEN: Morning, Mr. Halpenny. Thank you very much.

Mr. Halpenny, you were a partner in the firm of William Fry Solicitors in 1995 and 1996; isn't that right?

A. That's correct, yes.

Q. I think you actually left William Fry in 1998, and that you are now a partner in LK Shields & Partners?

A. That's right, yeah.

Q. And in 1995 and 1996, I think from mid-1995, you acted for Communicorp/Esat Telecom in relation to the Esat Digifone bid, but I think it's clear that you never at any time acted for Esat Digifone as a consortium or as a company; is that correct?

A. That's correct, yes, yeah.

Q. You have assisted the Tribunal by providing two memoranda of intended evidence, and what I propose doing, subject to your agreement, is putting those memoranda on the record. So I'll read through them and ask you formally to confirm the accuracy of their contents, and then what I propose doing is returning to discuss some of the matters referred to in your

memoranda in greater detail. And at that stage I propose opening the documents of which I think you have had notice.

A. Yes.

Q. Now, your first memorandum of intended evidence is dated the 19th March, 2002, and your second memorandum is dated the 2nd February, 2004. And I wonder, do you have copies of each of those documents with you in the witness-box? If you don't, I can arrange to have them handed up.

A. I have a copy of the 2nd February but not the first one.

Q. We'll hand up the first one to you so that you can just follow it while I am reading it.

Your first memorandum is dated 19th March, 2002. You state: "I now set out below, as requested, your replies in respect of the queries raised in the Tribunal's letter".

You state initially there that are a couple of points of clarification which you should make. The first is that your involvement at all times was on behalf of Esat Telecom Group, and at no relevant time did you act on behalf of Esat Digifone Limited. For the avoidance of doubt, you also confirm that you never acted on behalf of Mr. Dermot Desmond/IIU. Is that correct?

A. Correct.

Q. You then state that your note is also from recollection of matters with which you had a direct involvement and from consultation of files at William Fry Solicitors dealing with those matters to the extent that you were involved, and you have responded to the specific queries raised by the Tribunal as follows:

In relation to Query A, which was your knowledge, direct or indirect, of the association of Allied Irish Bank, Investment Bank of Ireland, Standard Life of Ireland and Advent International with the bid and/or the consortium and the subsequent disassociation of them from the bid or the consortium.

You answered that other than being aware of the fact that the four institutions were mentioned as potential investors in the consortium, you had no knowledge of any discussions which took place with any of those parties in relation to the bid and/or the consortium.

Is that correct?

A. Correct.

Q. And of course, that would simply be based on whatever information was available at the time, because you had no involvement in the actual preparation of the bid or in the submission of the bid to the Department or in any of the dealings between the consortium and the Department. Is that correct?

A. That's correct, yes.

Q. At Query B, you were asked for your knowledge, direct or indirect, of the association of Mr. Desmond/IIU with the bid and/or the consortium and their subsequent disassociation from the consortium.

And you had answered that you had no direct knowledge of how Mr. Desmond/IIU came to be involved with the bid or the Digifone consortium, although your understanding is that they were prepared to enter into a binding commitment with regard to participation and also underwriting in advance of a decision being made on the grant of the licence. In that regard, you were involved in the negotiation of the arrangements which led to the signing of letters dated 29th September, 1995, whereby IIU agreed certain arrangements regarding the funding of the consortium. Under those arrangements, IIU specifically agreed to underwrite the obligations of Communicorp Group Limited, which for the purposes of your response can be regarded as one with Esat Telecom group. In addition, it was agreed that in the event of the licence being awarded to Digifone, 25% of the equity of Digifone would be placed with IIU or its nominees. IIU also agreed to pay 25% of the net bid costs in the event of the bid not being successful. IIU was to be paid an underwriting fee in respect of its underwriting of the obligations of Communicorp. That is correct?

A. That's correct.

Q. I think in fact we'll see, when we look at the documents, that the agreement to pay IIU a fee may have fallen away before the final documents were executed on the 29th September.

At Query C, you were asked for your knowledge, direct or indirect, of the negotiations with Mr. Desmond /IIU from August 1995 to May 1996.

You have answered, "I have mentioned in the previous paragraph my involvement in the discussions leading to the execution of the documents relating to the underwriting arrangement on the 29th September, 1995".

Thereafter, your involvement centred mainly on the negotiation of the terms of the shareholders agreement between Telenor, Esat Telecom group and IIU. Those discussions and negotiations ultimately led to the execution of the shareholders agreement on the 16th May, 1996. As would be expected, the negotiations were lengthy and at times extremely detailed covering all aspects of the relationship between the shareholders governing the position going forward as owners of the entire issued share capital of Digifone.

Is that correct?

A. Correct.

Q. Query D, you were asked for your knowledge, direct or indirect, of each of the arrangements referred to at 1 to 4 or of any other agreements or arrangements with Mr. Desmond /IIU, whether concluded or otherwise.

And with reference to the items referred to in the second page of the Tribunal's letter, you responded as follows, and at Item 1 you were asked to comment on the following: Firstly, Item 1, dated in early August 1995, it appears that there was an outline agreement between Mr. Denis O'Brien and Mr. Desmond whereby Communicorp would arrange for Mr. Desmond to have the right to take up, at par, 15% of the ordinary shares in Esat Digifone Limited, replacing Allied Irish Bank, Investment Bank of Ireland and standard chartered bank; that Mr. Desmond would pay his portion of the bid costs; that Mr. Desmond would provide a bank guarantee for IR£1/23 million in order to enable Communicorp to draw down a £1/23 million bank facility, and that in exchange for the guarantee, Mr. Desmond would be paid a fee of IR£1/2300,000, no later than 31st March, 1996.

And you answered as follows. You state that you were not familiar with the outline agreement referred to and do not recollect any discussion or being involved in any discussion of its terms, although if you were in possession of information which would suggest what you are stating there is if the Tribunal is in possession of information that would suggest that you had some involvement, to let you know, and you would endeavour to inquire further on that aspect. You assumed that the outline agreement

must have been a forerunner to the arrangements ultimately entered into on the 29th September, 1995.

Is that correct?

A. Yes.

Q. And in fact it does appear from the documents that you didn't have an involvement, probably until sometime after the 18th September; but again, we'll come and look at them?

A. Yeah.

Q. The item that was mentioned at paragraph 2 in which you were asked to comment was as follows: By 29th September, it had been agreed that in the event that the consortium was awarded the second GSM licence, the consortium would place 25% of the equity with IIU and that IIU would arrange underwriting for the 37.5% of the equity from which Communicorp had agreed to subscribe, and you answered that as mentioned above, you were centrally involved in the discussions with IIU leading to the execution of the documents on the 29th September, 1995.

The third item which you were asked to comment on was as follows: By January, 1996, IIU had agreed with Esat Holdings that IIU would place 12.6% of the equity in Esat Digifone with Esat Holdings, and that in return, Esat Holdings would pay subscription amounts due on IIU's remaining 12.4% as they fell due up to a maximum of IRi½6.448 million. This agreement was

concluded on Telenor's approval.

And you have commented that while you are aware that Esat Telecom Group had made an approach to IIU to acquire a further 12.6% in Digifone and that IIU were prepared to consider such a transaction, you were also aware that it was at all times the case that IIU's consent was expressly subject to Telenor being happy with such proposal. It became apparent, once the matter had been raised with Telenor, that they, Telenor, were not prepared to agree to such a proposal. You have no recollection of having been directly involved in any discussions with either IIU or Telenor in relation to any such proposed agreement, though as mentioned, you were aware that the proposal was being made by Esat Telecom Group. Is that correct?

A. That's correct, yeah.

Q. The fourth item that you were asked to comment on was as follows: In May 1996, it appears that the agreements above were revised and the equity was ultimately held as to 40% by Esat Telecom Holdings, as to 40% by Telenor and as to 20% by IIU, subject to IIU's commitments to dispose of part of its equity equally to Esat Telecom Holdings and to Telenor at specified times.

You commented as follows: As mentioned above, I was centrally involved in all the discussions and



negotiations on the terms of the shareholders agreement which was entered into on the 16th May, 1996. Shortly before the agreement was signed, which you believe was also the day on which the licence was issued, IIU agreed to reduce its shareholding in Digifone from 25% to 20%, with each of Telenor and Esat Telecom Group increasing their shareholdings from 37.5% to 40%. Your understanding of the change in the shareholding was that the Department of Communications were quite keen that the shareholders of Esat Telecom Group and Telenor should remain at the levels at which they had proposed at the time when the original submission of the bid had been made.

In order to comply with this request, IIU agreed to a reduction. Accordingly, in or around the time of the signing of the shareholders agreement, agreements were entered with Telenor and Esat Telecom Group whereby IIU transferred 2.5% of the share capital of Digifone to each of them. The consideration in each case was IRi½1,375,000. Is that correct?

A. There is one small point, actually. I think on the 9th line, where it says "Department of Communications were quite keen that the shareholders of Esat Telecom", that should be "shareholdings".

Q. What they wanted was that the capital configuration should revert to that which was set forth in the bid?

A. Yeah.

Q. Now, the fifth item that you were asked to comment on was as follows: At various times subsequent to May 1996, it appears that IIU disposed of its shareholding to Esat Telecom and to Telenor, and that Mr. Desmond ultimately severed his connection with Esat Digifone at the time of the takeover by British Telecom. You have commented that you were aware that a further 5% of the shares in Digifone was subsequently transferred by IIU to each of Telenor and Esat Telecom Group, thereby reducing IIU's shareholding from 20% to 10%. From your examination of the files of William Fry, the agreement between IIU and Esat Telecom was entered into on the 18th April 1997, and you assume a similar arrangement was entered into with Telenor on the same day. As you left William Fry on the 12th June 1998, you had no further involvement in advising on any transactions which took place in respect of the shares in Digifone after that date. And as far as you are aware, at that point, IIU remained the holder of 10% of the shares of Digifone. Is that correct?

A. Correct, yes.

Q. Then you were finally asked for details of all of your involvement in any aspect of the negotiations with IIU/Mr. Desmond or with the agreements referred to above or with any other agreements or arrangements reached with Desmond/IIU, whether concluded or otherwise.

And you answered as follows: You stated, as mentioned above, you were heavily involved in advising on the shareholders agreement which was executed ultimately on the 16th May, 1996, and you also advised on the discussions leading to the execution of the agreements on the 19th September 1995. Apart from that, your direct involvement in discussions with or negotiations between IIU and Esat Telecom Group and, where relevant, Telenor, would have been relatively limited, as in most cases you would simply have received instructions from time to time as to whether certain commercial terms had or had not been agreed. Most of the meetings which you had in relation to the shareholders agreement, in particular, were to deal with the legal aspects of the transaction and the terms of the shareholders agreement. There were also, as would be expected in a transaction such as this, a large number of other issues which arose from time to time and which were negotiated between the parties leading to the execution of the various documents. Is that correct?

A. Correct.

Q. And finally, you have commented that you have used your best recollection, albeit going back up to seven years, and review of relevant papers to provide a full summary of the matters with which you were involved, and you indicated that if there were any specific

items in respect of which the Tribunal required further clarification or would like you to provide further information, to the extent that you were in possession of it or it is available to you, you would be happy to assist where possible.

Now, your second memorandum is dated the 2nd February, 2004, and it deals with your responses to the further specific queries which were raised by the Tribunal, primarily by reference to documents which appeared to record either communications from you or what occurred at meetings which you attended.

You state initially that you were a partner in the commercial Department of William Fry Solicitors until June 1998. During the period from 1994 to 1998, William Fry acted as solicitors to Communicorp Group Limited and Esat Telecom Group plc and various related companies, and you had significant contact with those companies during that period. In particular, during the period from August 1995 to May 1996, you advised Communicorp/Esat Telecom on dealings with Telenor and IIU relating to the Esat Digifone joint venture; in particular, in the negotiation of the shareholders agreement between the parties. In your memorandum, you will use the term "Esat Telecom" to refer to the entity or entities within Communicorp/Esat Telecom which was/were involved in those discussions.

As the Tribunal may be aware, Communicorp Group

Limited was originally a holding company for certain radio and telecommunications businesses of Mr. Denis O'Brien Junior and parties associated with him. But during 1996, a group reorganisation took place with Esat Telecom Group plc becoming a separate holding company for the telecommunications interests.

You state that in the Tribunal's letter of 17th December, 2003, you were requested to set out details of all of your involvement in the bid process, including the presentation, the negotiations between the members of the consortium, which expression you will use as a reference to the parties, together making up the shareholders in Esat Digifone Limited, in the period leading up to the grant of the licence and the negotiations between the consortium and the Department for the grant of the licence.

You have informed the Tribunal that on the first and third of those items, your involvement was effectively nil. You were in the offices of Esat Telecom during the hours leading up to the submission of the bid, but solely for the purposes of the meeting with Mr. Amund Bugge of Telenor, whom you had also met in the offices of William Fry earlier that day, to discuss the terms of a proposed shareholders agreement between Esat Telecom and Telenor. You had no other involvement whatsoever in the bid process, except to the extent that any items mentioned below might be construed as

involvement by reason of the fact that they were in some way related indirectly to that process, and certainly, you had no involvement prior to the submission of the bid apart from the meetings with Mr. Bugge. Furthermore, you had no involvement whatsoever in the negotiations and discussions between the consortium and the Department for the grant of the licence. As the Tribunal will be aware, there was a strict delineation of duties between yourself and Owen O'Connell of William Fry under which Owen O'Connell acted as solicitor to Esat Digifone Limited in those negotiations, whereas you acted exclusively for Esat Telecom in the negotiations on the shareholders agreement. Therefore, your main involvement was in the second of the areas mentioned by the Tribunal; the negotiations between the members of the consortium in the period leading up to the execution of the shareholders agreement between them and the grant of the licence.

Your involvement in the negotiations between the members of the consortium commenced, as mentioned above, with your meetings of Amund Bugge of Telenor, the first of which take place at about lunchtime on the 3rd August 1995 at William Fry, and the second at Esat Telecom from early that evening, you think about 7.30pm, until approximately 5am on the 4th August, 1995. From then until the date upon which the

announcement was made that Esat Digifone was to be awarded the licence, that was in October 1995, there was very little discussion on the arrangements between the shareholders. Once that announcement was made, the negotiations on the shareholders agreement commenced in earnest, albeit at times moving rather slowly, and developed into what you would describe as normal negotiations between commercial parties regarding the terms governing their joint venture.

Given that this was a commercial negotiation involving three unrelated parties, all seeking to protect their own interests, it was not surprising that the negotiations were both lengthy and at times complex, and the timing was also to some extent driven by the progress of the negotiations between the consortium and the Department. The shareholders agreement was eventually signed on the 16th May, 1996, being the date upon which the licence was issued to Esat Digifone.

And just to ask you to confirm that all of those introductory matters are correct?

A. Yes.

Q. You state that you now turn to deal with the specific questions raised in the letter from the Tribunal to you dated 17th December, 2003, using the numbering set out in that letter.

And you see that the Tribunal has prepared this in a

question-and-answer format, so it's quite clear what question you are answering.

A. Okay.

Q. Now, at Question 1A, you were asked for details of a telephone conversation between you and Mr. Amund Bugge on the 4th August, 1995, and recorded by you in your attendance of the same date. And you referred to the document at Tribunal Book 48, Document 31. You have answered that there is a misunderstanding here, as the attendance referred to is in fact an attendance prepared by Mr. Owen O'Connell and not by you. Your recollection is that at that point, you were actually with Mr. Bugge; and that while you were together, he had a conversation with Owen O'Connell by telephone, and the attendance to which you refer is Owen O'Connell's note of that conversation.

Question 1B, you were asked for your understanding as to why and for what purpose Mr. Bugge, on behalf of Telenor, was seeking an opinion that the Advent offer of funding to Communicorp was legally binding.

And you have answered that on the date of the telephone conversation in question, you were unfamiliar with the arrangements between Esat Telecom and Advent referred to in the letter from the Tribunal. However, you would assume that the issue of an opinion as to the binding nature or otherwise of Advent offer of funding was raised in the context of



Telenor seeking to satisfy itself that Esat Telecom would be in a position to satisfy the financial commitments required of it as a member of the consortium.

Is that correct?

A. Correct.

Q. Question 2, you were asked for details of all dealings between you and Mr. Peter O'Donoghue, Mr. Owen O'Connell or any other person in connection with the advices comprised in your letter dated 4th August 1995 to Mr. Peter O'Donoghue that's the document at Tribunal Book 48, 32. And you have answered that your recollection on this point is that the intention was simply to reiterate the advice that had been given by Owen O'Connell on the Advent issue. The Tribunal will note from the specific contents of the letter dated 4th August, 1995, to Peter O'Donoghue, that you did not offer any additional or new advice on the issue, and as you had no familiarity with the Advent arrangement, given that it predated your involvement, and you simply stated the fact that Owen O'Connell had given the particular advice. Is that correct?

A. Correct.

Q. Question 3, you were asked for details of all matters, factors or considerations which prompted the advices comprised in your letter dated 26th September, 1995, to Mr. Michael Walsh of IIU Limited. That's Tribunal

Book 48, Document 62. And you have answered that the reference to advices in the Tribunal's letter is somewhat misleading. As Mr. Walsh was not your client, you were not in a position to give him advice, nor was that either the intention or the purpose of your letter of the 26th September, 1995. You had met with Mr. Walsh on the 24th September, 1995, to discuss certain issues in relation to the document referred to in the Tribunal letter, and the letter represented a commentary on the amendments made following that meeting and other discussions with Mr. Walsh, and also from a consultation with your client as to the acceptability or otherwise of the changes being sought by him.

You wrote this letter as an adviser to Esat Telecom and in the context of negotiations between Esat Telecom and IIU regarding the terms of the arrangement agreement insofar as they affected Esat Telecom. Is that correct?

A. Correct.

Q. And what we'll do is, when we are looking at the documents, we'll come back and just look at that faxed letter of the 26th September.

A. Mm-hmm.

Q. Question 4, you were asked for your knowledge, direct or indirect, of all matters which prompted the decision or determination by the consortium or by any

member of the consortium to forward the letter dated 29th September, 1995, from Mr. Michael Walsh addressed to Mr. Martin Brennan, and you were referred to Tribunal Book 48, Document 64.

And you have answered, as mentioned in the previous reply, there had been various discussions and meetings with IIU on the arrangements proposed to be entered into between IIU and both Esat Telecom and Esat Digifone Limited relating to the provision by IIU of assurances effectively by way of underwriting for the obligations of Esat Telecom as a shareholder in Esat Digifone Limited. You referred above to a meeting which took place on the 24th September, 1995, and subsequent correspondence. On the 29th September, 1995, you attended with Mr. Denis O'Brien at the offices of IIU, where you met with Michael Walsh and agreed the final form of letters to be issued by IIU, including the letters from Mr. Michael Walsh, addressed to Mr. Martin Brennan, dated 29th September, 1995, which was, on that date, forwarded to the Department. However, your understanding is that the letter was in fact returned by the Department and that the Tribunal is aware of that fact. And that is of course correct.

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

A. It's correct, yes.

Q. Question 5, you were asked for details of all of your dealings with Mr. Denis O'Brien, IIU Limited or Telenor or any associated person in connection with the inquiries made by Telenor regarding Bottin International and brought to your attention by fax dated 13th October, 1995, from Mr. Denis O'Brien. And that was the document in Tribunal Book 48, Divider 79. And you answered, "I had no dealings of any substance with Mr. Denis O'Brien, IIU Limited or Telenor in connection with the inquiries made by Telenor regarding Bottin International" and brought to your attention by fax dated 13th October, 1995, from Mr. Denis O'Brien. You were not in a position to provide any information in relation to that company, and you assumed that information must have been provided to Telenor subsequently which was satisfactory to them, or that Telenor made their own inquiries and satisfied themselves in that way. You would be of the view that it would have been entirely reasonable for them to have sought some comfort in this regard, given the nature of the obligations being undertaken by Bottin. Is that correct?

A. Correct.

Q. Question 6, you were asked for details of the meeting of the 9th November, 1995, of which you kept an attendance, which is in Tribunal Book 49, Document 87; and in particular, firstly, your understanding of the

concerns of Telenor regarding Bottin as recorded in your attendance, and secondly, your understanding of the discussions and concerns expressed regarding IIU Limited.

And with regard to A, you have informed the Tribunal that the concerns of Telenor regarding Bottin would have been in relation to its ability to meet financial commitments and with the fact that it was being introduced as a party to the arrangements after the initial discussions had been with IIU.

And with regard to B, you have informed the Tribunal that the concerns would be similar in nature as to those raised in relation to Bottin, as Telenor would have wished to have some evidence that IIU Limited was in a position to undertake the obligations being assumed by it, including the underwriting of commitments in relation to Esat Telecom. Is that correct?

A. Correct.

Q. Now, at Question 7, you were asked for details of the meeting on the 21st November 1995 of which you made an attendance, which is in Tribunal Book 49, Document 90, and in particular, firstly, the person from whom you received the information contained in your attendance that IIU was "not a problem for Martin Brennan in the Department".

B, your knowledge, direct or indirect, of all contact

between the Esat Digifone consortium or any person connected or associated with it and Mr. Martin Brennan of the Department and which gave rise to the information referred to above.

C, your understanding of the matters or factors which prompted to you record that "Clause 4.5, better out of the agreement banks not to see."

In relation to A, you have informed the Tribunal that the meeting in question was attended by, among others, Richard O'Toole and Peter O'Donoghue, both of whom were involved in the discussions with the Department.

You would assume that the information in question was received from one or other of them. You took it to mean that the involvement of IIU as part of the consortium was not likely to be a big issue for the Department, given that the principal operational partners in the consortium would still be Esat Telecom and Telenor. Is that correct?

A. Correct.

Q. In relation to B, you have informed the Tribunal you have no knowledge, direct or indirect, of any such contact other than as a result of the discussions at the meeting referred to in paragraph 8A, but also again assume that the contact would have been between Richard O'Toole and/or Peter O'Donoghue on the one hand, and Mr. Brennan on the other hand; is that correct?

A. That's correct.

Q. And in relation to C, you have informed the Tribunal that you have been unable to locate a copy of the draft shareholders agreement containing the clause to which reference is made; therefore you were unable to confirm with certainty what was contained in the clause in question. However, it is likely that it was a clause which contained either a penalty for shareholders who did not fulfil any obligation to make a capital payment or an arrangement whereby the other parties would provide such funding in place of the party in question. The view may have been that to include such provisions in the relevant section of the agreement might give a negative message to any third-party lenders and that it was best not to include such a clause, at least at such early stage of the agreement. Obviously agreement was reached on the issue as the clause appears to have been removed.

Is that correct?

A. Correct.

Q. Now, at Question 8, you were asked for details of your understanding of the following matters recorded in your attendance on Mr. Richard O'Toole, dated 8th January, 1996, which is in Tribunal Book 49, Document 102.

A) each and every respect, IIU, was seen as an 'obstacle to getting things sorted.'

B) each and every respect which you understood that IIU was acting as a strategic operator.

C) your understanding of the concerns of Mr. O'Toole regarding the "20% V 25% issue."

And in relation to A, which was the reference to IIU being an obstacle to getting things sorted out, you have stated that your understanding of the comment made by Richard O'Toole was that in view of the fact that IIU had been very slow to provide comments on the draft shareholders agreement and were therefore holding up the finalisation of the agreement, it was very difficult for the consortium in turn to advance its discussions with parties such as the Department, third-party lenders, equipment providers and the like. The view of Esat Telecom and Telenor appeared to be that it would be greatly preferable in approaching those parties to be able to say that there was a valid and binding shareholders agreement, either in place or agreed in principle, but it was not possible to say this in the absence of detailed input from IIU.

Following on from this conversation with Richard O'Toole, you sent a letter to him, a copy of which is in the Tribunal's possession, outlining the various options and alternatives available to Esat Telecom and Telenor to try to remove the logjam. However, you believe that it would be incorrect to read too much in the particular comment. The reference by Richard



O'Toole to an obstacle was, in your recollection, very much in the context of logistical difficulties as opposed to any difficulties in principle between Esat Telecom and Telenor on the one hand, and IIU on the other. Is that correct?

A. Correct.

Q. And again, we'll look at all the documents when we are discussing it in more detail.

A. Mm-hmm.

Q. And at B, you have informed the Tribunal that the statement that IIU was acting as a strategic operator was an informal comment made by Richard O'Toole on the phone to you. Once again, you would not attribute too much significance to the comment. You believe that he was making the point that IIU was not a party directly involved in the telecommunications business, but that in the context of the equal shareholdings of Esat Telecom and Telenor in the consortium, it would be in a pivotal position at certain times, although any exercise of voting rights by any shareholder in the consortium was likely to be heavily qualified by the terms of what was likely to be a very strong shareholders agreement. Is that correct?

A. Correct.

Q. Then C, you have informed the Tribunal that you believe that the reference to the 20% versus 25% issue was simply an informal comment by Mr. O'Toole in the

context of the fact that ultimately a decision would have to be made as to whether IIU would remain with its 25% shareholding or reduce it to 20%. You do not recall a detailed discussion with Mr. O'Toole on the issue during the telephone call mentioned, but you are aware that the issue would have to be addressed with the Department at some stage, given that the structure of the consortium was going to be to some extent different from what was contained in the bid documents submitted to the Department. Is that correct?

A. Correct.

Q. Now, at Question 9, you were asked for your understanding of all factors or considerations which prompted Communicorp/Esat Telecom to request Telenor to extend the time for repayment of its bridging loan from the 30th June, 1996, to the 30th September, 1996, as recorded in your letter to Matheson Ormsby Prentice dated 11th April, 1996. That's in Tribunal Book 49, Document 120.

And you have informed the Tribunal that your understanding on this point is that Esat Telecom wished to have the payment date for the bridging loan extended from the 30th June, 1996, to the 30th September, 1996, due to the fact that there had been delays in the licence process which in turn caused delays in Esat Telecom being able to proceed with and close its fundraising exercise with mainly US

institutional investors. You were not aware that any formal agreement was ever reached with Telenor on the issue, but in any event, as the Esat Telecom fundraising closed early in June, the point was perhaps somewhat academic. Is that correct?

A. Correct.

Q. And finally you were asked about details of a meeting on the 9th May, 1996, of which you kept an attendance which is in Book 49, Document 135, and in particular, A) your understanding of the information recorded in your attendance that "No cash available immediately", and B) the identity of the person who provided you with such information.

And in regard to A, you have informed the Tribunal that you are unable to recollect in specific detail the particular issue to which reference was made, but you understand it to be a reference to a phone call made by Knut Digerud to the Department, presumably to say that there were still issues to be dealt with before Telenor was prepared to make available funding to Esat Telecom under the bridge arrangement. And this, you believe, explains your note that the bridge was dependent on the 12.5%. The Tribunal will be aware that Esat Telecom sought to reach agreement with Telenor regarding the purchase by Esat Telecom of additional shares so as to achieve a position under which Esat Telecom had a controlling shareholding in

the consortium. Telenor were clearly unhappy with this, as evidenced by the correspondence provided to the Tribunal, and the call by Mr. Digerud to the Department may have been an attempt by Telenor to put pressure on Esat Telecom to withdraw its proposal regarding the purchase of additional shares. There is also reference in the attendance of the meeting to a phone call being made by Denis O'Brien to the Department, presumably to try to mitigate any negative consequences of Mr. Digerud's call, which would have been regarded by Esat Telecom as unhelpful and not in the interests of the consortium as a whole.

Is that correct?

A. Correct.

Q. And at B, you state you have informed the Tribunal that you have no recollection of where the information came from, but you assume it would have been either from Paul Connolly or Leslie Buckley, both of whom were at the meeting. Is that correct?

A. Correct.

Q. And that concludes your second memorandum.

Now, Mr. Halpenny, we had heard from Mr. O'Connell, in the course of his evidence, that after the joint venture agreement was concluded between Communicorp and Telenor, that a decision was made that he would act for Esat Digifone and that you would come in and act on behalf of Communicorp, but solely in relation

to Communicorp's Esat Digifone affairs, if you

understand me.

A. Well, that's correct, but I had acted for Communicorp and Esat over a period. I mean, I had started acting for them, I think it would have been probably in the summer of 1994.

Q. I see.

A. So I had a significant amount of familiarity with the company. And then when the Digifone transaction came about, it was agreed in around August that it was appropriate, if Owen was going to act for Esat Digifone, if the partners were happy for him to do that, it was necessary for somebody else to act for Esat Telecom.

Q. Because obviously by that time, Esat Digifone also encompassed the interests of Telenor?

A. Indeed.

Q. And I think the first instance that we can see of your involvement, and I think you have stated this also in your memorandum, is meetings with Amund Bugge on the 3rd and 4th August?

A. Correct.

Q. And they seem to have been quite protracted meetings.

I think you said in your memorandum you attended a meeting until 5:00 in the morning on the 4th August, a meeting that commenced at about

A. I think it was probably even later, in fact, but

Q. 7.30 the previous evening. You seem to say in fact perhaps the principal matter that you were discussing at that meeting was the shareholders agreement or the early drafts of the shareholders agreement?

A. It was, yes.

Q. So in fact you weren't spending all of that time dealing with the stronger financial assurance that Telenor were looking for?

A. No.

Q. I see. Now, if I can just refer you to the attendance which was mentioned in both your memorandum in the questions and the answers. It's at Divider 31.

And as you pointed out in your answer, it's not in fact your attendance; it's Mr. O'Connell's attendance of a telephone call that he made, or perhaps Mr. Bugge made to him in the course of the meeting which you were having with Mr. Bugge about the shareholders agreement; is that right?

A. Yes.

Q. And just looking at it here, it records "Amund Bugge/Gerry Halpenny.

"Opinion re Advent offer to be provided.

"Ask DOB for Advent offer/agreement. That is legally binding on Advent.

"Peter O'Donoghue/DOB re Advent offer.

"Made clear OO'C has not seen Advent offer."

And of course, you wouldn't have been in a position to

give any commitment to Mr. Bugge in relation to the provision of an opinion, or indeed to express any view on the enforceability of any offer; you knew nothing about the agreement with Advent, and you knew nothing about the offer from Advent. Isn't that right?

A. That's correct, yes.

Q. Were you aware at the time that Mr. Bugge was looking for this opinion?

A. I was going back again to 1995 I would have been aware of the fact that one of the issues that was likely to arise for Telenor was to know that Esat Telecom would have been in a position to meet its financial obligations. And I also became aware then that there was some form of commitment which had been made by Advent. But as to the terms of the commitment or the specifics of it, I had no knowledge.

Q. You had no knowledge of that.

If I can just ask you to turn over the page to Divider

32, there is a letter here from you to Peter

O'Donoghue, and again that's referred to in your

memorandum. You say: "Dear Peter,

"I enclose for your attention a copy of the letter

handed over to Amund Bugge today in connection with

the financing of the GSM bid.

"We also discussed at our meeting this morning what

steps should be taken with Advent regarding the

funding of the GSM company. As you will recall, Owen

O'Connell is strongly of the view that the condition in Clause 4.2 of the agreement dated 12 July, 1995, has not in fact been satisfied, and that you should very strongly consider sending a letter along these lines to Advent, stating as that agreement was not satisfied, the agreement 12 July, 1995, is of no further effect.

"I trust this is in order."

Now, in your memorandum, I think you have said that you didn't give any separate advice and that you were simply recording and repeating advice that had been given by Mr. O'Connell to Mr. O'Donoghue that morning; is that correct?

A. Yes. As far as I can recollect, I think Owen may have been out of the office, and he wanted Owen asked me would I send it out to Peter just confirming his advice. I think it was something along those lines.

But certainly I wasn't I was simply stating that Owen had stated that the condition had not been satisfied.

Q. Would I be right in thinking, therefore, that you must have had a separate meeting with Peter O'Donoghue that morning that Mr. Bugge didn't attend?

A. The 4th August would have been the

Q. It was the Friday, the day the bid went in.

A. The day the bid went in. Yes, I think that's correct.

I think Mr. Bugge wasn't at that meeting.



Q. Can I just refer you to the letter which was handed over to Mr. Bugge that you referred to in your letter of the 4th. It's at Divider 30. It's two documents back in Book 48. It's to Mr. Bugge. It's from Mr. O'Brien on Communicorp letterhead.

"Esat Digifone Limited/GSM bid.

"Dear Sirs,

"We wish to confirm that we have received an offer from Advent International Corporation Limited of funds sufficient to perform our obligations in respect of the bid. We wish, however, to seek alternative sources of funds because the terms of Advent's offer are unfavourable to us.

"We are aware of your concern to ensure that Communicorp has access to sufficient funds to perform its bid obligations and accordingly agree that if we fail to raise sufficient third-party funding in time to provide Esat Digifone with funds as anticipated by the bid, we will accept and conclude Advent's offer of funding." Do you see that letter?

A. Yes.

Q. And was that a letter that you delivered to Mr. Bugge in the course of your meeting with him on the 4th August regarding the shareholders agreement?

A. I don't have any recollection of that, to be honest.

I don't think so, because I think in the note of the meeting with I can't recollect; I am sorry.

Q. You wouldn't have had any input, though, in the preparation of that letter or the decision that that letter should be provided to Telenor?

A. No.

Q. It was purely draft shareholders agreement matters that you were negotiating with Mr. Bugge in the course of those protracted meetings on the 3rd and 4th August?

A. To explain what happened exactly, Mr. Bugge arrived into our office I think about 12 o'clock, into the office of William Fry. And I think he arrived in with a draft shareholders agreement and said, "Oh, we'll have to negotiate this and sign it tomorrow". And I said to him, "There is absolutely no way in the world you can negotiate a shareholders agreement and sign it tomorrow".

So what we did for most of the time, I think, was to focus on particular issues in the agreement, but the meeting was quite a disjointed one, quite frankly. I mean, by the time we left the building at 5 o'clock in the morning or whatever, I wouldn't say that significant progress was made on commercial or legal issues on the agreement. It was very much you know, we would start discussing something, and there'd be an interruption for something else. So...

Q. In any event, we know there was no shareholders agreement signed until the 16th May?

A. No.

CHAIRMAN: Well, I think Mr. Bugge told us last week that he had some initial hopes that there might have been a shareholders agreement finalised before the bid went in, but perhaps with the hindsight and greater experience, he now accepted that it was pretty unrealistic. So what you recall seems to accord with that.

A. Yeah.

Q. MS. O'BRIEN: We know then that I think Mr. Bugge took matters up regarding the opinion with Mr. O'Connell directly and that Mr. O'Connell furnished a letter of 17th August, but again you'd have had no involvement whatsoever with that?

A. No.

Q. Now, I think the next involvement that we see on your part and that you have referred to in your memorandum was in relation to the negotiation and finalisation of the agreements that were ultimately executed on the 29th September that covered the involvement of IIU?

A. Yes.

Q. Now, if I can ask you to turn to Document 42 in Book 48. And that is Mr. O'Connell's attendance of a meeting that he had with Mr. O'Brien and Mr. Leslie Buckley on the 18th September.

And to just put that in context for you: The 29th September, when the documents were all executed and

the letter was sent off to the Department, was a Friday. And this was the previous Monday week, the 18th September. So it was, if you like, two working weeks before the 29th.

And it's Mr. O'Brien and Mr. Beck.

And it records: "Dermot Desmond going ahead with financing transaction.

"Need 'underwriting' letter for Department because finances are seen as the weakness.

"DD wants 30% of GSM. AIB standard and IBI to be excluded."

You see just below that there are figures,

"30 DD

"5 Advent

"32.5 Esat

"32.5 Telenor."

And that seems to have been what was in Mr. O'Brien's mind as to what the capital configuration of the company might be if Mr. O'Brien or Mr. Desmond was to get 30% and Advent were to retain their 5%. Do you see that?

A. I do, yes.

Q. Now, you weren't at that meeting. Can you recall when you first, if you like, were brought into the loop on this matter?

A. The first meeting I think I had would have been on the 24th, which was actually a Sunday. I met with Michael

Walsh and with Denis O'Brien in William Fry's office, I think it was William Fry's office, on the Sunday evening. And I then took it from there, because the following week, that was the Sunday before the Friday on which the documents were signed, and I essentially dealt with the matter from then on. I don't think, I can't recall nor could I find any reference to a prior involvement, but that is not to say there would not have been one. But obviously there must have been some involvement, because somebody would have told me I had to go to a meeting on Sunday night, which I could have done without, but and I would have also had some knowledge of what the arrangement was proposed to be. But clearly it had moved on from what is on Owen O'Connell's memo.

Q. It had. And we'll look at that.

Can I just ask you this: Were you aware, if you like, prior to your involvement, whether your involvement was in the week beginning the 18th, or didn't happen until the Sunday the 24th, that there were negotiations between ongoing, between Mr. O'Brien and Mr. Desmond?

A. I can't say for certain. I may have been told that there was some discussions going on, but as to any specific knowledge of what they were, I don't think I would have been aware.

Q. Right. Very good. Now, Mr. O'Connell told us that

subsequent to this meeting with Mr. O'Brien and Mr. Buckley that he telephoned Mr. Michael Walsh, and that on the following day, Tuesday, 19th September, he received from Mr. Walsh three draft letters.

Now, the first of those is at Divider 43, and I'll come back to discuss it with you; it's a draft letter to Mr. Kyran McLaughlin. The second letter, draft letter you received on the 19th, the Tuesday, was a draft letter from Michael Walsh, addressed to the Department of Transport, Energy and Communications, "Attention Mr. Martin Brennan", and again, we'll come back to that. And the third letter he received wasn't a draft letter; it was a letter from Mr. Walsh to Mr. O'Brien confirming Mr. Walsh's understanding of the principal terms that they had agreed. Do you see that? That's at Divider 45.

A. Yeah.

Q. Now, that sets out, if you like, what the principal terms under discussion were at that stage, and I'll just draw your attention to two of the five points. The second one was that the consortium would pay a fee of 1%, and the third one was that IIU Limited or its nominees would retain 30% of the equity of the consortium. Do you see that?

A. Yes.

Q. Now, we know that that was negotiated during the course of that week, and looking at the documents, it

appears that the final substantive terms, if you like, were agreed on the 21st, which was the Thursday. Now, did you have any input at all, do you recall, into the discussion of the if you like, the nuts and bricks of the agreement?

A. No, I don't recall any discussion, any involvement.

Q. All right. Now, if you just go on to Divider 48A, you'll see again it's an attendance of Mr. O'Connell on both Mr. Walsh and Mr. O'Brien by telephone. And he records on the Thursday the 21st, a commercial deal. "25% to IIU or nominees." So you see that's fallen from the 30 to the 25.

"Underwrite 40%. (Covenant)

"No placing of shares with Telecom.

"Company (competitor of Telenor); otherwise no restriction. Wording re behave reasonably in placing shares. Will consult company on all material places.

Fee: Side letter, DOB".

That seems to have been Mr. Walsh and Mr. O'Brien confirming, if you like, the final agreement on the nuts and bolts of their arrangements to Mr. O'Connell on the Thursday?

A. Yes.

Q. The 21st. Now, if you just go over the page again, to Divider this is a few more dividers on, Divider 52, you will see that a deed of covenant appears to have been faxed on the Thursday, the 21st September, in

draft form, presumably to Michael Walsh. And you'll see there that the reference on that would suggest that the draft was dated the 21st. It was prepared at 1.08.00pm, and the reference I think suggests that it was prepared or generated by Mr. O'Connell?

A. Yes.

Q. Is that fair enough?

A. Yes.

Q. Do you ever recall seeing this at that stage, or seeing this draft covenant?

A. Not at this stage. It did become the document that I subsequently dealt with.

Q. You'd have sat down and looked at this document with Michael Walsh and Denis O'Brien on the Sunday?

A. Yes.

Q. But you don't recall having any involvement with it as early as the Thursday the 21st?

A. No, not that I can recall.

Q. Right. Did you know at all that Mr. O'Brien was going to Copenhagen on the Oslo, I should say, on the Friday, to meet with Telenor in relation to this matter?

A. Well, I may have known at the time. Certainly as of now, I can't recall knowing it.

Q. I see. I think we know, in fact, from a subsequent fax which we'll look at, received from Mr. Simonsen, that Mr. O'Brien brought documents with him, because I



think Mr. Simonsen had some comments on them which he faxed to Mr. O'Brien on the Monday. But you didn't know about that at the time?

A. I may have known about it. I can't recall if I did or not, to be perfectly honest.

Q. Can I just ask you to look at Divider 53 here. It's a fax to Denis O'Brien from Michael Walsh. It's dated the 21st September, 1995. It's re Dermot Desmond. I am not going to read it all out, but it's effectively a resume in relation to Mr. Desmond. It's the kind of information that I suppose you might issue to the media, but more probably to somebody that knew nothing about Mr. Desmond; would you agree?

A. Yes, indeed.

Q. Do you recall what use this document was put to?

A. I don't recall. But I assume it was to be provided to Telenor as some, as you say, a resume of Mr. Desmond.

Q. It would be logical, wouldn't it, that if Mr. O'Brien was going over to Telenor on the Friday the 22nd for the first time, he was going to be introducing Mr. Desmond as an investor to the tune of 25% and as, if you like, his perhaps later, his underwriter, that they would want some information about Mr. Desmond?

A. Absolutely.

Q. So you'd agree the probability was that the use that this was put to was that Mr. O'Brien may have brought it with him to Oslo on the Friday?

A. Well, certainly for presentation to Telenor, yes.

Q. So we come now to your meeting on the Sunday. And can

I just ask you, first of all, I think you said that it

was in the evening, it was Sunday evening?

A. Yes.

Q. We have a short attendance of it and that clearly

records that Mr. O'Brien and Mr. Walsh were at the

meeting. Do you recall whether there was anybody else

at the meeting?

A. No. As far as I can recollect, it was just the two of

us sorry, just the three of us.

Q. Just the three of you?

A. Yes.

Q. Do you recall was it a lengthy meeting?

A. Not that lengthy. I was worried it was going to be,

when I was going to it, but in fact it was quite

short. If I recall, I think we started at about 6

o'clock, and I think we were finished by 7:00. Now,

again, it's going back quite a long time, but it

wasn't a very lengthy meeting. We discussed a few key

points, and I think everybody was keen to you know,

get back to their families.

Q. Presumably, in advance of that meeting, you would have

had to study the documents that were going to be

placed on the table?

A. Yes. Although I don't recollect any detailed study of

them, to be honest. I mean, it may well have been

that I went into the meeting without being altogether that familiar with what was in the document, but that's not unusual in my line of work.

Q. Would you have met Mr. O'Connell beforehand so that he could, if you like, fill you in on what was happening?

A. Owen may well have, certainly not on the Sunday, I don't think I met him on the Sunday, or but I am sure he probably filled me in as to what the proposal was so that I was aware of what the commercial arrangements were and how so that I would be in a position to reflect those in any legal agreements.

Q. Because it would have been difficult for you going to the meeting if you knew nothing about what had been discussed between the parties?

A. Absolutely, yes.

Q. And can I refer you to your note of the meeting. It's a very short note. I think it was served on you yesterday; we were actually able to pull it out in the course of the previous day. In our books, it's been put into Book 48 at Divider 60B. Do you have a copy of it? It's dated the 24th September, 1995.

A. I do, yes.

Q. Maybe you could read it out for me. It's in your own writing. We have tried to have it typed up, but we were guessing the words in the attendance. So perhaps if you read it out, it might be better.

A. I mean, there is a mention of a range of 52 million to

71.1 million. That says "range of investment indicated to the Department".

Then "IIU doc" document " not lodged with the Department." On the typed version there is a question mark; I think the question mark is a mistake.

If you see on my memo it's actually when I finish a line, I frequently would put an arrow, meaning we are going on to the next line, so I think the issue there was that it was not felt appropriate and necessary to lodge the full document with the Department, but that as subsequently happened, a letter would be sent from IIU confirming what they were proposing to do.

Q. Then below that?

A. And the Telenor 37.5/25, I don't actually quite understand why I would have written that, except to say that if IIU were going to have 25%, Telenor needs to have 37.5.

Q. Now, you just said to me in relation to what you recorded, IIU document not lodged with the Department.

Do you recall there being a discussion of that matter at the meeting?

A. Again, I can't recall specific discussion, to be honest. I mean, my recollection of what happened, the details of what happened at that meeting would be fairly limited. But I'm sure there must have been some discussion about whether or what would be sent to the Department.

Q. Would you have been asked for your advice in relation to what was appropriate, or I think as you said, what was necessary to send to the Department?

A. Quite possibly not, because as I mentioned, I wasn't involved in any discussions with the Department, didn't know how those discussions were progressing, wouldn't have known tactically or strategically, for want of a better word, what was the best way to present things to the Department; so therefore, I would have probably been guided as much by Mr. O'Brien as anything else as to what would be done in that regard.

Q. So it would have been Mr. O'Brien that you'd have been guided by, not by Mr. Walsh?

A. Well, in this case, Mr. O'Brien was the only one who was directly involved in the discussions with the Department. At the meeting, he was the only one who had direct contact with the Department.

Q. Right. What contact were you aware of that Mr. O'Brien had with the Department?

A. Well, I assume that as Chairman of the consortium, he would have had he would have had contact with the Department.

Q. Well, we know he attended the presentation. I presume at that stage you'd have known there had been a formal presentation, would you?

A. Yeah well, again, I wouldn't have been particularly

familiar with what the dates were, but I suppose the point I was making was simply that I had no dealings with the Department whatsoever. Michael Walsh had no dealings with the Department whatsoever. Mr. O'Brien would clearly have had some dealings or contact in the context of the fact that there was a bid submitted, so...

Q. Why did you you said to me when you were reading it out, you said that it was considered, in recording that, that it wasn't appropriate to lodge the IIU documents with the Department. Can I just ask you, first of all, when you say "IIU documents", what were you referring to there?

A. I would assume I was referring in fact I document I think it's

Q. There were quite a few documents by the time it finished, so I was just wondering what you were referring to?

A. Sorry, Divider 62, is it? No, 60B. I think it was one document. What I was I would think the document I was referring to was the actual arrangement agreement.

Q. Right. I think what you said, it was considered neither appropriate nor necessary to lodge the arrangement agreement then with the Department?

A. No, I think the comment is simply noting that it was agreed that that document would not be lodged with the

Department.

Q. It was just when you were reading it out in your evidence, you said that it was considered that it wouldn't be appropriate or necessary to lodge it. And I'm just wondering why would it not have been appropriate to lodge the arrangement agreement with the Department.

A. It may, to be honest, I would say it possibly wouldn't have made a whole lot of difference, but the view was probably it was best to keep what had been sent to the Department relatively brief. I mean, I am sure if the Department had wanted a copy of the document, it would have been supplied to them.

Q. I suppose if they had known there was a document, they would have had an opportunity to ask for it to be supplied to them; but there was nothing in the letter of the 29th, I mean, look at it now, that could have suggested to them that such an agreement existed?

A. But I think in view of the fact that the Department sent the letter back, the issue never arose. I don't think there is any suggestion or question that there was a sensitivity about giving the document to the Department.

Q. Why? Were they afraid that they were going to bore the Department by sending the arrangement agreement, was that it?

A. I just think that the it was probably felt that

providing the letter to the Department would be sufficient.

Q. A letter that was very carefully drafted, wasn't it?

A. Yes, I am sure it was, yes, yeah.

Q. Would it not have been necessary then I think you also said it wasn't appropriate or necessary why would it not have been necessary to furnish it to the Department?

A. To be fair, when I said, mentioned the word appropriate and necessary, that's not what's written in my memo.

Q. No, it isn't; it's just what you said when you were reading it out in your evidence. I am just asking you why you said in your evidence that it was considered not necessary to furnish the arrangement agreement to the Department.

A. Well, I don't I think the word "necessary" is fairly clear. The if I am deciding to furnish to anybody, I decide which ones are appropriate to provide to them, which ones they would like to see, would need to see. I assume, and it is an assumption because, as I say, I don't I cannot recall detailed discussion on the point at the meeting. I am purely going on the note that I made. I do not recall any discussion at the meeting about whether or not any particular document would be sent to the Department. But it would be open to anybody providing information



to any party to decide which particular information to provide, which would be of most use, which would be superfluous, and I am assuming that the view was taken at the time that providing a letter to the Department confirming the arrangement would be sufficient.

Q. I see. I suppose it's a bit like your note of what you would put in and not put in a shareholders agreement. There might be things in a shareholders agreement that you wouldn't want a bank or a financial institution to see, because it would give them the wrong impression. Would it be the same kind of consideration when you are furnishing information in a commercial context to a third party?

A. It could be, but in this particular instance, I don't believe it was. I don't think there was any intention to conceal the agreement from the Department, which I think is perhaps the suggestion that's being made. I am not aware that there would have been that

Q. I thought, Mr. Halpenny, that you didn't remember any of the conversation or discussion of this.

A. I don't. But you know, the dealings with the Department would be such that you would clearly want to make sure that the Department, there was a feeling of trust between the parties in the Department. So...

Q. That there was a feeling of trust. You'd want to make full disclosure to the Department of all material matters, wouldn't you?

A. Yes, absolutely, yeah. Well, yes, I assume you would.

Again not having been involved with the Department

Q. I accept that you weren't involved; I know that. But

looking at it, that would be your view, that your

desire would be to make full disclosure of the

material matters governing the involvement of IIU; as

a solicitor, that would have been your view?

A. Yes.

Q. In fairness, I think Mr. Moran shared that view when

he gave evidence last Friday in relation to the

involvement of Bottin, but we'll come back to that.

Now, I think you say that in your memo that

during that meeting you were, I suppose do you term

it "marking up" documents when you are dealing with

them as commercial lawyers? Is that the term that you

use?

A. Well, I wouldn't have been doing it during the

meeting. I think the markups would have been done

subsequently.

Q. But you'd be discussing the agreement paragraph by

paragraph?

A. Yes.

Q. Can I just ask you to come back to the draft letters

that Mr. Walsh furnished to Mr. O'Connell on the 19th

December. I'll just find them for you now. The first

one is to Mr. McLaughlin, and it's at Divider 43. Do

you have that?

A. I do, yeah.

Q. Now, there is actually two versions of the draft of the 19th. One that has handwritten annotations on it.

And then the second one incorporates the handwritten amendment into the typed form. Do you see that?

A. Mm-hmm.

Q. Okay. Now, can I ask you first of all, can you tell me whose writing that is on the draft, the handwriting on the first of the drafts? Do you see it down there:

"Accordingly we will not be taking up the conditional proposals from the institutions, AIB, IBI And Standard Chartered." Do you see that there?

A. Yes.

Q. Can you identify

A. It's certainly not mine.

Q. whose handwriting it is?

A. I can't definitely identify it. It looks somewhat like Denis O'Brien's writing, but I couldn't be sure.

Q. Do you remember whether this draft letter was reviewed or discussed in the course of your meeting on the 24th, on the Sunday?

A. I don't recall it being discussed.

Q. Right, okay. Now, this was a draft letter, and I'll just refer you to it. It's a draft letter to Mr.

Kyran McLaughlin, J&E Davy Stockbrokers. Re Esat Digifone Limited, a consortium.

"Dear Mr. McLaughlin,

"I refer to our previous discussions in relation to the funding of the above. Unfortunately, the letters provided by the institutions did not provide the certainty necessary on the availability of sufficient equity finance to the consortium.

"Accordingly, I have arranged firm" now, the typed version is "underwriting"; that's crossed off, and written above it is, I think, "Commitments through IIU Limited for 30 million of equity finance, being the 60% of the consortium not held by Telenor.

Accordingly, we will not be taking up the conditional proposals from the institutions, AIB, IBI, and Standard Life.

"I want to thank you for your help in the above matter.

"Yours sincerely,

"Denis O'Brien."

Do you see that?

A. Mm-hmm.

Q. Obviously it was going to be necessary to either write to or communicate in some way with J&E Davy in relation to AIB, Bank of Ireland and Standard Chartered because, if you like, they had to go out to provide at least part of the shareholding that was now going to be taken up by IIU; isn't that right?

A. Yes.

Q. Now, do you recall discussion in relation to how Mr.

McLaughlin should be approached?

A. I don't recall. I may have been involved in some, but I don't have any recollection of it.

Q. Because, in fact, this letter was never sent, was it?

A. I don't know.

Q. You don't know?

A. No.

Q. It wasn't, in fact. I think Mr. John Callaghan went to see Mr. McLaughlin on Friday, the 29th.

A. Right.

Q. To inform him that the investment from those three institutions wouldn't be required.

If you turn over the page now to 44, this is the draft of the letter, the first draft in typed form with handwritten annotations of the letter that ultimately went to the Department on the 29th.

And again, do I take it that that isn't your handwriting that's on the letter?

A. It's not.

Q. Now, there are a lot of changes that are made to the face of that letter. And do you recall whether there was any discussion of those changes in the course of your meeting on the 24th September?

A. I don't believe there was, no, not on the 24th. I can't recall detailed discussions on them, anyway.

Q. Right. Well, do you recall any other occasion during the following week from the week commencing the 25th

to the 29th, when you attended a meeting at any location when the amendment to this draft document was discussed?

A. Oh, absolutely, yeah. I mean, on the the meeting on the 29th, I mean, I was myself and Denis O'Brien were actually down in IIU for about five hours, as far as I can recall, and we went through the letters, and we discussed them, and we agreed the final terms of them.

Q. Right. It's just that if you actually look, and I'll show you another draft of the same letter; it's at Divider 60; that draft is dated the 25th September, which is the Monday, the day after your meeting on the 24th. Do you see that?

A. Yes.

Q. And in fact that draft is identical in all respects, save for one, to the terms of the letter that was finally sent on the 29th, and the only difference between this draft of the 25th and the letter that went on the 29th is that in the second, second line after the word "Equity," what was inserted was in bracket "I.e. circa 60%", close bracket. Do you see?

A. Are you telling me that

Q. I am saying that apart from that small, but perhaps very significant change, the text of the letter appears to have been in its final form by Monday the 25th; do you see that?

A. Yes.

Q. That's why I am wondering, do you recall any discussion of the text of the letter at your meeting of the 24th?

A. I don't recall, but again, it could have happened.

Q. Okay. We'll look at the letter in a moment in its final form.

Now, following your meeting with Mr. Walsh, you, I think, sent him a fax on the 26th, which was the Tuesday. This is the one we asked you about you were asked about in the set of questions from the Tribunal. Do you see that?

A. Yes.

Q. Now, it's dated the 26th September. It's to "for the attention of Michael Walsh.

Company: International Investment & Underwriting Limited.

The fax number from Gerry Halpenny. Your ref:.

Number of pages including this one: 11."

That presumably signifies you were sending him marked-up documents, would that be a reasonable inference?

A. Well, I think the fax refers to a revised draft of the deeds of covenant.

Q. "Dear Michael,

"Further to my conversation with you earlier this morning, I enclose revised draft of the Deed of

Covenant to show the amendments made to the previous draft.

"As mentioned to you, I am uncomfortable with the idea of signing the letter as drafted by you with the agreement to be entered into later on. Given the consequences of the issue of the letter to the Department, I feel strongly that the Deed of Covenant should be executed before that letter is issued.

"I have tried to incorporate all of the points in your letter into the agreement, and hopefully it will be possible to agree the document very quickly. The two outstanding issues are probably the transfer provision and the requirement of Telenor regarding the number of placees."

And we'll look at this again in a moment, but in fact, you had been in contact, I think, with Mr. Simonsen in Telenor during that week?

A. There certainly was contact during that week, yes.

Q. You say then: "In relation to the transfer provisions we discussed on Sunday, the replacement of the words "is likely to" with the words "has State an intention to" I will put this wording to Telenor for their views. I should also point out that I have added Esat Telecommunications Limited in the fifth line from the end of paragraph 5D2. I would also talk to Telenor regarding the number of placees. As I understand it you are happy to have the number of placees limited to



four as long as one of these placees is a nominee who may hold the interest of a number of other investors. Your particular concern in this regard is, should your underwriting obligations be called upon, you would wish to have the ability to seek investment from a larger number of parties.

"On the basis of the Deed of Covenant being agreed, your letter to Esat Digifone would then I think be reduced to the last two paragraphs, and as it is not appropriate to cover those in the Deed of Covenant, the introductory paragraph then should simply refer to the fact that the Deed of Covenant has been signed and that it is on that basis that the attached letter to the Department is to be issued.

"I am also sending a copy of this letter to Per Simonsen of Telenor by way of asking him to comment on the revised draft of the Deed of Covenant, and in particular the two points mentioned above."

And you see there that you CCed it to Per Simonsen and to Denis O'Brien.

Now, the particular matter I want to ask you about in relation to that letter, and I think you do point out that in this in writing this letter, you were not acting as solicitor to IIU; you were acting as solicitor to Communicorp/Esat Telecom?

A. Yes.

Q. So this was not a letter of advices to Michael Walsh.

You were notifying him of the position, and you were commenting on the various drafts and redrafts and amendments which had been inserted into the drafts; isn't that right?

A. Yes, it was to send him a redraft showing amendments made.

Q. Now, if I can just take you to the second paragraph.

You say "As mentioned to you, I am uncomfortable with the idea of you signing the letter as drafted by you with the agreement to be entered into later on. Given the consequences of the issue of the letter to the Department, I feel strongly that the Deed of Covenant should be executed before that letter is issued."

Now, can you just tell me what you meant by that paragraph?

A. What I believe I meant was that there was if a letter was to be sent to the Department confirming that IIU were undertaking certain obligations, the document underlying those obligations should be executed. I wasn't happy with a letter going to the Department saying that those obligations were being undertaken unless IIU were committed to doing so.

Q. Was there some suggestion at that stage, and it seems to be implicit in your advice, that the letter might go to the Department on the 29th, but the actual agreements mightn't be executed until sometime after that?

A. Obviously it must have been suggested, because I dealt with the point in the fax.

Q. That just brings me to something, actually, maybe I can ask you about it now: Can you tell me, what was the urgency attaching to this transaction, that it all had to be completed by the following Friday the 29th?

A. I don't think Friday 29th had any significance particularly, or if there was, I can't recollect it; but I think the urgency was simply to provide something, given that there was there would have been sensitivity, I suppose, regarding the financial strength of the particular consortium, it was felt it was probably felt that it would be a good idea to provide some security or comfort to the Department on that score.

Q. So, if you like, the urgency, insofar as you understood it, was to get the information to the Department as opposed to finalising the agreements with IIU?

A. That would have been my impression, yes.

Q. Who would you have got that impression from?

A. I would think, to a large extent, Mr. O'Brien.

Q. Can you recall what it was that he said to you or intimated to you that led to you that view?

A. No.

Q. I see. You see, it's surprising, because officially the result of the process wasn't due to be announced

until the end of November. So I'm just wondering what on earth the urgency was at that time to get that information to the Department by the Friday, to such an extent that it seems to have been contemplated that in fact the letter would go before the agreements were even signed by the parties?

A. Well, that would appear to have been suggested by Mr. Walsh, who was not my client.

Q. Of course.

A. And I simply in my fax said to him that I did not believe it was appropriate or indeed possible to send a letter to the Department in the terms we were proposing to send.

Q. I appreciate entirely Mr. Walsh wasn't your client, but the climate appears to have been, we have got to get this letter into the Department by Friday. In fact it went very late on Friday, didn't it?

A. Yes, absolutely.

Q. It was late in the afternoon that it was faxed from, I think, Mr. Desmond's office; isn't that right?

A. Yes.

Q. We'll come and have a look at it, but I'm just wondering what your feeling on it was. Why was there the need to get this in on the Friday to such an extent that Telenor seemed to have taken exception to the fact that they didn't have an opportunity to have a full legal review of the documents?

A. Well, I have heard that suggestion from Telenor, and obviously I don't the correspondence would tend to dispute that.

Q. I appreciate that; I am not criticising you at all on those grounds. I am just wondering, can you assist the Tribunal at all as to why there seemed to be this priority and urgency attached to getting this letter to the Department at all costs by the following Friday, even to the extent that Mr. Walsh appears to have been suggesting that the letter should go without the agreements being executed?

A. I can give no specific throw no specific light on it, I have to say.

Q. All right. That's fine.

Now, during that week, I suppose to an extent, you were trying to keep at least two sets of balls in the air, because you weren't just dealing with Michael Walsh, but you were also dealing with Mr. Simonsen and you were dealing with Telenor?

A. That's correct.

Q. And it appears to me, and it appears from the documents, that what you were trying to do was you were forwarding draft documents to Telenor, you were receiving their comments on their documents, you were incorporating them into your drafts, and then you were furnishing them to Mr. Walsh to see if you could get IIU's agreement; would that a fair way of summarising

it?

A. I was trying to agree the document with everybody.

Q. It was a tripartite arrangement?

A. Indeed.

Q. In the course of Mr. O'Brien's evidence, William Fry Solicitors produced a bundle of documents that were referred to in Mr. O'Brien's evidence in relation to your dealings with Mr. Simonsen. And in fact, I think two or three of these documents are already in the Tribunal book, but I think you were furnished with the documents in the form of the bundle that were produced by William Fry. And I am just going to refer you to those now.

A. Yeah.

Q. Do you have them

A. I think I have them; I got them yesterday.

Q. They were all circulated to all the other parties yesterday as well.

Now, the first document is dated the 25th September, 1995, and a fax to you from Denis O'Brien. That was on the Monday following your meeting of the previous evening; isn't that right?

A. Yes.

Q. And the first enclosure is a fax cover sheet from Mr. Simonsen to Mr. O'Brien.

"Dear Denis,

"please find attached changes/additions to document

presented by you on Friday". That's why I was asking you, did you know anything about the documents that Mr. O'Brien brought with him to Oslo; do you see there?

A. I am sorry, which document are you referring to?

Q. Sorry. It's the first of the bundle of documents.

It's Mr. O'Brien's fax to you of the 25th September.

Do you have that?

A. I got those separately, and I have put them into the folder in various places.

Q. I can hand you up a separate bundle, because it's probably we'll hand them up to the separately.

It's just easier to deal with them.

(Documents handed to witness.)

Do you see that?

A. Yes.

Q. Now, the first enclosure with that fax cover sheet is a fax cover sheet from Mr. Simonsen to Mr. O'Brien dated Monday, the 25th September, 1995, and time is 9.04.

"Dear Denis,

"Please find attached changes/additions to documents presented by you on Friday. I have still not got the final comments back from our lawyer, so minor changes can still be expected."

Do you see that?

A. I do.

Q. So it does appear that Mr. O'Brien must have brought some draft documents, probably the draft Deed of Covenant; I don't know if he brought any of the draft letters, but presumably we can ask Mr. Johansen, when he comes to give evidence, what documents were brought.

And it says: "I have still not got the final comments back from our lawyer, so minor changes can still be expected."

You see there the enclosure with that is a whole set of changes that Mr. Simonsen was proposing to the draft Deed of Covenant.

A. Yes.

Q. There is then a memo of your own, dated 26th September, to file from Gerry Halpenny, Esq. Again, maybe I could ask you to read it out.

A. I refer to "nominee for the underwriting obligations."

"4 people for the 25%." I think that's the reference to there being four potential places.

"Stated intention to be" I suspect that was probably a reference to a specific clause in the document. And "is our plans to be" is probably also reference to a particular clause in the document where a particular wording was being asked.

The 52 million and 71.1 million was a reference to the amount of the funding requirement, and again, I think the note there, "Either/ok" is probably either figure



could be used. I don't know what the "4" arrow

I think it's probably "Same okay", again probably a reference to a clause in the agreement.

Then "37.5%" is simply a reference to the percentages that would be held by Telenor and Esat and the underwriting obligation.

Q. It seems to be you discussing with Mr. Simonsen the changes, perhaps, that he was suggesting?

A. Yes.

Q. And in fact the next document is the same fax which you sent to Michael Walsh on the 26th, and I suppose, if I can draw your attention to it this time, I am not going to read it out all over again, is that you were conveying to Mr. Walsh the changes that it appears that Mr. Simonsen was looking for and that you recorded in your telephone conversation with him earlier that day?

A. Yes.

Q. You'll see that?

A. Yes.

Q. And you CCed that to Mr. Simonsen as well?

A. Yes.

Q. Now, the next document is a fax from yourself to Mr. Simonsen; it's the 28th. So it's the day before the Friday.

"Per, attached is last draft of the agreement with IIU which has now been agreed with IIU. We will call you

shortly to discuss it. The changes since the last draft are marked."

And that's on the Thursday?

A. Yeah.

Q. And then you received from Mr. Simonsen a fax on Thursday evening, the 28/9/1995, it looks like, two minutes to eight. It may have been two minutes to eight Norwegian time; it may have been two minutes to seven Irish time.

"Dear Gerard,

"Referring to your draft arrangement agreement of Thursday night, we have the following comments". And I think that must be the draft that you had sent to him under cover of the previous fax sheet. And he sets out the various changes that he wants made on the pages.

Now, at the very end, he says: "Please note that I am awaiting a legal check on changes discussed yesterday. We will anyhow expect to see the final version before it is signed, allowing time for a legal check on any further changes."

Do you see that?

A. Yes.

Q. Now, the next document is a fax from yourself to Mr. Simonsen. It's the 29th. You say "Dear Per,  
"Further to our telephone conversation last night, I enclose a revised draft of the agreement with IIU. I

have marked the amendments made."

Now, would that be the revised draft based on the faxed changes you got from Mr. Simonsen, do you think?

A. Yes, I believe so, yeah.

Q. So that's effectively going back to him and saying "Your changes have been incorporated; there they are".

Then the final fax is a fax to Mr. Michael Walsh,

"Dear Michael.

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

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

"I understand that we will be meeting later today to finalise matters.

"Kind regards,

"Yours sincerely,

"Gerry Halpenny".

And you CCed that to Denis O'Brien?

A. Yes.

Q. Now, we know, and we'll come to it in a moment, that you went to the meeting with Mr. Walsh and Mr. O'Brien in, I think, IIU's offices on the Friday.

A. Yes.

Q. Did you have any further contact yourself directly with Mr. Simonsen before the agreements were executed, do you recall?

A. I can't recall contact on that day. I obviously faxed him the document that morning. But I can't recall if I did or not, no.

Q. He did say, I think, in his fax of the 28th, that they wanted to review the final documents, and they wanted time to have a legal check. Now, the draft that you sent to him on the 29th, did you consider that, if you like, you were doing your bit in sending him the final documents by forwarding that draft to him with his changes in it?

A. I did, yeah.

Q. Okay. Now, when Mr. O'Brien gave evidence, he says he is quite certain that either he or you spoke to Mr. Simonsen and that he said "Fine, go ahead, sign the documents." Can you assist the Tribunal at all in relation to that?

A. I can't recall a conversation, but I'd be surmising. I mean, it may well have happened, and given the fact that the document was signed that day, I would say there is a strong likelihood that it did happen.

Q. When Mr. O'Brien was signing these documents, you had no concern, did you, that Telenor, in some way, were yet to agree to their contents?

A. No, it wouldn't have been my view at the time. Otherwise I would have taken steps to clarify it.

Q. You'd have alerted Mr. O'Brien, presumably, if you

thought that Telenor still wanted an opportunity to

consider them?

A. Mm-hmm. I mean, there had been a fairly detailed exchange of comments, and everything that Telenor had raised had been incorporated, so...

Q. Right. So you were happy enough when they were signed?

A. Yes.

Q. Okay.

Now, I want to ask you, before we come to the meeting itself on the 29th, we know that there was the arrangement agreement. And again, I don't want to open it unless there is something you want to point out to me.

We know that there was the side letter from IIU to Esat Digifone referring to the letter to the Department.

A. Mm-hmm.

Q. Okay. And we know that there was another side letter; there was a side letter in which IIU effectively informed Esat Digifone that it was assigning its rights and obligations under the arrangement agreement to Bottin. Isn't that right?

A. Yes.

Q. Now, I don't see any mention in your attendance of the 24th to Bottin.

A. No.

Q. Now, can you tell me when you recall that Bottin first came on the scene as the person whose party and company that was going to assume the rights and obligations of IIU under these commercial arrangements?

A. I can't, to be perfect low honest. And in checking through the files as well, it wasn't something that I was able to clarify. I know that it was raised subsequently that IIU wanted to assign to Bottin, but as to when it was actually raised and when I was made aware of it, I can't say.

Q. It was clearly before the 29th, because the side letter was dated the 29th.

A. I mean, the side letter wasn't furnished to me, or was it furnished to me?

Q. I don't know. I can only assume it was. I can only assume the terms of the side letter would have been agreed.

A. I don't have a recollection. And I haven't I don't think I have seen the side letter, certainly, in the documentation that was furnished to me.

Q. Well, we'll get it for you. Certainly there is a side letter to Bottin assigning IIU's rights to Bottin, and I mean, I think you know that Telenor were concerned about that in October, that they hasn't been told that there was going to be an assignment of these rights and obligations to Bottin.

A. Mm-hmm.

Q. Can I just ask you something; perhaps I don't understand it, and as a commercial solicitor, you can assist me. By virtue of that assignment to Bottin of which Esat Digifone had notice, I'd be right in thinking, wouldn't I, that effectively IIU ceased to have any obligations, and all those obligations were vested in Bottin?

A. It would depend on the terms of the assignment, as to what it said.

Q. That seems to be what the letter says. Maybe we'll just have a look at it.

It's at Divider 65 of the book we are working from.

And it's the second of the letters. Do you have it?

A. Yes, I do. My apologies, I hadn't

Q. To Mr. Denis O'Brien of Esat Digifone Limited, and it's signed in fact both by Mr. Walsh and it's confirmed by Mr. O'Brien, Communicorp Group and Esat Digifone Limited. So it goes a bit further than the usual assignment. It's not a mere notice of assignment; it's actually an agreement that the rights of IIU should be assigned to Bottin. Do you see that?

A. Yes.

Q. It says,

"Dear Denis,

"I am writing to confirm the basis of our agreement with the consortium as consideration for us issuing

the attached letter to the Department of Transport, Energy and Communications. Our agreement is based on the attached arrangement agreement ("the Agreement") document prepared by William Fry Solicitors, but is subject to this side letter

"1. In the event that the consortium is awarded the second GSM licence, then the consortium undertakes to place 25% of the equity in the consortium with IIU Limited or its nominees (together "The placees"). IIU Limited ("The Arranger") will arrange underwriting for the 37.5% of the equity which Communicorp Group Limited (Communicorp) has committed to subscribe for. The maximum combined commitment under the placing and underwriting will be 36.5 million ("The Commitment").

"2. The Arranger has assigned the agreement in its entirety, both benefits and obligations to Bottin International Investments Limited." Do you see that?

A. Yes, I do.

Q. It was an entire assignment, wasn't it?

A. Yes, it was. My apologies why I hadn't

Q. Can you just assist me, I'd be correct in thinking, wouldn't I, that on the execution of that document, IIU ceased to have any obligations under the arrangement agreement?

A. Yes.

Q. All of those obligations passed to Bottin?

A. To Bottin, yes.



Q. Can you tell me then why Bottin wasn't the party to the arrangement agreement, when it was Bottin that was assuming all of the rights and all of the obligations under the agreement?

A. Well, you can't assign the rights and obligations under an agreement until it's been executed, so therefore IIU would have had to execute it first before it could assign its rights and obligations.

Q. I understand that. What I am asking you is, why was this transaction structured this way? That's what I want to know.

A. I don't actually know. I think that's an issue that IIU would have to explain. They

Q. But you were solicitor to the other party who signed the agreement.

A. Yes.

Q. So I'm asking you, as solicitor to Communicorp, what your understanding was as to why this transaction was constructed in this way.

A. I assume it was done in that way for IIU's own internal it could have been a tax planning; I am not sure. It would have been something that they wanted done, and obviously I would have taken instructions on the question of whether it was appropriate for that assignment to take place and been told that it was acceptable.

Q. Are you just speculating now when you think it was to

do with tax planning? And fair enough, if you are speculating.

A. Absolutely, yeah, yeah. Absolutely, it was an internal IIU matter. It's not something that I would be familiar with or

Q. It's something that you would have known about, though, before the 29th, isn't it?

A. I don't know. It may well have cropped up at the meeting on the 29th. If you tell me I knew about it beforehand

Q. I can't tell you; I am just wondering.

A. No, I honestly don't know. It may well have arisen on the 29th.

Q. It did mean, didn't it, that because the transaction was structured this way, that IIU was able to write a letter to the Department rather than Bottin? Isn't that right?

A. Yes.

Q. If Bottin had been the party to the arrangement agreement, there could have been no question of IIU writing that letter?

A. That's correct, yes.

Q. Do you recall at all, was there some sensitivity about Bottin?

A. Well, clearly there was. Subsequently Telenor raised questions about it

Q. Yeah, apart from Telenor, was there some sensitivity

with regard to the Department knowing that it was

Bottin that was providing this underwriting?

A. That, I can't tell you.

Q. Did you know anything about Bottin yourself at the time?

A. About it?

Q. Just Bottin's activities, what it did?

A. No, not particularly. I knew it was a Dermot Desmond vehicle. That's

Q. It was offshore, wasn't it?

A. So I believe, yes.

Q. Did you know that there had been findings in the Glackin Report at the time in relation to Bottin?

A. I wouldn't have been familiar with if there were, no.

Q. That's fine. So you had the meeting on the 29th September?

A. Mm-hmm.

Q. That was in the offices of IIU, was it?

A. Yes.

Q. Okay. Was that on the Friday afternoon?

A. I think we went down just before lunchtime on the Friday, about 12 o'clock, 12.30.

Q. Was it a lengthy meeting?

A. Yes, it was

CHAIRMAN: I think, if you are just starting on that meeting, Ms. O'Brien, it's probably more appropriate if we defer for lunch. Perhaps, as Mr. Halpenny is

appearing unassisted, it might be helpful if you just briefly explain to him the proposed course or general nature of the further matters that you may be asking him about in the afternoon.

MS. O'BRIEN: I think he is aware of it, Sir, because in fact he was notified yesterday of the general matters that the Tribunal will be raising with him.

But I can certainly discuss it with him after lunch.

CHAIRMAN: Very good. We'll resume at two o'clock, if that suits you, Mr. Halpenny.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF GERRY HALPENNY

BY MS. O'BRIEN:

Q. MS. O'BRIEN: Just before lunch, we had arrived at the meeting of the 29th September?

A. Yes.

Q. I think you said to me that it was a fairly lengthy meeting; is that correct?

A. I can remember it clearly because I got no food, and by the time I got back to Fry's I was weak with hunger.

Q. I see. Can you tell me firstly, who was at the meeting?

A. It was myself, Denis O'Brien and Michael Walsh.

Q. Just the three of you?

A. Yes.

Q. Did anybody else join the meeting at any time?

A. There may have been somebody from IIU that occasionally came in to do a particular thing, but no, it was essentially just the three of us, because I think, if I remember, it was the afternoon of the Smurfit European Open, and I think most of the people in IIU were off on the golf course.

Q. I see. That would have been in the K-Club, presumably?

A. The K-Club indeed.

Q. Mr. Desmond wasn't at the meeting?

A. No.

Q. Do you recall whether there was any telephone contact made by anybody with anybody else during that meeting?

A. Not that I can recall, but that's not to say there wasn't any or that there weren't I mean, Michael Walsh, for instance, was not in the room at all times. He may well have been in contact with Mr. Desmond during the meeting.

Q. I see. Were you still negotiating matters then on the 29th that in the ordinary course, Mr. Walsh might have wanted to contact Mr. Desmond about?

A. Possibly, but the negotiations as such were not I mean, while the meeting took an awfully long time, there wasn't a huge amount of negotiation or difficult discussions. I mean, we were all really working together at that point, I suppose. And I suspect that

he wouldn't probably have needed to talk to Mr.

Desmond about the issues that we were discussing.

Q. Right.

A. But that's not saying he didn't.

Q. That's fair enough. So at that meeting, you'd have

had the draft arrangement agreement; you'd have had

the two side letters?

A. Yes.

Q. You'd have had the draft letter to the Deputy?

A. Yes.

Q. And was the object of the meeting to go through each

of those documents line by line?

A. Well, to conclude them. I think a lot of the line by

line would have probably happened at some time during

the course of previous week as well. I mean, there

was certainly some to-ing and fro-ing on those

letters, as you have seen from the fact that there

were certain mark-ups.

Q. It was more to finalise the terms of them; if changes

needed to be made to those documents, were they being

made in IIU?

A. To the letters, yes.

Q. Yes. So they were being retyped and regenerated in

IIU?

A. I think Mr. Walsh was probably doing it himself.

Q. Right. The arrangement agreement itself was a Fry's

document?

A. It was a Fry's document, and from recollection, I had with me I think the document was signed, and it was actually a marked copy. It was the document I brought with me from Fry's on the day.

Q. You don't recall that there was any need to make any changes to the text of the arrangement agreement?

A. I don't think there was. I don't think there was.

Q. So it was really these letters that you were down to?

A. Yes.

Q. Okay. Now, can I just ask you about the letter of the 29th itself. That's at Divider 64. You see that?

A. Yes.

Q. Now, that was one of the in fact the shortest of the four documents that were tabled at your meeting on the 29th?

A. Yes.

Q. I think you might recall before lunchtime that I referred you to the draft of that letter which was dated the 25th. Do you recall that?

A. Yes.

Q. And I pointed out to you that the text was identical to the final version of the letter except that in the second paragraph, second line, after the word "Equity", the "(i.e. circa 60%)" seems to have been inserted at some time after the 25th?

A. Yes.

Q. Do you recall there being discussions on this text at

the meeting on the 29th?

A. Not specifically, no.

Q. Right. Do you remember there being any discussion relating to the inclusion of the "circa 60%"?

A. No.

Q. Can you assist the Tribunal at all as to why "circa 60%" was inserted rather than 62.5%, which was the correct figure?

A. I can only surmise that the reason for it would have been that the issue of whether IIU would have 20% or 25% was probably something that would have to be agreed and finally decided at a later stage. And perhaps rather than put 62.5% in the letter, which would have probably raised caused the Department to ask the question at that point, it was decided to say "circa 60%".

Q. It would have been likely to cause the Department to ask a question, wouldn't it, if 62.5% had gone in, because the capital configuration of the proposed licencee company in accordance with the bid was 40:40:20?

A. Yes. I assume it would have. Again, not having had contact with the Department, that's simply a matter of guesswork on my part.

Q. Because, in fact, there was no doubt as to what Mr. Desmond and IIU were entitled to under the arrangement agreement, was there; it was 25%?



A. 25%, yes.

Q. If it was ever going to be less than 25%, it was going to have to be as a result of negotiation?

A. Yes.

Q. So as of the 29th September, there was no doubt that IIU and Mr. Desmond were entitled to 25%, and then on top of that the 27.5% that they were going to underwrite, which of course, by that underwriting, they may have themselves ultimately held?

A. Mm-hmm.

Q. Can I just refer you to the text of the letter. Just for your views on it.

It says:

"Dear Sirs,

"Refer to the recent oral presentation made by the consortium to the Department in relation to their proposal for the second GSM cellular mobile phone licence. During the course of the presentation there was a detailed discussion in relation to the availability of equity finance to the consortium from Communicorp and a number of institutions."

Do you see that?

A. Yes.

Q. Now, you couldn't have known anything about that, because you weren't at the presentation?

A. No.

Q. You had been relying entirely on what you were being

told about what occurred?

A. Yes.

Q. It then goes on to say: "We confirm that we have arranged underwriting on behalf of the consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor. In aggregate, the consortium now has available equity finance in excess of 58 million.

"We do not foresee any additional need for equity.

However, we are confident that if such equity is required, we will not have a difficulty in arranging it."

Okay?

A. Mm-hmm.

Q. Now, would you agree with me that, if you like, the operative part of the text, the text that provides the further information to the Department is the first sentence of the second paragraph: "We confirm that we have arranged underwriting on behalf of the consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor."

A. Yes.

Q. Now, you said to me earlier this morning in your evidence that, as you understood it, it wasn't appropriate or necessary to furnish the Department with the copy agreements?

A. Yes, I did say that, but obviously, going back to the

note of my my note of the meeting, I was just

noting the fact that it was

Q. Absolutely.

A. That it would not be provided to the Department.

Q. Would you agree with me here that in that sentence,

that no distinction is being made between the 25% that

IIU were entitled to subscribe for, or indeed place

with nominees, and the 37.5% in respect of which there

was an assumption of an obligation to underwrite?

A. Yes.

Q. The Department weren't being told, were they, that IIU

would be entitled to 25% of the shares in Esat

Digifone?

A. No.

Q. Can you tell me why, as far as you know, it was

considered neither appropriate nor necessary to tell

the Department that fact?

A. Well, the only thing that I suppose the Department

could be told was it was 25% or something less. It

wasn't more than 25% being offered to IIU. And I

think it's fair to say that the issue of whether the

Department was told 20 or 25% was something which the

parties had got to consider.

Q. Yes.

A. And subsequently, as it happened, it was in fact 25%.

Q. But the letter didn't say even 20%, did it?

A. No, it didn't.

Q. And it really wasn't telling the Department what the true position was, was it?

A. Well, that's one perception of it, to be fair. I think the Department would have been aware and I think would have been very keen to be assured that the that Telenor and Esat were both involved as equal partners in the venture. So I don't think there is anything in this letter that would necessarily suggest to them that that was changing.

Q. No. There isn't. There is nothing in it to suggest that it was changing.

A. Yes. Sorry, to go on from that, it doesn't suggest that the equity participation of Esat was going to be anything below Telenor, and it says that Telenor was going to be providing, to use I mean, as a correlation to what's there, would be providing circa 40% of the equity, which would tend to suggest that Esat was also providing circa 40% of the equity.

Q. That was to keep the appearance that it would be consistent with the bid?

A. Sorry, in what way?

Q. By giving the impression that it was circa 60%, that Telenor would continue to have 40%?

A. That's fair comment, yes.

Q. Would you agree with me that the use of the term "arranged underwriting" appears to suggest that IIU had arranged underwriting with some third party?

A. It could have that meaning, but it doesn't necessarily need to have that meaning, no.

Q. What other meaning could it have?

A. It could mean that IIU was going to provide it itself.

Q. Well, wouldn't it have been much simpler to say that "We confirm that we are going to underwrite", if that's what was intended?

A. I am not sure that the word "Arranged" I mean, that would be a normal statement to put in a letter such as this, where you are talking about underwriting. So arrangement, I mean, "arranged" would be a very normal word to use in that context. I don't know what other word you could actually really use, to be honest.

Q. Why would you not simply say that "We are going to underwrite"?

A. Because IIU may have they were to some extent keeping their options open as to whether they did it themselves or syndicated it or did it with other people.

Q. That would be fair enough. In that case you'd expect to see "We confirm that we will arrange underwriting", which was what was in the side letter. This says "We have arranged underwriting". It appears to suggest that the arrangements are in place; would you agree with me? And I accept this may not be your drafting, but I am just asking to you comment, and I am not criticising you personally at all.

A. Sure.

Q. Because you made it clear that's not your writing on the drafts we were looking at.

Before lunch we were talking about the assignment to Bottin.

A. Mm-hmm.

Q. And I think you agreed with me that as a result of the assignment to Bottin, which was agreed to and signed by Mr. O'Brien on behalf of Esat Digifone, that effectively IIU ceased to have any obligations under the arrangement agreement, and those obligations and indeed those rights had all been vested in Bottin.

A. Mm-hmm.

Q. What was being stated in this letter to the Department, therefore, would you agree with me, was to entirely misrepresent what the position was?

A. Well, the letter is from IIU; as you say yourself, it has "arranged underwriting". One interpretation of that could be that it had arranged for Bottin to underwrite.

Q. I see.

A. But the point about it also is that IIU and Bottin, as far as I was always aware, were both vehicles under the control of Mr. Dermot Desmond. And I think, in the context of the transaction, the joint venture, it's probably fair to say that there was a certain amount of feeling that if you were dealing with Dermot

Desmond, you were dealing with Dermot Desmond, and the vehicle probably wasn't desperately important. You had a statement from him.

Q. But in fact as of I think it was ten to five in the evening on the Friday the 29th September, when this letter went to the Department, IIU no longer had any obligations under that agreement; isn't that the correct legal position?

A. Yes, that is I think that that's correct. I accept that.

Q. Now, if I can ask you to look at the document that was served on you yesterday. It's in our books at Divider 64A, and it's actually the activity report and the faxed cover sheet in respect of the transmission of the letter to the Department. Do you see that?

A. Yes.

Q. And from the activity report, we see that the start time was the 29th September, and the time was 16.50. Ten minutes to five.

A. Mm-hmm.

Q. And the fax message, the cover sheet for the fax message, then, if we just have a look at that, that's completed in hand that's Mr. Walsh's writing? Do you recall Mr. Walsh

A. I would assume so.

Q. It's to Martin Brennan from Michael Walsh, dated 29th September, '95. Time: 16.50.

No of pages: 2.

Then the fax number. 6041188.

Then the letter itself. In fact the copy that we have of the fax cover sheet is very poor, but I think that the names of the director partners of IIU also appear at the foot of the fax cover sheet. Is that apparent in your copy?

A. Well

Q. Just about.

A. It is almost illegible.

Q. We know from the evidence of the civil servants that the fax number to which this letter was sent was a fax that was designated for use in the course of the GSM process.

Can you assist the Tribunal at all as to how Mr. Walsh would have had that number?

A. I have no idea. I would assume maybe Mr. O'Brien was able to give it to him.

Q. Do you remember at the meeting whether he asked Mr. O'Brien for the number and that he proffered it?

A. I don't remember. He may well have done.

Q. That's fair enough.

Can I ask you, can you remember any discussion as to why this letter I can understand why the letter would be signed by Michael Walsh, but can you recall there being any discussion as to whether the fax should come from Michael Walsh or should be sent in by



Esat Digifone?

A. Not really, other than the fact that we were in IIU, and it was the quickest way to get it in.

Q. It's just that within and again, you may not have been aware of this within the competition, there were very formalised arrangements within the evaluation process for the receipt and furnishing of information, for communications between the Department and the consortia. Now, in the case of each consortium, there was a designated person who would communicate with the Department and to whom the Department would send communications. And there was a designated person within Esat Digifone, and I am just surprised that there wasn't some consideration of this letter being sent in the normal, formal and designated way.

A. I'd have to say I wasn't aware of those procedures, and I accept entirely what you say, so you know, there is I assume it was done in this way simply as a matter of speed.

Q. I see. And again we come back to speed: Why was there the need for this speed?

A. I honestly cannot tell you. I mean, we discussed that earlier on. The letter was finalised; it was done.

And I assume the intention was to have it in the Department before close of business on the Friday, and if that was to happen by us leaving IIU on a Friday

afternoon and trying to get back to somewhere else to send it, there was a risk that it might not get there.

Q. Did you get any impression at all even in the course of this meeting that there was some deadline for getting this in by the Friday evening?

A. No, I didn't.

Q. You see, we looked at your fax of the Tuesday to Mr. Walsh earlier on in which you had said to him that you were uncomfortable with the idea of the letter being signed and going in to the Department before the agreements were settled and executed. Do you recall that?

A. Yes.

Q. Which had obviously been a proposal of Mr. Walsh's; you recall that?

A. I assume so. I mean, I commented on it on the fax, so I assume he must have made some suggestion.

Q. I am just wondering, would it not have made sense for you to suggest at that time, "Look, why don't we leave it all over to the Monday or Tuesday?"

A. I think I am not sure why there would have been a reason to leave it till the Monday or the Tuesday if you could agree it by the Friday. It was simply a matter of getting the documentation, getting the letter finalised as quickly as possible, and then when it was finalised, issue it to wherever it was supposed to be issued.

Q. Except you were all under a lot of pressure, weren't you?

A. Well, I am not sure. I wouldn't have the work involved in getting those documents agreed between the Sunday night and the Friday was not, quite frankly, very substantial, certainly in the context of the way I would work.

Q. I see.

A. And there was a no hugely pressurised amount of work involved.

Q. I see. It was still being anticipated, though, on the previous Tuesday, by Mr. Walsh, if you are correct in your assumption it was he that made the suggestion, that it might not be possible to conclude these agreements by the Friday?

A. He must have made the suggestion, and as is clear from my fax, I rejected the suggestion.

Q. Were you aware at the time, or did anybody mention to you that during the course of the formal presentation with the Department, that Mr. Brennan, who was the leader of the Project Group that was evaluating this in the Department, had informed Esat Digifone and indeed had informed all the other consortia, but Esat Digifone mightn't have necessarily known that that Esat Digifone should not send in any further information to the Department, and that Mr. O'Brien agreed to that? Did you know that?

A. No. No, I don't recall knowing that, no.

Q. Do you recall at all, either on the 29th or indeed at any earlier date when you were involved in this, and I presume you knew from some days earlier about this draft letter from the Department, because you noted it on the 24th that the documents wouldn't be lodged, was there any expression by anybody of any inhibition with regard to the forwarding of this letter to the Department?

A. I don't recall having hearing an expression of inhibition.

Q. Or any doubt as to whether it might be a sensible thing to do?

A. Again, I can't recall any discussion on it. I was simply acting on instructions we were to try and agree this document and get it into the Department.

Q. Were you aware at all, either directly from observation, or indirectly from what you may have heard or from what you may have surmised, that anybody on behalf of the Esat Digifone consortium or any member of that consortium or any person on behalf of any member of that consortium had any contact with the Department in advance of this letter being sent on the 29th September?

A. I don't recall. I can't say whether there was or was not. But no, I don't recall. As I say, my I was quite a distance away from the bid process, quite

frankly. I don't think I ever had any contact at all with the Department.

Q. I know you had I am not suggesting that you did.

But you said to me that "I don't recall"; are you saying to me that you don't recall whether you were aware, or are you saying that you didn't know of any such contact?

A. I don't know of any I don't now I can't say that I was aware of any such contact. Sorry, can you repeat the question? Because I have got quite confused as to what you are asking me.

Q. What I asked you was were you either aware directly, from what you knew directly, or indirectly, from anything that you gleaned or anything that anybody told you that the consortium, Esat Digifone, or any person on its behalf or associated with it, or any member of that consortium, that would be IIU/Communicorp, Telenor, or any person on behalf of any member or any person associated with any member, was at any time in contact with the Department in relation to this matter prior to the 29th September when the letter was sent?

A. So far as I am aware, no.

Q. Okay.

Now, as you indicated yourself in your memorandum, the letter was returned, and that was I think by letter of the 2nd October from the Department to Mr. O'Brien.

And if I could just ask you to look behind Divider 69.

Do you see that letter there: "I refer to the ground rules of the competition as outlined at our recent meeting with you on Tuesday 12th September. The Department has already made it clear that applicants shall not be permitted to provide any further material to supplement their applications except where expressly requested to do so by the Department.

"Accordingly the additional material received from you on Friday last is enclosed herewith. It shall not be taken into consideration in the evaluation process."

Can you tell me when you became aware that that letter of the 2nd October had arrived?

A. I would think probably maybe on the 2nd or some day subsequent to that.

Q. It would have been fairly shortly afterwards?

A. Yes, yeah.

Q. Can you recall what the reaction was when this letter came back?

A. I can't really recall what the reaction was, to be honest. I think no, I can't. Obviously some unhappiness, I would have thought; but other than that, I mean, I don't recall any specific people making specific comments about it.

Q. Mr. O'Connell, in his evidence, stated that the view was that it was a disappointment, but at the same time the information was in the minds of the people to whom

it was sent. Would that accord with your

recollection?

A. It doesn't not accord with any recollection, but to be fair, I wouldn't have

Q. You don't have a specific

A. I wouldn't have thought it through on those terms. I don't know whether the information was received by the Department, so to speak.

Q. Well, it went by fax to Martin Brennan, and it was coming back by letter from Martin Brennan. So you could only assume it was received by Martin Brennan?

A. Yes, but it could have been received by again, I would not have been familiar with the bid process, who was involved in evaluations and what have you; so Mr. Brennan, if Mr. Brennan got it, read it and returned it, I don't know what significance it would have been that it was in Mr. Brennan's mind, unless he had passed it on to somebody else.

Q. It also says it refers to the ground rules of the competition as outlined; "The Department already made it clear". So it's making it fairly clear there was a breach of the ground rules of the competition. Now, do you recall there being any concern in relation to that statement?

A. No. Not particularly, no.

Q. None at all?

A. Oh, I am not saying there wasn't any. I don't recall

there being any.

Q. Well, were you concerned? I mean, your client is now being told, or the consortium of which your client was entitled to 37.5% of the shares was being told, you have been in breach of the ground rules of the competition; would that not be cause for concern?

A. I think I probably would have been of the view at the time that the best bid was going to get the licence.

So that it was unlikely that the Department would decide not to award a bid, simply because of something like this, to what would have been the best applicant.

So therefore, if Digifone was the best applicant, it should probably still get the licence. If it wasn't, it wouldn't.

Q. Did you form that view as a result of any discussions you had with anybody?

A. No.

Q. Now, we know that Telenor weren't told by Bottin, were they?

A. I have no I can't say that they were told about Bottin certainly on the 29th September, no.

Q. Why weren't they?

A. I cannot recall, to be honest. I mean, it may have been that there was a sensitivity that Telenor might have a concern about the fact that it was Bottin rather than IIU, although they probably knew as much about Bottin, quite frankly, as they did about IIU.



But I can only surmise that the view was taken that there wasn't a substantive change, in that IIU and Bottin were both Dermot Desmond vehicles.

Q. Right. But IIU but Bottin was now, if you like, taking over all of the underwriting obligations?

A. Mmm.

Q. Was that not a very significant matter from the point of view of Telenor, that had effectively agreed to a reduction of its shareholding by 2.5%?

A. Subject to I mean, Bottin or IIU or whatever, would have to meet its obligations for that reduction to take place. If it wasn't in a position to meet the obligations, then Telenor would not have suffered that loss.

Q. Telenor would not have

A. If Bottin or IIU, to actually get its 25%, would have had to actually pay for that 25%, like the other shareholders.

Q. Yes. But I mean, weren't they in an extraordinary position because Bottin was an offshore company? It looks as if information was never forthcoming to Telenor about who they were, where they were, where they were registered. How was this ever going to be enforced?

A. Well, again, I would go back to the point that Bottin and IIU were to some extent, I would have regarded them to some extent as being the same thing. They

were Dermot Desmond vehicles. And I would have thought it highly unlikely that Dermot Desmond would have entered into an arrangement such as this, then to use some sort of a mechanism to get out of it. And also, I think it's fair to say that there was I wouldn't have been aware of the comparative strengths of Bottin financially as against IIU, quite frankly.

Bottin could well have been far more financially

Q. That, I fully appreciate. But you had very carefully sent every one of these documents to Per Simonsen.

Mr. O'Brien had brought draft documents on Friday the 22nd. Per Simonsen had corresponded with Mr. O'Brien on Monday the 25th, and you had very carefully been keeping Telenor apprised of what was going on. You were sending off drafts of the documents. You were taking on board their comments, incorporating them into the revised drafts. You sent them over to Michael Walsh to get his agreement. And I am just wondering why you wouldn't have sent any of these drafts of the Bottin letter to Telenor.

A. I can't recall. I honestly can't answer the question.

As I say, the only thing I can think of, the introduction of Bottin came at a late stage, and maybe it was felt that we needed to get you know, just to finish out the process and to introduce Bottin at that point might have delayed things further.

Q. Again, to get the letter in on the Friday?

A. Yes.

Q. Now, Telenor I think Mr. Haga wrote to Mr. O'Brien on the 6th October looking for information about Bottin. I think you know that letter, do you?

A. Mm-hmm.

Q. He didn't get it. And then Mr. Digerud incorporated the same request in a letter which he sent directly to Michael Walsh, I think, on the 12th October?

A. Yeah.

Q. Now, you received a fax from Mr. O'Brien on the 12th October. It's at Divider 79. Do you have it there?

A. I am just getting to it, yeah. I only have the cover fax sorry

Q. It's a fax with

A. 10th

Q. 12th October.

A. Yes.

Q. In fact, there is I think you may have received it on the 13th.

If you go to the last page of it, there is a second copy of the fax cover sheet, and I think perhaps that's your annotation, "8.30am", is it?

A. No.

Q. And there is a change in the date to the 13th. Not a lot turns on it, anyway. It was either sent on the 12th and you received it on the 13th, or perhaps it wasn't sent until the 13th.

"Please find attached letter from Telenor for your information. I will call you about this today."

Do you see that?

A. Yes.

Q. Enclosing a letter from Mr. Digerud, addressed to him, dated the 12th.

"Dear Denis,

"Thank you for joining us at Telecom '95 in Geneva.

As you will have noticed, there is a great deal of attention and enthusiasm at all levels in Telenor regarding our joint GSM project in Ireland.

"We sincerely hope that the IIU underwriting will strengthen the financial credibility of the bid.

However, we were surprised by the side letter agreement, especially clause 2, assigning the arrangement agreement to Bottin International Investments. I have therefore asked Michael Walsh to provide detailed information on Bottin urgently (see attached copy of the letter). And he attached a copy of the letter and sent it to Michael Walsh.

He said, "Please also provide us (for our records) with a written statement that there exists no other agreements between any Communicorp Group company (or yourself) and any IIU-controlled company (or Dermot Desmond/Michael Walsh) than the two presented to us.

"We believe it would be a good idea to finalise the shareholders agreement and articles of association

before the decision in the Ministry is being announced. We are prepared to do this either late next week or early November. Please notify us regarding what time that would be most convenient for you."

Do you see that?

A. Yes.

Q. And Mr. O'Brien said he'd call you about that later that day. Now, we don't seem to see a response from Mr. O'Brien to Telenor's request. Can you assist the Tribunal at all in relation to that?

A. No, I am not aware of what happened in relation to the response or whether there was any discussion with Mr. O'Brien or Mr. Digerud.

Q. Do you recall Mr. O'Brien discussing it with you later that day perhaps not later that day, or at any subsequent time?

A. I don't have any recollection, and I am not sure there was any note of a discussion, but my as regards Bottin, my view was that that was a matter for IIU to provide information, but certainly I wasn't in a position to provide it.

Q. It doesn't look as if that information about Bottin was ever given to Telenor at all, and in fact I'll refer you in a moment to a meeting that I think was on the 21st November, where Telenor were still expressing their concerns about Bottin. Maybe you remember the

attendance. In fact, you kept one of the attendances of that meeting. And I wonder, do you know at all why there appears to have been a reluctance to give this information to Telenor?

A. I don't. Because to some extent, in purely legal terms, my clients would have had the same issue. We would have wanted to know what this company was, but I suppose the reality was we were familiar with Mr. Desmond, and we probably hadn't the same level of concern.

Q. Of course. I mean, you would have been Communicorp, I should say, would have been in a completely different position to Telenor in terms of their requirements for information, because Mr. O'Brien knew Mr. Desmond well. Mr. Desmond would have been known, presumably, to William Fry, and to anybody associated with Mr. O'Brien. But it would have meant entirely nothing to Telenor?

A. Yes.

Q. But the information was never given, for some reason, but you can't assist on why not?

A. No.

Q. Now, from the announcement of the result onwards, you appear to have been primarily involved in negotiating and drafting the shareholders agreement; isn't that the position?

A. Yes, that's correct.

Q. From the documents, it appears that from the Communicorp side, you had dealings with Mr. O'Donoghue and Mr. O'Toole.

A. Mm-hmm.

Q. Would that be correct?

A. Primarily, yes. Although, Mr. O'Donoghue, as far as I can recollect, was moving he was moving into the Digifone side.

Q. Esat Digifone finance end. Who did you consider you were taking instructions from in relation to the shareholders agreement?

A. It would primarily have been Richard O'Toole to some extent; he was quite heavily involved in the discussions. And occasionally Mr. O'Brien, although he wasn't that involved in the detail of the discussion. So I think it was probably mostly Richard O'Toole.

Q. Would you have been happy, if you like, to take instructions from Mr. O'Toole?

A. Yes, yes.

Q. You wouldn't have felt there was any need to go back to Mr. O'Brien to get confirmation on those instructions?

A. No.

Q. All right. On the Telenor side, you seem to have been primarily dealing with Mr. Simonsen and Mr. Haga, represented by Mr. Moran of Matheson Ormsby Prentice?

A. Yes. I mean, there were various people at various times. I mean, I dealt with Mr. Digerud at times, with Arve Johansen, Mr. Rolf Busch, Amund Bugge.

There were quite a number of people at various times.

Q. Then in terms of IIU, who were you dealing with?

A. IIU was Michael Walsh, and Neville O'Byrne, also William Fry, was representing them legally.

Q. Now, you attended a number of meetings, if you like, I suppose shareholders meetings, with a view to tying down the nuts and bolts of the shareholders agreement in the months leading up to Christmas. I just want to refer you to some of the attendances of those, not to go through the technical matters, but just to ask you if you could assist the Tribunal in relation to some of what's in the attendances.

Now, the first one I want to refer to you to is Mr. Moran's attendance of a meeting on the 9th November. That's at Divider 86 of Book 49. Do you see that?

A. Yes.

Q. In fact, you have an attendance of the same meeting as well, which we'll look at in a moment. And it looks as if Mr. Moran first met with his clients, and then it appears that you all met up together at the Davenport Hotel. Do you see that? "Davenport 126"; it's a couple of lines down. We have a typed version of this attendance. Do you have a copy of that in your book?



A. I do, yes.

Q. You see there he records Knut Haga, Per Simonsen, Knut Digerud. He deals with a number of matters, and just below that you see "Davenport" on the right. "Peter O'Donoghue plus Richard O'Toole plus Gerry Halpenny."

Then there is some discussion clearly about Communicorp, whether it be Communicorp or Esat Telecom, and just below that, "IIU are Department aware? Yes, 29/9/1995 letter to Department.

Department replied that letter not taken into account.

Copy to be supplied to us."

Now, what's your recollection of the discussion at that meeting in relation to the Department's awareness of IIU?

A. Can I consult my own note to see if there is anything there?

Q. Yes. You have something similar in your own note.

It's at the next divider. In fact it's a shorter note. "Esat Telecom rather than Communicorp.

Bottin IIU appearance, Telenor unhappy re Bottin", then "letter"; we weren't so sure and we haven't been sure that the word after letter is "from" or "for", and maybe you can

A. It's "from".

Q. "Letter from the Department re IIU." That's your note. And the rest just relates to technical matters.

I think Mr. Moran's evidence was that this was a query

that was being raised by Telenor and that the information was coming from the Communicorp side, which would either have been yourself, Peter O'Donoghue or Richard O'Toole. Can you

A. I am not quite sure what the query was.

Q. I was asking you, can you recall that discussion about the Department's awareness of IIU?

A. No. No, I can't. I assume from the note that I made that we told them that the letter been sent but had been returned.

Q. You would have known, of course, that the letter fell far short of telling the Department what IIU's role was intended to be?

A. I'm not sure I'd agree with that, but...

Q. Well, we have just been through it. It certainly didn't say the Department weren't told that IIU were going to get 25% of the shares, were they?

A. No, but you said "the role". With respect, the letter talked about IIU's role in arranging underwriting.

Q. Yes, but it was intended that IIU were going to be shareholders, and the Department weren't told that in the letter, were they?

A. No, that's correct.

Q. Now, in your own note, let me just refer you to your own note. You record, again,

"Bottin IIU appearance.

"Telenor unhappy re Bottin."

A. Yeah.

Q. You see there clearly that Telenor are again expressing their concerns about Bottin?

A. Yes.

Q. Do you recall that discussion?

A. Again, just from my note, I assume that Telenor were saying, "Who is Bottin? How do we know Bottin can fulfil its obligations?"

Q. You don't recall whether Mr. O'Donoghue or Mr. O'Toole were in a position to tell Telenor anything about Bottin at that stage?

A. I don't recall, other than to tell them that it was again a Dermot Desmond vehicle, and...

Q. Could I ask you to go on to Divider 88.

A. Yes.

Q. Now, you wrote to Mr. Moran in relation to the matters discussed at the meeting on the November. Do you see that letter there? Again, it's primarily technical matters, and I am not going to open it all. I am going to refer to one very specific part of it.

You say: "Dear Arthur,

"I refer to our meeting on 9 November 1995, and I now set out a summary of our comments on the agreement.

You will recall that in a number of cases the lawyers were asked to try and ensure that the wording fits the bill, and I have put forward suggestions in this regard. However, as you know, there are a number of

other issues of a commercial nature upon which agreement has yet to be reached, and I have also set out our present position on these."

And you set out a number of matters, and I just want to refer you to what's the second subheading on that first. You see "Recital E"?

A. Mm-hmm.

Q. Now we know from a subsequent document that "Recital E" related to IIU?

A. Yes.

Q. Okay. And says "Recital E

"I would remove the word 'institutional', as it may well be that some of the investors will be private."

A. Yes.

Q. Now, presumably, in writing that, you were acting on instructions?

A. Yes, because well, the letter was written subsequent to the meeting on the 9th November, and I assume the issue would have been discussed at that meeting, and at that point it would have been stated that some of the Recital E, we are if we are talking about the IIU placing with investors.

Q. Yes, that's what it refers to; would you agree with me?

A. Yes, I think it is, yes. And that being the case, I think IIU did not want to restrict themselves to purely placing with institutional investors.

Q. But you wouldn't have been getting your instructions, surely, from IIU?

A. No, but I can't tell you how I am aware of this, but I think I can recall there being some discussion about IIU, about this, and they had a preference for the word "institutional" not to be there, and I didn't have a difficulty with that. I didn't particularly think it made a whole lot of difference, quite frankly.

Q. Obviously somebody told you that it mightn't necessarily be institutions that IIU would be placing with, if they intended to place, that they may well be placing with private investors.

A. And indeed the point may well have been discussed at the meeting on the 9th.

Q. I don't think there is any reference to it, but

A. The meeting probably went on for several hours, and there is a page of notes.

Q. I don't think there was anybody from IIU at that meeting?

A. No, there wasn't, no. But I may have made the point too.

Q. I see. Now, if I could ask you to turn to Divider 90, there is a note of a meeting on the 21st November, 1995. And this is actually your note.

A. Yes.

Q. Do you see that? It's with the same protagonists.

Mr. O'Toole, Mr. O'Donoghue, Mr. Haga, Mr. Simonsen,  
Mr. Moran and yourself.

A. Yeah.

Q. Do you see that?

A. Yes.

Q. Now, I take it that you would have been aware that  
when the announcement of the winner of the competition  
on the 25th October was made, it was announced that  
Esat Digifone had won the competition, and that Esat  
was owned between Telenor and Esat Digifone, and that  
I think there would be some shares placed with  
institutions?

A. Mm-hmm.

Q. You knew that there was no reference to IIU at that  
stage?

A. Yes, I think that's probably correct, yeah.

Q. Now, you see there in the typed version again, you  
can use your own handwritten version, if you wish, and  
correct anything that we may have made error with.

It says: "Position re the Department IIU  
not a problem for Martin Brennan in the Department  
main concern that DOB and Telenor mainly involved  
on the operational side." Do you see that?

A. Yes.

Q. And you can see that there was again a discussion of  
the position regarding the Department and IIU?

A. Yes.

Q. And I think in your memorandum you indicated that it was either Mr. O'Donoghue or Mr. O'Toole who was in a position to tell the meeting that it wasn't a problem for Martin Brennan in the Department.

A. Yes, it must have been one of those two.

Q. It must have been one or other of those?

A. Yes.

Q. Would you have been aware at that time that there had been some publicity in the media over the previous weekend, I think on the RTE radio news on the Friday evening and in articles in the Irish Times and Irish Independent on the Saturday, that Mr. Desmond would be assisting Esat Digifone in relation to the placement of shares, that portion of the stories having been confirmed by Mr. O'Brien, and also speculation that Mr. Desmond might take up some of the shares himself. Would you have been aware of that?

A. I may well have been, I can't remember, but if it was if there was speculation, there was speculation.

Q. You'd have been generally aware I know that your principal role was in relation to hammering out the terms of the shareholders agreement, but would you have had a general awareness that there was a concern about the Department's knowledge of IIU?

A. I suppose there is always a concern if the position is presented which is in any way different from what you

know was originally presented. So when the bid was presented, it was 40:40:20, and the 20 was supposed to be institutional investors. So therefore there might have been some sensitivity, but I would also have taken the view, I suppose, and would still take the view, that the main concern of the Department was to ensure that there were two strong operators involved, being Telenor and Esat, and that the identity of the other shareholders might not have been such a key factor. I don't know what the view of the Department was as to who they should be, whether they wanted it to be Irish institutions or anybody else, and I honestly don't know what their position was on that. But I think I would have been of the view that the primary concern was to make sure that Telenor and Esat were the parties in control, effectively.

Q. I suppose that's what you were being told at this meeting, anyway, wasn't it, by either Mr. O'Toole or Mr. O'Donoghue?

A. Probably, yes, I suppose it is, yes.

Q. Then below that, at the bottom of the page, it says:

"Carve out the radio division 40:40:20 issue should not be a problem."

That's the capital configuration; again that's being discussed here as to whether that might be a problem for the Department?

A. Yes.



Q. And again somebody is saying "Should not be a problem" can you recall, would that also have been Mr. O'Donoghue and Mr. O'Toole?

A. Again, I would say it must have been one of those two, yes.

Q. Did you get the impression that that was also as a result of some contact with the Department?

A. I assumed it was as a result of contact with the Department. I mean, they were the people who would have had an extensive amount of contact with them, to the extent there was contact, and that they would be the ones best in a position to gauge the view of the Department on the shareholding structure.

Q. So that was your view both in relation to the IIU involvement and the capital configuration, that the view being expressed by Mr. O'Donoghue or Mr. O'Toole was based on their contact with the Department?

A. Yes, I believe so.

Q. You had dealt quite a bit, I think you said to me, with Mr. O'Toole?

A. Yes.

Q. Did you know of any contact that Mr. O'Toole had with the Department?

A. I wouldn't have detailed knowledge of it, no, but you know, I don't know. He was obviously involved in the discussions, was brought in specifically in the context of the bid, as I understand it. So he would

have had a significant involvement in all of the aspects of the bid process, I would have thought.

Q. Now, can I ask you to look at Divider 99.

A. 99?

Q. Yes. In the same book. This is a memo that you received from Mr. O'Byrne, Mr. Neville O'Byrne, also of William Fry, acting on behalf of IIU. It's dated the 19th December of 1995. Do you recall when Mr. O'Byrne came in to act on behalf of IIU?

A. I don't recall specifically. But clearly it was sometime before the 19th December.

Q. Right. It was sometime after you may have opened the discussions, was it?

A. Mm-hmm.

Q. Can I just point out to you a few of the points he had made. He said "We have had a chance to review the draft shareholders agreement between Telenor Invest, Esat Holdings and IIU with our clients, and the following comments were made:" And I am not going to read them all out. I just want to draw your attention to one or two of them.

At 4, he refers to Clause 1.8. He says "Our clients require the power to veto the issue of new shares in the capital of the company. Probable contributions to the company, unsubordinated loans, and any combination of any one or more of them."

They were looking for a power of veto with regards to

that?

A. Mm-hmm.

Q. At paragraph 6, Clause 1.22: "It is our client's opinion that the decision to create subordination loans should be a unanimous one" that's equivalent to a power of veto, isn't it?

A. Yes.

Q. Then at 8, Clause 4.3: "We suggest that when additional funding is required by the company under this clause, each party shall have a right of veto, or alternatively any two of the parties may agree on the additional funding." Similar requirement?

A. Yes.

Q. Then at 10, in relation to Clause 4.5: "Our clients are not happy with the figure of 75% and suggest a figure such as 75.1%." I don't quite know what that relates to, but would that be what was required for a special resolution or something of that nature?

A. Yes.

Q. And just over the page at 16, Clause 7.9: "We believe that it should be a condition that there can be no quorum at a board meeting if our clients are not in attendance by their director." Do you see that?

A. Yes.

Q. Just go over the page to 4. Paragraph 22, Clause 11.8, 11.9 and clause 4.3 "These clauses provide the board with very wide powers to vary the company's

borrowing requirements. Our clients would suggest that there should be unanimous consent in these matters." Again equivalent to a power of veto?

A. Yes.

Q. So it would be fair to say that they sought quite significant rights at this stage in relation to the shareholders agreement in the areas of finance, raising finance, issuing shares, entering into subordinated, loans and so forth?

A. Yes.

Q. I'll come back to those in a minute.

A. Okay.

Q. Now, if you go to Divider 102. This is an attendance that you made of a telephone conversation that you had with Mr. O'Toole on the 8th January. I think you know this attendance; you were asked about it in your memorandum. And again it's been typed up, and please correct me if there are any errors in the typed-up version.

It says "Concern re IIU obstacle to getting things sorted.

"Licence issues about to be raised again.

"Acting as strategic operator/investor

"20% V 25% issue IIU not come in Esat and

Telenor go ahead make the capital calls option to come in, but price goes up as time goes on."

Is that correct?

A. Yes.

Q. Okay. And I think it's clear from your attendance that Mr. O'Toole was concerned that there was a delay in finalising the shareholders agreement due to the conduct, if you like, of IIU?

A. Yes, that's correct. They were slow in coming back with comments.

Q. Well, it was a bit more than being slow, wasn't it? Wasn't it his view that they were looking for rights and protections under the shareholders agreement that were akin to the kinds of rights and protections that a strategic operator would look for, rather than an investor?

A. Well, no, with respect, the types of protections they were looking for would not be at all unusual for a 25% shareholder to look for. I mean, a minority the purpose of a shareholders agreement, quite frankly, is to is normally to protect or give rights to minorities, because under the law, minorities have really no protection whatsoever except maybe to block special resolutions. So I wasn't surprised with what IIU were looking for in terms of these protections. They were, like any minority shareholder, trying to protect their position as best they could.

Q. Of course they were. And they were entitled to look for as much as they could possibly get?

A. Yes.

Q. It was certainly Mr. O'Toole's view, as recorded in a memo that he sent to Mr. O'Brien, which I'll refer to you, that he considered that the rights that they were looking for were more akin to what a strategic operator would look for rather than an investor.

Would you agree with that?

A. If that's what he said, I wouldn't disagree with what he said. The reality is that I viewed this simply as a minority shareholder seeking as much protection as it could get.

Q. As much as he could get?

A. Yeah.

Q. Again, the 20 to 25% issue seems to be discussed?

A. Yes.

Q. And I think at this stage Mr. O'Toole was proposing that perhaps there be a bilateral shareholders agreement between Telenor and Communicorp and then to negotiate on with IIU?

A. Yes.

Q. That what he had in mind?

A. Yes, and I think

Q. I think you wrote to him on the 9th January in relation to that, and that's at Divider 103. And if you like, you deal with the legalities of what he was proposing. And again, I don't intend to go into it in considerable detail. But I think the nub of your advice is on the second page, would you agree with me,

in the paragraph at the top of the page.

I think you said that if they could agree all the outstanding points, they would go ahead on a 50/50 basis. The agreement would be presented to the Department as evidence of the fact that a legally binding shareholders agreement was in place. The current draft agreement could probably be tailored very quickly to meet the requirement, and indeed many of the provisions could remain the same. However, the parties would indicate to IIU that notwithstanding that a shareholders agreement had been entered into governing the position between Communicorp and Telenor, they would still undertake to negotiate in good faith for a revised agreement bringing IIU into the equation. If all outstanding matters had been agreed between Communicorp and Telenor, they could take quite a firm position, that as far as they were concerned, the agreement being put to IIU was in terms which satisfied the condition set out in IIU's letter, although it would be advisable to have a few further concessions which they would be prepared to make. You said then that concurrently with the above steps, the company would make a call on its shareholders to subscribe for the shares. The notice will be a long period of 30 days, and you then negotiate with IIU during the 30-day notice period. And that's what you were suggesting?

A. Yes.

Q. We know of course that never happened, that there was no agreement, there was no bilateral or even tripartite agreement until the 16th May?

A. Yes, I think it's fair to say what I was suggesting there was something it was a backstop.

Q. Yes?

A. Really, it wasn't it would have, in practical terms, been quite difficult to do, but if we had to do it, it was one way of getting around it.

Q. It was one way of getting around the problem.

If you go over the following page, on the same day, we have Mr. O'Brien writing to Mr. Walsh a letter which is marked "Subject to contract" in which he confirms the terms on which he had made an offer to buy 12.6% of IIU's 25% shareholding. Were you aware that Mr. O'Brien was making these moves as of the date of that letter?

A. I don't believe I was. I think I only discovered it subsequently.

Q. Sorry?

A. I only discovered that subsequently.

Q. Right. Do you recall when you became aware of it?

A. I would imagine probably quite soon afterwards, because it would have become a matter of discussion; but as to when specifically I became aware of it, it may be somewhere in the attendances, but



Q. It wasn't at this stage?

A. I don't believe so, no.

Q. You had no role, did you, in relation to this aspect of the negotiations between the shareholders?

A. No, none.

Q. This was a shareholders matter, wasn't it?

A. It was a matter between shareholders. For what it's worth, when I became aware of it, my view was that it wasn't there was Telenor weren't going to agree to it anyway.

Q. No.

A. So it was something that I would have been very surprised had it been had it received acceptance.

Q. But it was definitely a shareholder matter, wasn't it?

It was nothing to do with Esat Digifone's consortium dealings with the Department, or indeed any other dealings of Esat Digifone as a consortium?

A. Yes, I agree, yeah.

Q. But you had no role in it?

A. No.

Q. Now, there is then another further meeting on the 10th January; it's all on the one day. It's at Divider 105.

And this is Mr. Moran's, I think, attendance, of a meeting initially, I think, between Communicorp and Telenor with their solicitors in attendance, but was subsequently joined by Mr. Walsh and his solicitors.

Do you see that?

A. Yes, down at the bottom?

Q. Yeah. And it records some IIU points.

Then it goes on to record that "Telenor would lend to Esat Digifone, Esat Digifone to issue to Esat Telecom on a 1p paid basis." I think that relates to how you were going to structure the bridging finance. Is that right?

A. Sorry, are you still referring to Arthur Moran's

Q. Yes, but I am I am using the typed version. It's behind the handwritten version. Do you have it there?

A. Oh, yes.

Q. You see IIU points were initially discussed. Then there is some reference to Clause 11.1.3 of the shareholders agreement.

Then "Telenor lends to Esat D.

"Esat D issues to Esat on 1p paid basis."

I was saying to you, I presume that was a discussion of how you'd structure the bridging loan from Telenor to Communicorp?

A. Yes.

Q. Then it goes on: "Department still believes in 40:40:20 split." Do you see that?

A. Yes.

Q. Can you assist the Tribunal as to who would have been informing the meeting of that matter?

A. It could have been any one of Peter O'Donoghue,

Richard O'Toole, Per Simonsen or Knut Haga.

Q. Did you know that Knut Haga or Per Simonsen were having any dealings with the Department?

A. I can't recall. I honestly can't recall. I mean again, this was after the decision had been made by the Department. At that point, I assume there was substantial contact between Digifone, the consortium and its members and the Department on an ongoing basis, so...

Q. It goes then "Cash call likely soon 12 million 20/1/96". Were you anticipating at that stage that there was going to be a need to capitalise the company that early?

A. I suppose the issue was that there were there was going to have to be some preparation in advance of the actual grant of the licence, and that it may be necessary to go out and place contracts with equipment suppliers or so, but as to the precise requirements or whether 20 million was needed or whatever was needed, I wouldn't have been aware particularly.

Q. But there was a view that money was going to be needed fairly quickly?

A. Apparently, yes, yeah.

Q. Then you see it records "Michael Walsh, John Bateson, Neville O'Byrne" he is a solicitor in William Fry at the time?

A. No, Michael Walsh, John Bateson is IIU, or was IIU at

the time.

Q. "Neville O'Byrne and Sonya Price"; I think Sonya Price was a solicitor in Fry's at the time?

A. Yes.

Q. Then we come to Recital E again. That's the same recital that you were referring to in your letter of the 10th November we just opened.

"Recital E on whose behalf were IIU acting? IIU Nominees listed. Need to talk to the Department." Do you see that?

A. Yes.

Q. Can you recall the discussion there, "need to talk to the Department", or what it related to?

A. Specifically, no. Again, I would have thought it was to inform the Department as to what the IIU shareholding, you know, that general description, how that would have been made up.

Q. Who would be entitled to the beneficial interest?

A. Yes.

Q. Do you remember at all or can you recall, did you know of anybody going to the Department, either at this stage or subsequently, to discuss this matter?

A. Directly, no. I know obviously there were discussions ultimately with the Department, but no, I am not aware of any specific contact at that point.

Q. Can I refer to you a note behind Divider 110, which is in fact a note of Mr. O'Connell's. I am not quite

sure the date on which it was made, because it's not dated. I don't know if Mr. O'Connell was able to indicate when he made it. It's at 110.

Now, it has to have been after the 19th December, because it's quite clear that what they are referring to is Mr. Neville O'Byrne's memo to you of the 19th December; do you see that?

A. Yes.

Q. I think there must be some reasonably good reason that it's at this position in the Tribunal books, between a memo of the 16th January and a I think an attendance of the 8th February. So perhaps this was around the time, or this was the gap or spot it was in on the Fry's file.

You see, it's I think Mr. Coughlan has confirmed to me that Mr. O'Connell wasn't able to date it. Anyway, it's attendance of Mr. O'Connell on Denis O'Brien.

"Read NOB letter to GFH re IIU". So clearly it's the letter of the 19th December.

A. Mm-hmm.

Q. "Wants view as to what is realistic.

"Word with NOB?

"Some over the top e.g. 25.1%

"IIU not an industry partner, merely an institution."

Do you see that?

A. Mm-hmm.

Q. That again seems to be echoing, doesn't it, what Mr.

O'Toole was saying to you on the telephone on the 8th January?

A. Yes.

Q. The 25.1%, that relates to what was being suggested in relation to a special resolution, doesn't it?

A. Mm-hmm.

Q. Can I just ask you this: Were you out of the office at this time?

A. I have no idea; given that there is no time on the memo, I couldn't say. But no, I don't know.

Q. It's a bit puzzling that Mr. O'Brien is going to Mr. O'Connell in relation to this and coming to you, isn't it?

A. It suggests that maybe he wanted a second opinion on it, but...

Q. Well, anyway, I'll let it go.

If you go on to the next divider; it's 111. And it's another attendance of Mr. O'Brien on Neville O'Byrne, and Michael Walsh, Denis O'Brien and Owen O'Connell.

And it primarily relates to the negotiations regarding Mr. O'Brien's desire to acquire 12.6% of the IIU sharing of Esat Digifone; do you see that?

A. Mm-hmm.

Q. It says "MW talked DD, does not want to sell out fully. Happy with convertible structure.

Uncomfortable about shareholdings in multiple companies. Some discussion of DD co-investing with

CSFB but this very tentative.

"Current position. IIU will do to 12.4% will resolve 5% problem by convertible, same effect as a share.

See MW memorandum lot of difficult points". And then it says and records: "Problem for IIU in coming up with capital in interim."

Now, do you recall that there was discussion or there was an awareness that there was some financial restraint on IIU providing for its capital calls in the short term or in the interim?

A. Not that I was aware of.

Q. They were certainly slow to sign up to the shareholders agreement, weren't they?

A. Well, to be fair, the shareholders agreement was a protracted discussion, in that they weren't the only ones holding it up I don't mean holding it up, but it took its full term to get resolved between all of the parties.

Q. Right. Okay. If you go to Divider 112, that's a memo from Mr. O'Toole to Mr. O'Brien where again, I think Mr. O'Toole is advising Mr. O'Brien that

A. I don't actually I don't have that. It wasn't one of the

Q. Sorry, it's Divider 112. We'll hand it up to you. It's a memo with an enclosure. And I am not going to open it all, but effectively, it's Mr. O'Toole advising Mr. O'Brien that fairly strong steps needed

to be taken to conclude the shareholders agreement.

And he had in fact included with that memorandum and enclosed with it a draft letter that he was proposing that Mr. O'Brien would forward to Mr. Walsh. Do you see that?

A. Yes.

Q. Can I just refer you to the first paragraph, halfway down the second.

"It was a draft letter. I should add of course not sent. Draft letter to Michael Walsh IIU. I am writing to ask IIU to progress certain matters relating to the shareholder agreement which will govern Esat Digifone Limited.

"As you know, two meetings have been between Esat Telecom Holdings, Telenor and IIU on the shareholders agreement. At the last meeting in January, comments from IIU were reviewed. The essential point at issue was that IIU appeared to be asking for rights in the agreement which Esat and Telenor believe are more appropriate for shareholders which will have primary responsibility for operational promotional and management of the Esat Digifone project."

So again Mr. O'Toole seems to be making the same point, that these rights that were being sought, all right, fair enough, as you say, a minority shareholder will look for as much protection as can be negotiated for. But it does appear to have been both Mr.



O'Toole's, and perhaps to lesser extent or an equal extent, Mr. O'Brien's view, based on the attendance, that these rights that they were seeking were not rights that you would normally see investors looking for?

A. Yes, yeah.

Q. Now, we know that from then on you were negotiating the shareholders agreement. We know that the shareholders agreement ultimately concluded and was executed on the 16th May?

A. Mm-hmm.

Q. We know that you had no dealings with the Department whatsoever. I think Mr. O'Connell and Mr. Digerud were having the dealings on behalf of Esat Digifone with the Department?

A. Yes.

Q. But clearly from time to time they were coming back to you, and they were reporting to you in relation to matters that the Department might require which would relate to the consortium members rather than to the consortium or to Esat Digifone Limited. Would you agree?

A. Yes.

Q. Now, I just want to refer you to a draft letter which Mr. O'Connell appears to have circulated on the 13th May, and if I can just put it in context for you first, it may be of assistance. It's in Book 50, at

Divider 144. And

A. 144, what I have here is

Q. It's a fax from Mr. O'Connell addressed to Mr. Denis O'Brien, Mr. Leslie Buckley, Esat Telecom, CCed to you, also addressed to Mr. Michael Walsh and CCed to Mr. Neville O'Byrne?

A. Actually, sorry, it's 144A. 144 is a memo.

Q. I am very sorry, it is 144A. I do apologise.

Just to put that in context for you, we know that on the 3rd May Mr. O'Connell and Mr. Digerud attended a meeting at the Department, and the Department, at that meeting, indicated, if you like, its list of requirements of what it wanted. And you may recall it wanted certain certificates in relation to each of the consortia members, that they had funding in place; they wanted certificates, I think, from the banks that were going to provide the debt financing. Do you recall that?

A. Yes.

Q. Now, one of the matters that Mr. O'Connell was asked to deal with, and indeed Mr. Digerud, who was at the meeting also, was an explanation as to how Davys, Bank of Ireland, AIB, Standard Chartered and Advent were replaced by IIU. All right? And I can tell you that that was the position. Now, Mr. O'Connell prepared a draft letter on Friday, 10th.

A. Right.

Q. And that included an explanation that had been sought by the Department; all right?

A. Mm-hmm.

Q. On the Monday the 13th, there was a revised draft prepared, and this draft excised all of the information in Mr. O'Connell's draft of the 10th which related to the substitution of IIU for Davys, AIB, IBI and so forth; right?

A. Yes.

Q. Now, Mr. O'Connell clearly CCed a copy of his letter of the 13th to you, and maybe I can just show it to you first.

It says: "Dear Denis, Michael and Leslie,

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

"Please confirm approval urgently.

"PS Martin Brennan has asked Knut to deliver the letter personally at 12.30pm."

You see that?

A. Yes.

Q. And there is a handwritten note up on the right.

"Esat: Note this" I am not sure what the next word was "was received by Esat Telecom prior to being sent to the Department." Do you see that?

A. "Note this" I think it's "submission was reviewed

by Esat Telecom prior to being sent to the Department". I think it's "submission", is it?

Q. "Submission was received"; all right.

A. And then "reviewed".

Q. "This submission was reviewed by Esat Telecom prior to being sent to the Department." Can you tell me at all whose handwriting that is?

A. I have no idea. It's certainly not mine.

Q. It's not yours?

A. No.

Q. You don't recognise it?

A. No, it's not mine. It's not I am pretty sure it's not Owen O'Connell's.

Q. Now, if you just go over the page, you see the draft letter there. It's "Dear Mr. Brennan, "I refer to our recent meeting and to your request for information concerning this company. I confirm that I am a director and the Chief Executive of Esat Digifone Limited.

"I enclose the following"; it just lists the enclosures. I am not going to go into it.

And then it closes: "The company will, on or before the grant of this licence, be owned as to 40% each by Telenor and Esat Telecommunications Holdings, a wholly-owned subsidiary of Communicorp, and as to 20% by IIU Nominees Limited (holding on behalf of Mr. Dermot Desmond). IIU Nominees Limited is a

wholly-owned subsidiary of International Investment and Underwriting Limited (which in turn is also wholly owned by Mr. Desmond). I hope that the above is of assistance". Do you see that?

A. Yes.

Q. Do you recall receiving that draft?

A. I don't particularly recall, but I may well have.

Q. It's CCed to you. You must have received it?

A. Yes.

Q. Can I show you the draft of the 10th. Now, we know that you were at a meeting at least one meeting, anyway, with Mr. O'Connell; you may have been at more.

But I'll just show you the draft of the 10th and see

if you recognise it at all. It starts with the same

"I refer to our recent meeting and refer to the

following". It lists the same enclosures.

It then goes on to state as follows: "During our

meeting you asked for an explanation of the

involvement of International Investment and

Underwriting Limited in this transaction, having

regard to the prior involvement of Davys Stockbrokers

and certain of their clients. As you know, the bid

was made jointly by Telenor and Communicorp, who were

accordingly responsible for its financing. However,

the bid also indicated an intention to place 32% of

the company with private and institutional investors,

as to 20% immediately and 12% in the short to medium

term. At that time Davys and their clients had given conditional letters of intent in regard to funding 20% of the equity element of the investment, but there was no legally binding commitment by them. Throughout the period prior to and after the submission of its bid, Esat Digifone behaved consistently on the assumption that it would be awarded the licence, planning and spending accordingly. It was thought desirable to secure the proposed 20% non-Telenor/Communicorp funding, and in addition Communicorp wished to improve its financing arrangements for its share of the cost of the licence fee and subsequent construction and launch cost associated with a successful bid.

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

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

the present structure is fully in accordance with the bid. IIU has agreed initially to take up loan stock in lieu of shares in respect of the preplacing element of its commitment, which will result in the shareholding structure certified in the attached letter from Mr. Blank of Esat Digifone Limited. In this regard, I should make it clear that the shareholding and the 40:40:20 ratio certified in that letter and also referred to in Mr. Connolly's letter relate to the situation which will prevail upon and immediately prior to the grant of the licence. Their delivery to date should accordingly be regarded as being in anticipation of the issue of the relevant shares. I hope that all of the enclosed documents are clear and helpful. Should you have any queries thereon, please let me know."

Do you see that?

A. Well, I hear it, yes.

Q. Do you recall seeing that draft?

A. No.

Q. When Mr. O'Connell gave evidence on this matter, he said that while he couldn't be absolutely certain, he was speculating that those paragraphs of the letter, of the draft letter, which dealt with the explanation for the substitution of IIU, were excised either at the request of or with the acquiescence of the Department. Do you know of any dealings with the

Department relating to those paragraphs of the draft

letter?

A. No.

Q. Do you know of any dealings between the consortium and

the Department in relation to the removal of any

reference to IIU or any reference to an explanation

for the substitution of IIU?

A. No.

Q. Now, just one final matter I want to ask you about.

We know the shareholders agreement was signed on the

16th May, and we know that there were side letters to

that agreement as well?

A. Mmm.

Q. I want to ask you about one of the side letters. And

it's at Divider 160. Do you have that?

A. Yes.

Q. It's the side letter that was sent by IIU to sorry,

it was sent yeah, it was sent by IIU to Telenor and

to Esat Telecom, and it was signed also on behalf of

Telenor and Esat Telecom signifying their agreement.

Do you see that?

A. Yes.

Q. I'll read it to you briefly can I just ask you

this: I presume these side letters would have been as

carefully negotiated and agreed as the letters we were

looking at earlier on?

A. Yes, although I think a number of these letters would



have been drafted and negotiated perhaps even on the day. I mean, if I recall, more or less that entire day was spent in meetings with the shareholders.

Q. We know this one wasn't, because I think the first draft of it was prepared in the middle of April by Mr. O'Byrne.

A. Okay.

Q. It's "Shareholders agreement dated 16 May 1996 (the agreement.)

"Dear Sirs,

"We refer to the agreement, and in particular to the provisions of clause 12.2" which I think were the preemption rights?

A. I think so.

Q. "In accordance with our discussions, we are writing to you to confirm that the shareholding of 20% in Esat Digifone Limited (the company) held by us as registered owner is beneficially owned in the following manner.

"Dermot F. Desmond 100%.

"This letter is further to record that our agreement that any transfer of the beneficial ownership listed above will be subject to the terms and conditions regarding the transfer contained in the agreement and the memorandum and articles of the company, save and except that the shares beneficially owned by Mr. Desmond 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, provided that if we offer shares to either of you, we will make an offer of an equal amount on equal terms to the other party. If at the time of the share transfer Esat Telecom Holdings Limited and Telenor Invest AS do not hold equal amount of shares in the company, the offer shall reflect the parties' pro rata shareholding.

"Finally, you, either alone or in concert with other parties, agree not directly or indirectly to purchase shares or interests in Esat Digifone Limited from any party holding such shares or interests, from any placement exempted from the shareholders preemption rights, or to acquire shares or interests in any party directly or indirectly holding such shares or interests in Esat Digifone without offering to the other shareholders of Esat Digifone the opportunity to participate in purchase on equal terms and pro rata to their shareholdings in the company."

Okay?

A. Mm-hmm.

Q. Now, I was discussing this with Mr. Moran as well, last week; and would you agree with him that, if you like, the genesis of this free-transfer provision was contained in the arrangement agreement?

A. I think so. I can't be sure, I mean yes.

Q. Let's put it like this: The arrangement agreement entitled IIU to subscribe for 25% of the shares or to place those 25% of the shares with investors?

A. Yeah.

Q. I think what was contemplated was that the shares would be held by IIU Nominees Limited as nominees for those that had a beneficial interest in the shares?

A. Mmm.

Q. And as I understand it, the reason for the free-transfer provision was to enable the nominee, if you like, to transfer the legal title in the shares to the beneficiaries?

A. Yes, I would think so, although that letter probably goes slightly further than that.

Q. Exactly. That's what I was going to ask you about.

Because as I understood it, that was the thinking behind it, that IIU Nominees would either would hold the shares as nominee for various investors, and if IIU Nominees wished to, it could then transfer the legal title to those shares to those investors without triggering the preemption rights?

A. No, I would take a different view as to the reading this letter. It's saying clearly that Dermot Desmond is the beneficial owner of the shares, and what it is saying is that he can make one transfer of the shares without having to go through the preemption provisions, but subject at all times to making sure

that the Esat/Telenor relationship

Q. The Esat/Telenor relationship had to at all times remain in balance, so if he was going to transfer the shares, say, some of the shares to Esat, he had to transfer the equivalent amount to Telenor. That was agreed between all parties, and they wouldn't even go behind each other's back and try and acquire a greater interest.

A. Yeah.

Q. But what I am wondering is, here, as you say, this goes much further. It's being disclosed that IIU Nominees is holding the shares for Dermot Desmond.

A. Mm-hmm.

Q. So Dermot Desmond is stated to be the investor.

A. Yes.

Q. Effectively. So if all you wanted to achieve was to enable IIU Nominees to vest the legal title to the shares in Dermot Desmond, there would either I suppose be a share transfer form which hasn't been registered, it could be done that way; would that be right?

A. Mm-hmm.

Q. Or you could provide for this right to transfer but limit it to Mr. O'Brien, or again to his nominee; maybe he'd want to take it in a company Mr. Desmond, I should say.

A. Well, I am not sure I would agree with the view that this is simply a reflection of what was in the

arrangement agreement, because I think this I mean, this is, what, seven months, eight months later. My understanding and recollection of it was that IIU/Dermot Desmond did want to be able to make they didn't want to have to go through the preemption provisions. I don't think it was simply a matter for instance, you mentioned that you would simply just do a share transfer form from IIU to Dermot Desmond. That would actually require to go through the preemption provisions and the articles of association as drafted, because you know, any transfer of share would need to be approved. So I think what this was getting at was the genuine ability to transfer the shares to somebody else at any time, just one chance, you know, to other investors or whatever. And not purely as a matter of, if I could say, sort of the technical issue regarding the difference between the legal and the beneficial ownership.

Q. Yes, this was providing for a complete right in Mr. Desmond if he wished to, one time, to transfer his entire 20% to anybody, wasn't it?

A. Yes.

Q. If you look at the way it's framed?

A. It says "The shares beneficially owned may be freely transferred". I suppose that could be all or some of them.

Q. It could be all or some.

The day after, on the 17th May, under the terms of this side letter, Mr. Desmond could have transferred, without invoking or dealing with the preemption provisions, he could have transferred the entire 20%, 5% each to four other investors?

A. Yes.

Q. And there was nothing like that contemplated in the arrangement agreement, was there?

A. No, I don't believe so.

Q. In fact, if this was to be consistent with the arrangement agreement, which provided that the shares could be placed with up to four investors, if it was to be consistent solely with the arrangement agreement and if there was no further negotiations between the parties are you with me?

A. Yes.

Q. Okay. This could only be consistent with Telenor and Communicorp believing that Mr. Desmond was in fact being backed by underlying investors; isn't that right?

A. If there was no further negotiation

Q. If there was no further negotiation.

A. Well, I don't think it's, frankly, the two documents are consistent, because this is clearly stating that IIU Nominees holds the shares for Dermot Desmond.

Q. It does.

A. So it's disclosing that position straight away.

Dermot Desmond is not holding the shares for anybody else.

Q. It's not stated that he is.

A. Well, "beneficially owned" means he is not holding for anybody else. He is holding them for himself beneficially.

Q. Do you know of any negotiations between the parties at all whereby they agreed that Mr. Desmond was to have greater rights than those that he was entitled to under the arrangement agreement?

A. No. But I think this letter, as you mention, was first produced in April, and there clearly was negotiation on it because it reflects an agreed position between the parties and clearly there was input from both Telenor and Esat into the contents of it.

Q. Do you know of any negotiations yourself? You say there must have been. But do you know that there were any negotiations?

A. I can't recall any. Well, sorry, I think I probably can recall the letter reviewing the wording of the letter, because clearly the principle was that Esat and Telenor were to be treated equally.

Q. Yes, I can understand that. But I am not talking about that part of it. I'm talking about, do you recall there being any negotiation that Mr. Desmond

should have greater rights than those agreed under the arrangement agreement and greater rights than any of the other two shareholders?

A. No. But I am not sure that I would categorise this as giving him greater rights in any practical sense. It gave him the ability to sell the shares once to shareholders without going throughout the

Q. But Telenor didn't have that right, did it?

A. No.

Q. And Communicorp didn't have that right?

A. No, it didn't.

Q. So just bear with me for a moment so he had a right that was greater than any of the other two shareholders; isn't that correct?

A. You could categorise it as greater. I wouldn't read that much into it, to be honest.

Q. You wouldn't read that much into it?

A. No, I wouldn't

Q. Do you know that it enabled Mr. Desmond to dispose of one share to BT at the end and to influence entirely the takeover of Esat Digifone?

A. I was not I was long gone at that point. So I am afraid anything to do with that, I have no knowledge of.

Q. Let me show you the genesis of this letter. If you go back to Book 49, and you look at Divider 123.

A. I don't have Divider 123 with me. Again, it wasn't



one of the documents mentioned.

Q. We'll get you a copy: It's a letter from Mr. Arthur Moran to Mr. Neville O'Byrne. It's dated the 16th April. Do you see it?

A. Yes.

Q. "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 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."

Do you see that?

A. Mm-hmm.

Q. So he is clearly referring to the arrangement agreement whereby Mr. Desmond and IIU were to be entitled to place with up to four investors. That's the one that you negotiated and that was finalised on the 29th?

A. Yes.

Q. Do you see that?

A. Yes.

Q. Now, Mr. O'Byrne responded on the 19th, at Divider 124. He says "Please find enclosed a copy of my

letter to Michael Walsh as discussed with copy draft side letter. I confirm our meeting on Monday next at 2.30".

In fact, if you go over the page again, you'll see his letter that he was enclosing to Michael Walsh with the enclosure.

A. I again, that wasn't one of the

Q. You don't have them. Sorry.

A. That wasn't on the list of documents which

Q. I thought you'd probably be familiar with these, but and the next document as well.

Now, you see the enclosures that went to Mr. Moran on the 19th; it's a letter from Neville O'Byrne to

Michael Walsh. It's "Dear Michael:

"With regard to clause 12.2, I have prepared a draft side letter which I have sent to Arthur Moran and Gerry, and I now enclose a copy of the draft."

And here's the draft. At this stage it appears that what was being contemplated is that the shares be held beneficially by IIU Limited and Bottin International.

Do you see that?

A. Yes.

Q. It says "This letter is further to record our agreement that any transfer of the beneficial ownerships listed above will be subject to terms and conditions regarding transfer contained in the agreement and the memorandum and articles of the

company, save and except that the shares held in our own 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." Do you see that?

A. Yes.

Q. And that was prepared in the context of Arthur Moran raising the rights that IIU had under the arrangement agreement, and it was prepared for the purposes of giving effect to them?

A. It was prepared in response to his letter but doesn't specifically refer to the arrangement agreement, with respect, but yes, that's

Q. Right. Now, can you refer me to any negotiations between the parties between the 19th April and the 16th May whereby it was agreed that Mr. Desmond was going to have even greater rights than those provided for in the arrangement agreement?

A. Can I refer you to negotiations specifically? No. But can I say that they took place? I would have absolutely no doubt that they did.

Q. Why have you no doubt, Mr. Halpenny?

A. Because that letter would have been reviewed very carefully by everybody. And clearly Mr. Moran would have got a copy of it to comment on it; I would have got a copy to comment on; my clients would have got a copy to comment on; Telenor would have got a copy to

comment on. And everybody would have made their contribution, and I think, if you look at the final letter that was signed, the significant difference between it I think, just having read this draft now the significant difference between it and what was, and the first draft, leaving aside the reference to Dermot Desmond holding the 100%, was that the additional wording was put in to protect the position as between Telenor and Esat.

Q. I accept that.

A. So therefore, clearly Telenor and Esat both had input into the document, and the form as signed on the 16th May was an agreed form document. So everybody it was it clearly must have been negotiated, because the changes wouldn't have happened on their own.

Q. Because it's a very significant difference, isn't it, to what's in the arrangement agreement?

A. The arrangement agreement, yes, but I don't share your view as to the significance of it necessarily in the overall context of the consortium.

Q. Well, let me suggest this to you I could be completely wrong, and I'm not making any case; I am just asking you to comment on it.

The Department was informed that these shares were held beneficially for Dermot Desmond.

A. Mm-hmm.

Q. Now, if and yet Mr. Desmond here is being given a

right to transfer the shares freely.

A. Yes, but I may be wrong on this, but in terms of the Department, I am not familiar with the terms of the licence, but would I be correct in thinking that it was there could be no transfer of shares in the consortium or in the company without the consent of the Department?

Q. No, you are not.

A. Is that not right?

Q. Not at all. Those were Article 8 negotiations. That had nothing to do with it.

MR. NESBITT: Perhaps, Mr. Chairman, he could be told what the position is. It seems strange to have an examination with only part of the story being put to the witness.

CHAIRMAN: Well, I don't think that greatly arises, Mr. Nesbitt.

Mr. Halpenny, from your own point of view, is there anything you'd like to be further informed about?

A. No, no, My Lord, no.

CHAIRMAN: Well, in any event, Ms. O'Brien, I am anxious to let Mr. Halpenny go today.

Q. MS. O'BRIEN: Can I just ask you to agree with me on this: This side letter goes far further than what would have been required if Mr. Desmond's rights were solely those under the arrangement agreement?

A. I would agree with that, yes.

Q. Thank you.

CHAIRMAN: Mr. O'Donnell.

THE WITNESS WAS EXAMINED BY MR. O'DONNELL AS FOLLOWS:

Q. MR. O'DONNELL: Mr. Halpenny, I appear for the Department of Communications, and I have just some questions to ask you firstly.

I think your evidence has been that you had no dealings with the Department or the members of the Project Team who were deciding on the appropriate consortium to be awarded the licence?

A. That's correct.

Q. And I think that has been the case throughout. You didn't have negotiations with the Department?

A. No.

Q. That was being done by other people?

A. Yes.

Q. I think it's also clear that in September, after the presentation had taken place, your meeting on the 14th September was a meeting with Mr. Walsh and Mr. O'Brien, but there was nobody else there who had had any meeting with the Department?

A. No.

Q. And of course the only meeting that Mr. O'Brien had had with the Department was at the presentation which had been on the 12th September?

A. Yes, I assume so.

Q. So as far as you're concerned, after the presentation,

you are not aware of any member of the Esat Digifone consortium making any contact attempting to make any contact with the members of the Department or the Project Team?

A. I am not, no.

Q. And that is that was your position then, and that's your position now; you haven't learned anything since then?

A. No.

Q. And I think, therefore, insofar as you are relying on Mr. O'Brien's contact with the Department, that was his view as to what happened happened at the presentation and how the Esat consortium had done at the presentation, rather than some other contact, because there was no other contact, so far as you were aware?

A. That would be correct, yes.

Q. Now, I think, then, that you were involved in the drafting of the letter or the finalising of the letter of the 29th September of 1995. And because you weren't at the presentation, you are unaware as to what statements were made at the presentation as to whether a letter should or should not be sent in?

A. That's correct.

Q. But you were aware in general terms, I think, that there was going to be two operational investors, being Esat and Telenor, who were going to be 40% and 40%,

and there was also going to be 20% allocated to what might be regarded as financial or institutional investors?

A. That's correct.

Q. And I think your view was that it didn't it wasn't it wouldn't matter greatly to the Department who that financial or institutional investor was, provided the operational personnel were the same and provided they remained at 40 and 40 each?

A. Absolutely.

Q. And therefore, to that extent, you didn't see any great significance in sending in a letter indicating that somebody other than other banks who had been suggested as being possible investors were now going to be replaced by IIU?

A. That's correct.

Q. Now, I think the letter was sent in, and you became aware that the letter was returned, and a number of witnesses have categorised the letter as an attempt to give additional information to the Department, but an attempt which failed. Mr. O'Callaghan said that, and I think a number of other witnesses; Mr. Connolly and Mr. Simonsen also said that. Would you agree with that as a reasonable characterization?

A. Yes.

Q. And therefore, it cannot be said in those circumstances that there was a breach of the rules,



because there was no additional information supplied to the Department and taken into account by the Department?

A. That's correct.

Q. And I think you were aware that IIU must have been aware of the 40:40:20 split as between Esat, Telenor and the institution or financial investors?

A. Absolutely, yes.

Q. And that was a matter would have been known to them, that the Department would have been entitled, as they did, to insist on the 40:40:20 split?

A. Yes.

Q. And of course that's what ultimately happened?

A. Yes.

Q. So whatever negotiations might have been going on between IIU and the other two partners in the consortium as to whether IIU would get 20 or whether they might get 25, everybody knew that if the Department insisted on 20 for the institution or financial investors, that was going to be the way it was?

A. Absolutely.

Q. And in relation to the fax, I think it was suggested to you that the fax number in question was a fax that may have been supplied to Mr. Walsh by Mr. O'Brien. I think you may be unaware of that. But are you aware that that fax number had been used in the past, as far

back as May of 1995, by the Department when communicating with the various consortia who had applied for, participated in the competition?

A. I wouldn't have had any particular I wouldn't have attached any particular significance to the fax number. I have to say, it wasn't something that

Q. It wasn't something that was shrouded in secrecy or have any significance of any sort?

A. No.

Q. And I think it's also clear that everybody knew that the identity of the investment component of the consortium was going to be disclosed to the Department at all stages, that it was going to happen, and this had to happen before the licence could be granted?

A. Yes.

Q. And that was in fact exactly what did happen after the negotiation rights were granted exclusively to the Esat consortium; the institutional investors, the identity of the institutional investors were disclosed?

A. Yes.

Q. Now, I think November 9th, I think you had a record, kept a record of a meeting that you attended on that occasion, and I think at that stage you don't recall any discussion about the Department's awareness or non-awareness of the involvement of IIU at that stage?

A. No. I mean, my memo, I don't think I think it just

noted the fact that it was an issue that would have to be eventually addressed.

Q. There was no there had, for example, had been no letter from the Department indicating they knew about IIU; there was no phone attendance or no memorandum or no record of the Department being aware of IIU?

A. Not that I was aware of.

Q. At that stage it was simply the position that the Department were going to have to be told at some stage about IIU?

A. Mm-hmm.

Q. And similarly, I think in on the 21st November of 1995, I think you say, "Position re the Department IIU not a problem for M. Brennan."

I think in your answer to the questions put by the Tribunal, your written answer, you said: "I took it to mean that the involvement of IIU as part of the consortium was not likely to be a big issue for the Department, given that the principal operation of partners in the consortium would still be Esat Telecom and Telenor."

A. Yes.

Q. So again, it's an assumption that when the Department are told about IIU, that is unlikely to be a problem, because Esat and Telenor would still be involved?

A. Yes.

Q. There is no again no record that the Department

have said "We know about IIU and we don't mind". It's rather an assumption made by whoever told you, Mr. O'Toole or Mr. O'Donoghue, that this isn't going to be a problem?

A. Yes.

CHAIRMAN: I think leave it in sequence, Mr.

Fitzsimons, unless you have some particular reason

MR. FITZSIMONS: Under the usual sequence, I go first,

I think, Mr. Chairman.

CHAIRMAN: Well, certainly, by all means.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FITZSIMONS:

Q. MR. FITZSIMONS: Could I ask you to go to Document 48, 53, please.

A. Sorry, what number?

Q. 48, 53. Document 53 in Book 48.

A. I don't have that document in my folder, unfortunately.

Q. You may recall it from earlier.

I would like you to the document has now been put on the screen. It's the

A. Yes.

Q. the document that lists Mr. Desmond's CV at the time, if you want to call it that.

You'll note that paragraph 3 of the document, it refers to him as being previously of Chairman of Aer Rianta, the Irish Airports Authority. "Under his chairmanship, Aer Rianta was responsible for managing

Dublin, Shannon and Cork airports."

Then if we go down to paragraph 5, "In Dublin he was the initiator of the Irish Financial Services Centre."

Could I suggest to you, Mr. Halpenny, that armed with this information, it would be a reasonable inference that Mr. Desmond could be said to have political contacts?

A. I don't believe that's something for me to form an opinion on, quite frankly. This was a note from Michael Walsh to Denis O'Brien. I have I had no involvement in the preparation of it.

Q. I see. So if you read this document, the fact that Mr. Desmond was a Chairman, former Chairman of Aer Rianta and was the initiator, as we know, of the Government-backed Irish Financial Services Centre, that would not intimate to you that Mr. Desmond must have political contacts?

A. To be perfectly honest, Mr. Fitzsimons, reading through that would suggest nothing more to me than that he was a very successful businessman in his own right, and I would see nothing in terms of political connections there at all.

Q. You don't?

A. No.

Q. Very well.

A. My own view, but there we are.

Q. We are only looking for your view.

Now, if I could move on to another matter: Document

63B, please. The same book.

A. Yes.

Q. Now, this is your letter of the 29th September, 1995, to Mr. Per Simonsen.

A. Yes.

Q. "Dear Per, further to our telephone conversation last night, I enclose a revised draft of the agreement with IIU. I have marked the amendments made."

Do you see that?

A. Yes.

Q. Now, if you just go back to Document 48 sorry, 68, I beg your pardon. I am sorry, I am getting confused myself now. Sorry, Document 63, I beg your pardon.

A. Yes.

Q. As you see, these are a list of amendments to the same agreement from Per Simonsen sent to you on the 28th.

Now, are these the amendments that you referred to in your letter of the 29th, which is at 63B of the book?

A. Well, I presume so. I mean, the document that I sent on the 29th would have marked amendments made, and I haven't checked the documents to see did they correspond with these, but I assume they would.

Q. If you just go to the second page of that letter, Document 63, as you see, Mr. Simonsen in the final paragraph states: "Please note that I am awaiting a legal check on changes discussed yesterday. We will

anyhow expect to see the final version before it is signed, allowing time for a legal check on any further changes."

Why did you not send to Mr. Simonsen the final document and give him time to allow for a Telenor legal check on any further changes?

A. Well, I believe that the document that was actually sent with the fax on the 29th was the document that was signed. The document I brought with me to IIIU that day was a marked document, and in fact the marked document itself was what was executed.

Q. I see.

A. I can't say with certainty whether or not I spoke to Mr. Simonsen or anybody from Telenor during the course of that day. I would have thought I probably would have, because I would have wanted to get confirmation that they were happy with the document; but if they say that I didn't, then I would have to I couldn't disagree with that.

Q. Going back to your letter at 63B, why did you not tell him that the agreement was going to be signed that day, on the 29th? You see, Telenor didn't know that the document was going to be signed on the 29th.

A. I can't if they didn't, I would have thought that the sequence of events was such as to lead to a conclusion of the documentation for signature on the 29th.

Q. Can we just establish again, who you were acting for on the 29th of September?

A. Well, primarily Esat Telecom.

Q. You said primarily Esat Telecom?

A. Well, Esat Telecom, yes.

Q. Secondly, who were you acting for?

A. Well, the documentation clearly had Esat Digifone as a party. But I think at the point there was a point where it was down to the shareholders of Esat Digifone to agree. So that was I mean, I sent the documentation to Per Simonsen on behalf of Telenor. I was acting for Esat Telecom.

Q. You were acting for Esat Telecom.

A. Yes.

Q. But what involvement had Esat Telecom got in it? The members of the consortium were Communicorp and Telenor.

A. Sorry, Communicorp/Esat Telecom. I use the term to describe them both.

Q. Then I repeat my question: Who were you acting for secondarily on the 29th?

A. I wasn't acting for anybody secondarily. Sorry, I may have misled you; I was acting for Esat Telecom/Communicorp.

Q. Okay. And you were asked this by Ms. O'Brien, but I just want to be absolutely sure: Who from Esat Telecom/Communicorp was giving you instructions on the



29th September?

A. Clearly, as I mentioned, I was with Mr. O'Brien at the meeting.

Q. So it was Mr. O'Brien who was giving you instructions on that date? Because you mentioned Mr. O'Toole on other occasions.

A. It was Mr. O'Brien.

Q. Did you receive an instruction not to inform Telenor that the agreement was going to be signed on the 29th September?

A. Certainly not that I can recall, no.

Q. Well, then, why, in this two-sentence letter of the 29th that ends with "Kind regards" not put in a sentence "The agreement is being signed this afternoon"?

A. I don't know. It may have been because I knew that Mr. Simonsen knew it was being signed that afternoon, because I would have had telephone discussions with Mr. Simonsen as well during that week. But I can't say. I can't say.

Q. Well, I mean, I gather from your evidence that you were directed not to tell Telenor about the Bottin arrangement.

A. Yes, the Bottin arrangement was not disclosed to Telenor on that day, so therefore, it's by implication I must have been told not to disclose it.

Q. And can we assume from what you have told us that it

was Mr. O'Brien, being the only person there who was entitled to give you an instruction, gave you that instruction?

A. I think that's a fair assumption to make, yes.

Q. Now, can we go to Document 65, I think it is, in that book.

A. Yes.

Q. You have the letter?

A. Yes.

Q. Now, correct me if I'm wrong, but I may have taken it up wrongly; I took you as agreeing with Ms. O'Brien that this letter was an assignment from IIU to Bottin. Am I right or wrong there? Is that your opinion?

A. I think that is from paragraph 2, you would have to I'd have it to agree with that, yes.

Q. Paragraph 2 states: "The Arranger has assigned the agreement". So where is the assignment? Doesn't the assignment have to be a separate document?

A. This letter is the only evidence of the assignment. I didn't see a separate assignment document. But this letter was signed by Michael Walsh and countersigned by Denis O'Brien, so I would take that to be an acknowledgment by Denis O'Brien.

Q. Are you specifically recalling what happened at the meeting now, or are you saying that there is no assignment? Because this document does not assign anything; isn't that so? Where are the words of

assignment in this document?

A. The document states that it has been assigned and is an acknowledgment. I am not aware of any other document, Mr. Fitzsimons. I was not presented with any other assignment document.

Q. Mr. Halpenny, you are a very experienced commercial lawyer, and whether you were presented with one or not, you have said to Ms. O'Brien that this document is an assignment, an effective assignment.

A. Well, I think the question which she put to me was, by virtue of this document, were effectively the obligations assigned from IIU to Bottin? Now, speaking as a commercial lawyer, ideally there would be a separate form of assignment. But if someone were to put it to me and if I were being asked about this in a court, for instance, I would find it difficult to argue that this did not constitute an assignment, or at least an acceptance of the assignment.

Q. Was there ever an assignment back from Bottin to IIU, or to anybody else, for that matter?

A. Not that I am aware of, no.

Q. Well, if it was an effective assignment, would there have to have been an assignment from Bottin to whoever ultimately became entitled to this particular share of the venture, to use very general language?

A. Well, the assignment was in the assignment, such as it is, was in relation to the obligations under a

particular agreement. So if there was to be an assignment back, I again couldn't disagree with you. I mean, if it was going to be an assignment of rights and obligations under a document, there should be a written assignment.

Q. There should be, because I mean, Ms. O'Brien put it to you fairly and squarely that IIU no longer had any interest under the agreement as a result of this letter.

A. Well, that's yes, I would again say that the letter was countersigned by Denis O'Brien, which would, to me, signify acceptance of the position as put forward by IIU.

Q. Is it possible that there is an assignment in being that you know nothing about?

A. It's possible, but I'd be surprised if there was.

Q. So you recall that day and the precise documents that were before the meeting

A. There was no I certainly don't recall any assignment document.

Q. I see. And had you approved this letter before the meeting as an assignment?

A. I don't have any specific recollection of it. I mean, we talked through the letter at the meeting. As I explained to Ms. O'Brien, I can't remember when the involvement of Bottin was first raised.

Q. I see. Anyhow, it's I suppose it's not...

Now, just one final matter; it's just a small point.

You were asked about the Glackin agreement, and the reference in it to Bottin International Investments Limited. My instructions are of the Glackin Report, that the Glackin Report is dated the 7th July, 1995.

And Bottin International Investments Limited is a company, I am instructed, it was incorporated on the 4th of February 1994. Is it possible that Mr. Glackin would have referred to that company in his report in those circumstances?

A. I have absolutely no idea; I am sorry.

Q. I don't have the report. So I don't know what's in it.

Thank you very much, Mr. Halpenny.

CHAIRMAN: You are correct, Mr. McGonigal, but having regard to the positions of people in 1995, I should leave you till the end, so I'll invite in fact, Mr. Fanning has moved on.

You don't intend to utilise your own right of audience, Mr. McGonigal?

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. MCGONIGAL:

Q. MR. MCGONIGAL: Just a couple of matters, Mr. Halpenny. I hesitate to delve into the area of commercial law at all, but could I just go to the letter of the 29th September in relation to the matter Mr. Fitzsimons has been talking to you about. Do you recollect that letter being created or drafted

or anything on the 29th September?

A. I can't recollect the exact sequence of events. There were letters in circulation, certainly, in the course of that week. But as to as I say, as to when the specific mention of Bottin arose, I don't recall.

Q. I am just trying to get clear in my own mind, because I had I understand that at least I thought I understood that your involvement, in a sense, initially related to the shareholders agreement and certain discussions around the 4th August, and then you appear to go out of the matter pretty well altogether, except possibly continuing work on the shareholders agreement, but then come back into it in a particular way from the 24th September, leading to the 29th.

Now, I am just curious in relation to the 29th. Was it in relation to the Deed of Covenant or the arrangement agreement that you came into for that?

A. It was. I think because of the fact that the obligations the underwriting of which was being sought were essentially those of Esat Telecom.

Q. So that so far as the letter of the 29th September, so far as that is concerned, that wasn't something with which you were concerned at all; that is the letter of the 29th to the Department?

A. No, no, no.

Q. You weren't involved in the drafting of it, or you

weren't involved in the thinking about it, or anything

like that?

A. I don't believe so, no.

Q. And you don't recollect any specific discussion that

you were involved in on the 29th in relation to that

letter?

A. No.

Q. So far as this letter of the 29th September is

concerned, the Bottin letter is concerned, do you

recollect an involvement in the creation of this

letter?

A. I think I would have had some involvement in it,

without a doubt, but

Q. Are you able to recollect what that involvement was?

A. It would have been purely in terms of reviewing it

from a legal perspective, taking instructions on it

from my clients and implementing any changes that they

required, and also making sure that in legal terms, it

hung together properly.

Q. Well, Mr. Fitzsimons has asked you about one aspect of

that letter, the Arranger has assigned, and I don't

intend to go into that; but what I am wondering if you

could help me with is in relation to paragraph 3.

"The obligations of the arranger or its assignee under

the agreement are conditional on" what is the

effect of that part of the letter?

A. It's clearly to make the obligations of the arranger

conditional upon satisfaction of those conditions.

Q. To my in my language, does that mean that this letter wouldn't have any effect until those conditions were met?

A. Precisely.

Q. So that, for example, in relation to paragraph B, which talks about the shareholders agreement, until there was a shareholders agreement having been signed or about to be signed, this assignment of the arrangement wouldn't come into place?

A. Yes.

Q. Does that also then I wonder if you could just turn to

A. Sorry, if I just go back on it. It's saying that, I suppose, that the obligations are conditional upon those conditions being satisfied. Obligations of the arranger.

Q. Now, I just wonder if you would turn to Tab 66 for me, please, which I think is the I think it is the arrangement agreement which was ultimately signed.

A. Mm-hmm.

Q. Is that the one you recollect?

A. Yes.

Q. Now, just in relation to that, could you turn to the second page; and the conditions, you see the conditions at the top there?

A. Yes.



Q. "This agreement and everything contained herein is conditional upon the company being awarded the licence or being notified of a definite decision to award the licence to it on or before the 31 December 1995, and if the condition referred to in subparagraph A is not fulfilled on or before such date, this agreement and everything contained therein", etc. Can you explain to me what that condition means?

A. Yes. I mean, it means that if the licence hasn't been awarded or a definite decision to award the licence been made by 31 December 1995, then the obligations in the agreement falls away.

Q. When you talk about the award of the licence, what do you mean by "the award of the licence"?

A. I would construe that to mean the actual signature of a licence document, yes, the issue of a licence.

Q. You wouldn't consider it to be the winning of a competition?

A. No, I don't think I would, no.

Q. So that that agreement, then, wouldn't come into effect until the licence had been awarded; and then, when that agreement came into effect, then you would begin to look to see whether the subsequent agreement, if it still stood, came into agreement (sic)?

A. Mm-hmm, yes.

Q. So that as of the 29th September, whatever documents may have been signed, they elicited an intention of

what was to happen in the future if certain events

took place?

A. Yes.

Q. Just one other small matter I just want to try and get clear in my own mind, Mr. Halpenny. If you would go to 63A; Book 48, 63A.

A. Yes.

Q. Now, that appears to be a fax from you to Mr. Simonsen?

A. Mm-hmm.

Q. Of the 28/9, and what you are doing is you are attaching the last draft of the agreement with IIU which has now been signed by IIU. "I will call you shortly to discuss it. The changes since the last draft are marked." And that speaks for itself, really, doesn't it?

A. Yes.

Q. Now, the next document then is 63, which is probably the one before that, and that's a fax from Mr. Simonsen to you, and that is referring to your draft arrangement agreement of Thursday night and he gives the reference, and he then puts in his comments.

Now, that seems to follow 63A; isn't that right?

A. Yes, I think so.

Q. And then if you go to 63B, then you have your fax to Mr. Simonsen of the 29th: "Further to our telephone conversation last night, I enclose a revised draft of

the agreement with IIU. I have marked the amendments made."

Do you see that?

A. I do, yes.

Q. And that again speaks for itself. That appears to reflect a time, if I am understanding the stamp properly, seems to have been around 10 o'clock outwards from William Fry; is that right?

A. Yes.

Q. And that seems to involve the written sequence that we have in relation to the transfer of those documents?

A. Yes.

Q. And clearly, that refers to certainly one or two phone calls, but you think, or is it possible, that there were phone calls while you were with IIU on the 29th?

A. It is possible, yes.

Q. Thanks very much, Mr. Halpenny.

CHAIRMAN: Anything in conclusion, Ms. O'Brien?

Well, I don't think I'll trouble you at this stage of the day, Mr. Halpenny, with any further. It remains only for me to acknowledge with very considerable thanks that you have had a long and quite strenuous day, and I thank you very much for your assistance and presentation for today. We won't need to trouble you again.

11 o'clock tomorrow morning. Thank you.

MR. MCGONIGAL: Just one small matter. I wonder I

am not sure whether it was a mistake, but I certainly would like clarification, because I seem to have missed it myself, as to whether the Tribunal could give an indication of where in the Glackin Report the reference to Bottin is made. Because if there isn't one, I think it should be corrected. It should be corrected that there wasn't.

CHAIRMAN: Well

MR. McGONIGAL: It's just a small matter of detail more than anything.

CHAIRMAN: It has occurred to me that it might have been a different company to Bottin that may have been alluded to, but certainly if it is the case,

Mr. McGonigal, I'll see that clarification is intimated at the outset of tomorrow.

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

CHAIRMAN: 11 o'clock tomorrow. Thank you very much.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,  
FRIDAY, 20TH FEBRUARY, 2004 AT 11AM.