

A P P E A R A N C E S

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I N D E X

Witness: Examination: Question No.:

Richard O'Toole Ms. O'Brien 1 - 150

Mr. Nesbitt 151 - 160

THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY, 20TH

FEBRUARY, 2004 AT 11AM:

MS. O'BRIEN: Just before I proceed to call Mr.

Richard O'Toole to give evidence, I just want to  
briefly correct the record of yesterday's proceedings  
and confirm that there is no reference to Bottin in  
the Glackin Report.

CHAIRMAN: That will be rectified, Ms. O'Brien. Thank  
you.

MR. MCGONIGAL: I thank the Tribunal for that.

MS. O'BRIEN: Mr. Richard O'Toole, please.

MR. STRAHAN: My name is Brian Strahan, and I am  
representing Mr. O'Toole.

CHAIRMAN: Thank you for your attendance, Mr. Strahan.

I discussed a somewhat similar situation earlier in  
the week with the legal representatives of Mr. Arthur  
Moran of Matheson Ormsby Prentice, and what I had  
intimated, Mr. Strahan, was that I certainly, pursuant  
to an announcement I made in the very early days of  
the Tribunal, I certainly would not wish that you or  
your client be expected to undertake today's

preparation and attendance gratuitously; but I think it may, in the context of it being exceedingly improbable that your client's good name or other matters will be put in jeopardy, I think it may be somewhat unfounded to actually go so far as to an order for representation.

So what I'll do for the moment is I'll indicate that provision will be made for the preparation, taking of the statement and the like; and if, in the course of this morning's hearing, anything arises that changes that situation, of course I'll reappraise it; and if it does seem to you, Mr. Strahan, at the conclusion of your client's evidence, that you'd like to ask any question or questions by way of clarification, of course I'll hear you. Thank you.

RICHARD O'TOOLE, HAVING BEEN SWORN, WAS EXAMINED AS FOLLOWS BY MS. O'BRIEN:

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

Mr. O'Toole, you were I think a part-time consultant to Communicorp/Esat Telecom from September 1995 to approximately March of 1996, and you have assisted the Tribunal by providing a statement of intended evidence. And just so that you know, I propose approaching your evidence. What I propose doing is taking you through your statement to put it on the record and ask you to confirm that it's correct, and

then I'll return to one or two matters arising out of your statement; perhaps we'll look at some of the documents of which you have been notified in the course of doing that.

A. Fine.

Q. Now, your memorandum is headed "Statement of Intended Evidence of Richard O'Toole". You informed the Tribunal that the following account is based upon the best of your recollection of events which occurred over seven years ago. Apart from the information, the documents which the Tribunal has supplied to you, it should be noted that you cannot be fully certain about dates and times, nor the details and the sequence of all events at the time. Nonetheless, you hope that this account may be of assistance to the Tribunal.

You state that the following is your response on the matters raised with you in the Tribunal's written communication of January 20th, 2003. You say that you did not have a consultancy or employee relationship with Esat Digifone Limited. Instead you recall that you supplied part-time consultancy services to Communicorp Limited during the period between September 1995 and March of 1996. Your recollection of your role in the matters mentioned in the Tribunal's communication of January 20th, 2003, is as follows:

Firstly, in relation to the establishment of the Esat

Digifone consortium with Telenor, you have informed the Tribunal that you do not recall having any involvement in discussions between Communicorp and Telenor on the preparation of their joint bid for the GSM licence prior to the announcement of the results of the competition. You do recollect that during the winter of 1995/96 that you advised and represented Communicorp together with Gerry Halpenny of William Fry Solicitors in certain matters with Telenor and their legal advisers on the drafting of the shareholders agreement between Telenor and Communicorp. Subsequently you recollect that representatives of IIU joined these discussions in order to accommodate IIU's participation in the consortium. All of the documents attached to the Tribunal's communication to you of January 30th, 2003, appear to relate to discussions that took place amongst the parties in late 1995 or early 1996 on the draft shareholders agreement.

You recall further that your consultancy arrangement with Communicorp ended in March 1996, prior to the conclusion of the shareholders agreement. You recollect that the discussions and the draft shareholders agreement were of the usual kind that take place amongst participants in a proposed commercial joint venture of this type. Your recollection is that at the time, Communicorp and

Telenor, the principal operating entities within Digifone, had largely progressed the draft shareholders agreement as between themselves, and further work was necessary to adapt the draft to incorporate IIU's involvement as a financial investor in Digifone.

In early 1996, Communicorp had considered proposing to Telenor, IIU and the Department possible variations in the shareholding structure, and this, as would be appreciated, gave rise to further discussion which continued beyond the period of your involvement. But in the event, you understand that these proposed variations were not acceptable to all of the parties concerned, and the originally envisaged 40:40:20 split as between Communicorp, Telenor and financial investors, represented by IIU, was ultimately maintained.

Quick finalisation of the shareholders agreement was considered desirable at the time because, A, the agreement would have to be furnished to the Department upon issuing of the licence; B, the agreement would also have to be furnished to the banks supplying project finance to Digifone; C, it was desirable that the mutual obligations of shareholders be settled fairly quickly, as Digifone already had begun to build out its network and thus to consume working capital; and D, the existence of a shareholders agreement and a

bank project finance agreement would help speed up efforts to raise finance for Communicorp, and later Esat Telecom Limited, in the US markets.

Is that correct?

A. Yes.

Q. Secondly, you were asked about your involvement in the dealings of Communicorp with Advent International, and more generally, the manner in which it was intended to fund the Communicorp participation in Esat Digifone.

And you have answered as follows:

A. Following the announcement of the result of the GSM licence competition, you recall that you advised and represented Communicorp in the course of December, 1995, in discussions with the representative of Advent International. These negotiations resulted in heads of agreement between Communicorp and Advent which as you recall contained the following principal provisions.

1. Communicorp agreed to transfer a 3.5% share in Esat Telecom Limited, a company formed to hold Communicorp's telecommunications interests to Advent.
2. Advent agreed to drop its contested claim to a 5% interest in Digifone.
3. Communicorp's obligations to repay its outstanding loan and interest to Advent International were counselled.
4. Advent's interest in Communicorp's radio interests

was released.

At B, you have informed the Tribunal that your recollection on the matter of the funding of Communicorp's interest in Digifone is that Communicorp intended to have recourse to the US high-yield or equity markets to fund the interest of Communicorp and later that of Esat Telecom Limited, the majority of whose shares were held by Communicorp. Pending completion of this US offering to be arranged through Credit Suisse First Boston, your recollection is that Telenor was prepared to provide interim bridge finance to Communicorp/Esat Telecom. Is that correct?

A. There is one point where I think, in the fourth indent relating to Advent, where you said "released". The word is "realised".

Q. I see. Very good.

Now, at 3, you were asked about your involvement in negotiations between Communicorp and Mr. Dermot Desmond/IIU and the ultimate agreements reached with them on the 29th September of 1995.

You say that you do not recall involvement in any discussions that may have taken place between Communicorp and Mr. Dermot Desmond/IIU in the period to 29th September 1995. Is that correct?

A. That's correct.

Q. Fourthly, you were asked for your involvement or the advice or assistance in matters relating to EU policy



on mobile telephony communications. You say that you do not recall involvement in specific advice or assistance in matters relating to EU policy on mobile telephony communications. Is that correct?

A. Correct.

Q. 5, you were asked about assistance in communications between the Esat Digifone consortium and the European Commission in matters touching upon the bid and its compliance with European law. And you inform the Tribunal that you do not recall rendering specific advice or assistance in such communications. Is that correct?

A. Correct.

Q. 6, you were asked about assistance in advancing the Esat Digifone bid before the Department prior to the announcement of the award of the licence to Esat Digifone, and assistance in negotiating with the Department thereafter for the purpose of securing the grant of the licence to it.

You have informed the Tribunal that you do not recall rendering such assistance prior to the announcement of the results of the competition for the licence. You do recollect, following the announcement of the licence competition, that you did participate once on behalf of Communicorp in a review with Communicorp's legal advisers of the draft licence terms supplied by the Department, and together with other members of the

Digifone consortium subsequently attended one meeting of the Department which sought factual clarification on the terms of the draft licence. Is that correct?

A. That's correct.

Q. Finally you asked about any further assistance that you may have provided in ensuring that the negotiations as between the consortium and the Department successfully concluded in accordance with European law. And you inform the Tribunal that you do not recall providing such assistance; is that correct?

A. That's correct.

Q. That concludes your statement of intended evidence.

Now, before moving on to look at the documents of which you were served notice and discussing the substance of your involvement, I just want to ask you briefly about your consultancy to Communicorp. I think your consultancy commenced, you have informed the Tribunal, in September of 1995.

A. Yeah, to the best of my ability, that's when it began.

Q. In around that time, anyway?

A. In around that time.

Q. Can you tell me, prior to September 1995, had you had any involvement at all with Mr. O'Brien, Communicorp or any of Mr. O'Brien's businesses?

A. No. I had met, I believe, Mr. O'Brien and Mr. Buckley I forget; it may have been early September, it may have been August where they had inquired about my

availability to help them, and I had indicated that I was ready to help them on a part-time basis with some of their projects at that time.

Q. Right. Apart from the Esat Digifone project, were you also providing any other assistance to Mr. O'Brien or Communicorp or any of his companies?

A. Yes, I was, yes.

Q. And what was that?

A. I believe I was assisting them and giving advice on some of their fixed-line issues.

Q. And were these issues in relation to their dealings with the European Commission, or issues in relation to their dealings with the Department?

A. They were more issues in relation to the extra circuits they needed for their business.

Q. So that is that was presumably, therefore, dealings with the Department rather than with the Commission?

A. Yes, it involved, I think, some contacts with the Department.

Q. Right. And did you have meetings with the Department during that period from September '95 to March '96 apart from the meeting on the 9th November, which we know about, which related to the fixed-line business?

A. I haven't had notice of this particular series of questions. Would it be in order to actually get these in advance and to consider them? Because you are asking me something completely out of the blue.

Q. I am just asking you about your consultancy, and I am just wondering if, in the course of that time, you had any other meetings with the Department.

A. I am happy to look at answering these, but I'd like to have notice of these questions and to consider them.

So, you must remember this is quite some time ago, and in order to assist the Tribunal, I believe it would be wise for me to get advance notice of these questions and then to respond to them.

CHAIRMAN: Well, I think, Mr. O'Toole, all that is sought, the Tribunal isn't making any inquiries in detail into matters of fixed-line dealings between Mr. O'Brien's Communicorp and the Department. I think it's merely as regards setting the scene, that Ms. O'Brien is only seeking to elicit the most generalised basis of what may have been your involvement in matters other than pertaining to the licence competition.

A. Her questions are focused on the Digifone and the licence issues.

CHAIRMAN: It is, yes, but as part of the background

Q. MS. O'BRIEN: It's just simply background information, Mr. O'Toole.

A. Could you repeat your question.

Q. I was just wondering, during that period from September '95 to March of '96, when you were providing

consultancy services to Communicorp, whether you attended any other meetings with Department personnel apart from the meeting on the 9th November.

A. I believe I did, but I can't give you more details.

Q. That's fine. I am not trying to fix you to times or dates.

Prior to September of 1995, did you provide any ad hoc services or perhaps gratuitous services to Mr. O'Brien or to Communicorp?

A. I don't understand what you mean.

Q. Well, apart from a fixed consultancy, were you retained in any capacity by Mr. O'Brien, Communicorp or any of his related businesses to undertake any activities on their behalf?

A. I don't recall I was. I think it was mainly with the issues to do with the shareholders agreement, with the Advent issue, with some, I suppose, corporate advice, corporate finance advice, we were working on with Paul Connolly and Credit Suisse First Boston, and of course the fixed-line business issue.

Q. And all of that was between September and March, was it?

A. Yes. There may have been after I had finished my formal engagement, I may have had one or two conversations. I may have been in Dublin and have helped in sometime in that spring; I can't as I said in my statement, I can't be absolutely sure about

the precise delimitation of dates, but I think it was around spring that I basically withdrew completely.

Q. And since the completion, if you like, of that consultancy and the Esat Digifone project, have you since been retained at all by Mr. O'Brien or by of his companies?

A. On a subsequent period I was a director of Esat Telecom. I don't recall precisely the dates, but I was a director.

Q. So you were appointed a director of Esat Telecom sometime after March of 1996?

A. Yes, it was some years later.

Q. And then presumably you ceased to be a director on the takeover by BT?

A. Correct.

Q. Okay. About how much of your time would you say that you were devoting to Communicorp business during the business of your consultancy?

A. I would say about 10 to 15%.

Q. And were you based here in Dublin at that time?

A. No, I was based in Switzerland.

Q. So you were travelling forward and back?

A. Correct.

Q. Can you tell me, I think you said to us that you met with Mr. Buckley and you met with Mr. O'Brien in either August or September. Could you tell me how it arose that they made contact with you?

A. I think I got a telephone call, and they said they were interested in meeting me, and we had, I think, a dinner in the Berkeley Court Hotel.

Q. So you just got a phone call from them, and they asked you to come and talk to them?

A. Yeah.

Q. Now, I know you mentioned that you were involved in the resolution of the Advent dispute, and the Tribunal has heard quite detailed evidence in relation to that matter, I think, from Mr. O'Connell, from Mr. John Callaghan, who I think you may have assisted, or he may have assisted you, in resolving the dispute; and we have also heard from Mr. O'Brien in relation to it. And as I understand it, would I be correct in thinking that it was effectively you, Mr. Callaghan, and perhaps Mr. Connolly who entered into negotiations with Mr. Prelz around December of 1995?

A. Yes, I think John Callaghan and myself had primary responsibility. We also, I think, touched base with Paul Connolly as well. And basically I took charge, in the end, of concluding the agreement.

Q. I think you just effectively sat down with Mr. Prelz to see what you could do for him short of giving him the 5% of the shareholding in Esat Digifone. Would that be the position?

A. I think it involved more than just sitting down in one session.

Q. I accept that, but you negotiated with him?

A. Yes, I had a negotiation with him.

Q. Was it a lengthy negotiation?

A. It was not too lengthy in comparison to some of the other negotiations that were going on at the time.

Q. Did it extend over more than one meeting?

A. Oh, yes, yes. Yeah.

Q. Was it a series of meetings, then?

A. It was a series of meetings, of telephone conversations, of contacts, of exchanges of documentation.

Q. I see. We know that Mr. Callaghan knew Mr. Prelz before that because they were both directors of Esat Telecom. Had you known Mr. Prelz before you met him in the context of this negotiation?

A. No, I didn't meet him until I met him in the context of Esat.

Q. And we know, I suppose, that the resolution of that dispute, it not only dealt with the disputed 5%, but it also assisted in the restructuring of Mr. O'Brien's telecommunications and radio interests?

A. That's correct, yeah.

Q. Now, you referred to the meeting that you attended with the Department on the 9th November, and perhaps I can just ask you to look at the two records that we have of that meeting. We have both Mr. O'Connell's handwritten notes, which have been reconstituted in



typed form by the Tribunal, and we also have the Department's formal record of the meeting. And I think you have been served with both of those?

A. No, I have the Department's minutes and I have I think I have a handwritten copy of Owen O'Connell's notes, but I found them difficult to read, quite frankly, so if you have a typed copy, that would be helpful.

Q. We have. You needn't be too concerned, because I am not going to go into them in any great detail. But the Tribunal has heard evidence of this meeting, both from the Department officials and indeed from Mr. O'Brien and Mr. O'Connell, and this was I think the first meeting that was held with the Department after the results of the competition had been announced.

A. That's correct. I refer to that in my statement.

Q. Yes. And just looking here at the persons who attended the meeting. This is in the Department's formal record which, for everybody else, is in Book 43 at 150.

You will see that there was a whole list of personnel from the Department. Then there was Mr. O'Brien, who was there, I suppose, perhaps in a dual capacity, both as Chairman of Esat Digifone and perhaps also as managing director or Chairman of Esat Telecom/Communicorp. There was yourself, and clearly you were there with your Communicorp hat. There was

Mr. O'Connell, who was solicitor at that stage for Esat Digifone. And there was Mr. Burke, who was head of regulatory affairs in Esat Telecom. And then there were four representatives of Telenor. You see that? And this seems to have been a fairly general meeting at which the Department reviewed how they had moved forward, and I don't think there were any specific discussions at the meeting or negotiations in relation to the actual provisions of the licence, because, as I understand it from the other witnesses, the Department actually hadn't issued a draft licence at that stage.

Would you agree?

A. I couldn't recall exactly what the status of the licence was at the time.

Q. There was certainly nothing from the records that we have that would suggest that there was any detailed negotiation of the licence or the provisions of the licence.

There is one reference, I think, in Mr. O'Connell's record of the meeting, of the contribution which you made; and if you have the typed copy there, I can just refer you to it.

A. No, I don't have the typed copy.

Q. We'll hand it up to you.

A. Which page are you referring to?

Q. It's the sixth page of the typed copy. They are not numbered, I am afraid, but there aren't that many

pages.

A. I have it, yeah.

Q. It says "ROT issue re progressive deregulation per EU.

How to impact on licence given 15-year term. Their approach will be to put full restrictions, etc., into the document now. Presumably subject to subsequent review, i.e. position will not be frozen per EU law.

Licence will reflect status quo as of now, not ambitions of consortium members."

Do you see that?

A. Mmm.

Q. And I think that appears to be the only contribution that you made in the course of the meeting. I suppose what I am just wondering, Mr. O'Toole, given that you had had no involvement in the bid, you weren't at the presentation, you had had no dealings with the Department, you weren't a director of Communicorp, and I am just wondering why it was you, of all people, that attended this meeting.

A. Why I attended the meeting: I attended the meeting because I was asked by Denis O'Brien to attend.

Q. Yes, of course. But what was your understanding as to what you were bringing to the table, if you like?

A. I suppose that in my I have had reasonably good experience of various commercial negotiations, and I was also acquainted with regulatory developments in Europe concerning telecommunications. And I suppose

that the fact that Mr. O'Brien had asked me to become involved in a number of these projects, that he thought I was a good person to have along in the delegation.

Q. In your time working in the Commission, or working in and around Brussels, or otherwise, would you have met or would you know would you have known any of the officials within the Department at the time?

A. Yes, I would have met a number of officials, not all who were there, but John Loughrey I would have known, the Secretary of the Department. He I think was in the Department of the Taoiseach for a short while when I had been in the Commission, and we had contact. I think Martin Brennan I hadn't had much contact with him, but he was I think in the permanent representation of Ireland to the EU at the time, and he would be he would have known of me, and we would probably have met.

Q. Would he have been in the permanent representation at the time that you were in Peter Sullivan's then Cabinet?

A. I can't recall if he was, but I think that there was an overlap at some stage, but I am not a hundred percent sure.

Q. And what about any of the other officials who were at the meeting? Would you have known them: Mr. Fintan Towey? I think Mr. Towey also well, I think he is

in Brussels at the moment, but

A. No, I didn't know any of the others, I think, when I was in Brussels.

Q. So you did know Mr. Brennan, and you also knew Mr. Loughrey?

A. Yeah. I knew more of Mr. Brennan. And I had contact with Mr. Loughrey. I don't recall specific contact with Mr. Brennan when he was in Brussels.

Q. Now, we know that you were actively involved, as you say, in endeavouring to negotiate the shareholders agreement between Esat Telecom

A. Are we finished with this document?

Q. yes; thank you very much Communicorp and Telenor, and as you said in your statement of intended evidence, that IIU then came on board also.

Now, I think we have seen from the documents that in your negotiations and in attending the meetings, the Communicorp negotiating team seems to have been yourself and Mr. O'Donoghue, and Mr. Halpenny and Mr. Halpenny obviously was there as your solicitor to advise you; would that be correct?

A. That would be correct.

Q. And on the Telenor side it seems to have been Mr. Simonsen who was a permanent feature, and then Mr. Haga the odd time, Mr. Digerud and certainly Mr. Arthur Moran who was their solicitor; would that be correct?

A. Yeah. My impression was that Mr. Haga was more involved than your statement suggests.

Q. Right. So you felt that he was more actively involved in the negotiations?

A. Yes, I would have thought that both he and Mr. Simonsen were pretty fully involved.

Q. Right. And they were represented by Mr. Moran?

A. They were represented by Arthur Moran, yeah.

Q. Now, in relation to IIU, who do you recall was the negotiating team there?

A. IIU was represented by Michael Walsh and John Bateson, and I think their solicitor was Neville O'Byrne from William Fry's.

Q. And in terms of these negotiations, who did you consider that you were, if you like, reporting to?

A. Communicorp and Mr. O'Brien. I was engaged by Communicorp/Mr. O'Brien.

Q. So it was to Mr. O'Brien that you reported?

A. That's right.

Q. And if you needed confirmation in relation to instructions or so forth, can I take that it was Mr. O'Brien that you went to?

A. Yes. I would also probably, on the finance issues, have a word with Paul Connolly from time to time.

Q. Now, we know that you attended a number of meetings prior to Christmas of 1995. I just want to refer you to some of the attendances of those meetings that we

have, just to ask you about one or two matters that I can assure you won't be on the technical side of your negotiations.

The first one I want to refer you to is at Divider 86 in Book 49. It's Mr. Arthur Moran's attendance of a meeting on the 9th November. I wonder, do you have that in typed form?

A. I don't, no.

Q. If you don't, we can hand it up to you. It's probably easier to work from.

(Document handed to witness.)

Do you have it there?

A. Yeah.

Q. Now, you have heard evidence from Mr. Moran in relation to it, and he has confirmed that he met briefly with his own clients before he met up with you, Mr. O'Donoghue and Mr. Halpenny in the Davenport Hotel. Do you see that, just halfway down the page, it records: "Peter O'Donoghue plus Richard O'Toole plus Gerry Halpenny", and just above it, on the right-hand side, is "Davenport 126"; do you see that?

A. I do, yeah.

Q. Below that it records "Communicorp/? or Esat Telecom requested not conceded.

Funding how secured?

88% Communicorp

12% executives - C and Esat

IIU are Department aware?

Question, 29/9/959 letter to Department. Department

replied that letter not taken into account copy to

be supplied to us."

Do you recall there being discussion at that meeting

in relation to the Department's awareness of IIU?

A. I wasn't at the meeting.

Q. Well, you are recorded as being at the meeting, Mr.

O'Toole.

A. Sorry, this is an attendance of Arthur Moran

Q. Yes.

A. with

Q. With Knut Haga, Per Simonsen, Knut Digerud

A. You are saying the part below 126 relates to

Q. Yes.

A. I see. I hadn't realised that. Do I recall sorry,

would you ask your question, then, again.

Q. You see there he records yeah, there was one

meeting initially between Mr. Moran and his clients.

A. I see what you mean.

Q. Then Mr. Moran and his clients joined you, Mr.

O'Donoghue and Mr. Halpenny, and it appears that you

met at the Davenport Hotel; do you see that?

A. Mmm.

Q. In fact I have Mr. Halpenny's note of the same meeting, which I can you take to you in a moment. It records "Communicorp/? Or Esat Telecom requested,



not conceded"; that seems to be discussion of whether it would be Communicorp or Esat Telecom that would take the interest in Esat Digifone. Do you see that?

A. Mm-hmm.

Q. Then below that "Funding how secured? 88% Communicorp 12% executives C and Esat.

"IIU are Department aware?

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

Do you see that?

A. I do, yeah.

Q. There seems to have been a discussion there, and in fact it's been confirmed by the other people who are at the meeting as to whether the Department was aware of the IIU involvement; do you see that?

A. Mmm.

Q. Do you recall that discussion?

A. I don't recall it, no.

Q. I suppose it would be difficult at this remove to recall the discussion itself, but do you recall that being an issue that was arising at your meetings with Telenor?

A. Yes, I think the I would recall the fact that somebody would have given information that a letter had been sent to the Department, I think. I do recall that.

Q. Did you know anything about that letter of the 29th September?

A. No.

Q. Clearly it can't have been you, then, who was telling them that a letter went to the Department and it had been returned?

A. I doubt it very much.

Q. Well, I suppose if you didn't know about the letter, you couldn't have been telling them about it; wouldn't that be the position?

A. Yeah.

Q. Now, if I can just ask you to move on to the next divider, which is Mr. Halpenny's note of the same meeting. It's Divider 87, and again we have it in typed-up format, which may be of assistance to you, and I'll hand it in to you.

A. Yes indeed, it would be.

(Document handed to witness.)

Q. You see there again it's the 9th November, 1995. It records the persons in attendance as Peter O'Donoghue, Richard O'Toole, Knut Digerud, Knut Haga, Per Simonsen, Arthur Moran and Gerry Halpenny. It's Mr. Halpenny's note.

"Esat Telecom rather than Communicorp." That again echoes that discussion as to who would take the interest in Esat Digifone.

You see below that it records

"Bottin IIU appearance

" Telenor unhappy re Bottin."

Do you see that?

A. Mm-hmm.

Q. Now, again I am sure you are going to say to me you don't remember details of the discussion, and you couldn't be expected to at this remove, but do you recall, at these meetings that you were attending, that Telenor were raising their concerns about the involvement of Bottin?

A. What I recall is that there was discussion amongst the parties about who precisely which precise legal entity would represent them in the consortium. On Telenor's side, there was a question as to whether it was Telenor Invest or an Irish subsidiary.

Q. Yes, I see that.

A. In Esat's case, it was Communicorp/Esat Telecom. The concept of Esat Telecom Holdings was beginning to develop at that stage, and in IIU there was a suggestion that IIU might be represented by this company called Bottin. And I do recall Telenor raising a question as to who or what was Bottin, and to what extent would it be able to, as I understand it, you know, really fulfil the obligations that IIU would be expected to fulfil.

Q. I wonder, were you aware at the time that by virtue of a side letter dated 29th September, IIU had actually

assigned all of its obligations under the agreements

on the 29th September to Bottin?

A. I wasn't, no.

Q. Right. Clearly you wouldn't have been in a position to say anything to ease Telenor's concerns, given that you apparently weren't even aware that there had been an assignment to Bottin?

A. You talk about Telenor's concerns. It didn't come across to me as Telenor's concerns. It was more of a query as to, you know, who precisely was Bottin. It was a reasonable query for them to have. But I didn't get an impression, as you try to put it, that there was an major concern about it.

Q. Well, you may not have seen the correspondence that Telenor were sending

A. No, I didn't.

Q. both to IIU and to Mr. O'Brien, in which looking for information about Bottin.

A. All I can tell you is that my perception was that there wasn't such a big concern expressed at that meeting.

Q. Now I want to ask you about another meeting, shareholders meeting that you attended on the 21st November. In our book it's Divider 90, and we also have a typed version of Mr. Halpenny's note of that meeting, which we can hand up to you.

(Document handed to witness.)

It's the do you have it there?

A. Mm-hmm.

Q. It's the 21st November 1995. And again it records the same people in attendance: yourself, Mr. O'Donoghue, Mr. Haga, Mr. Simonsen, Mr. Moran and Gerry Halpenny.

It records "Position re the Department IIU

not a problem for M. Brennan in the Department

main concern that DOB and Telenor mainly involved on the operational side.

"Present the agreement to IIU ASAP."

Which I think would have been your view, wouldn't it,

that the draft shareholder agreement should go to IIU

as soon as possible?

A. Absolutely. I was concerned to try and get as many I's dotted and T's crossed.

Q. Would that be your usual approach where you were assisting in the negotiation of a shareholders agreement, that you would move it forward as quickly as you could? Or was it because of the particular context of these negotiations?

A. No, it was just a matter of practice. Obviously you would have to take into account any realities that had to be also taken into account which may require delay, but my view would be that it would be just as a matter of good practice to move these things along.

Q. Below that "CSFB position paper was being marketed. Good reaction so far." I think that relates to

Communicorp's fundraising efforts in the US. Would that be correct?

A. Your question?

Q. I think that relates to Communicorp's fundraising efforts in the United States; is that correct?

A. Yes, yeah.

Q. Below that, "Replace between DOB and Advent with a new perhaps cleaner agreement all around.

"Carve out the radio division.

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

Now, again, I want to refer you and I think the remainder of the meeting was taken up with discussions of provisions, individual provisions of the proposed shareholders agreement.

Now, can I just ask you in relation to the first matter that's been recorded, again, it's recording a discussion regarding IIU and the Department. Do you see that, do you?

A. I do, yeah.

Q. "Position re the Department IIU"

"Not a problem for M. Brennan in the Department main concern that DOB and Telenor mainly involved on the operational side."

Now, it's clear from that, and it's been confirmed by witnesses, that there was somebody at that meeting who was in a position to inform the meeting that IIU was not a problem for M. Brennan in the Department. Do

you recall who that was?

A. Why do you assume that?

Q. We have heard it from other witnesses, Mr. O'Toole, and Mr. Halpenny has confirmed his note yesterday of what he recorded from that meeting.

A. Well, it's such a long time back, but you refer to this as somebody informing the meeting.

Q. Yes.

A. I think there is another explanation other than information. It could also have been an opinion expressed at the meeting.

Q. Well, was it an opinion expressed, do you remember?

A. I can't recall exactly. All I'm saying is that I don't think one can simply take it from this note that was an element of information. It could also have been in fact, looking back, it seems to be a more plausible explanation that somebody was expressing an opinion.

Q. That's very helpful. Were you in any contact with Mr. Brennan around this time yourself?

A. Absolutely not.

Q. I see. Do you know of anybody else in Communicorp who was in contact with Mr. Brennan around this time?

A. I don't, no.

Q. You don't. Okay. If you just move down, "Carve out the radio division, 40:40:20 issue should not be a problem". We see here there was a discussion about

the 40:40:20 issue. I think that was the issue that you referred to in your memorandum?

A. Which memorandum?

Q. Your memorandum of intended evidence that we have just opened.

A. Oh, yeah.

Q. So obviously there was discussion there again in relation to the 40:40:20 issue. Do you recall that?

A. I don't recall specifically there, but at various times during the discussions on the shareholders agreement, we were faced with an issue where the intended shareholding was shifting around. It was quite fluid.

Q. This was because Mr. O'Brien was anxious to acquire another 12.6% from IIU, is it?

A. Well, there were various ideas put on the table from time to time about the ultimate shareholding structure, and these were of course matters for discussion between the parties.

Q. Right.

Can I take you on to Divider 102, please, which is a note of a telephone attendance which Mr. Halpenny kept on you. It's dated the 8th January, 1995. And again we can hand it up to you, and I can tell you that Mr. Halpenny has confirmed the typed note as being an accurate note of his handwritten attendance.

Now, you see that, 8 January, 1995. "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."

Now, can you tell me what you meant there by "Concern

re IIU as an obstacle to getting things sorted"?

A. The first point I just make on the document is that

the date is down as 8th January, '95. In fact I think

this is a mistake. It should read 8 January, '96.

Q. You are probably quite correct, and I think it's purely in the transcription from Mr. Halpenny's note, and you are quite correct; it only makes any sense if it's 1996. Yes.

A. As regards the points there that I think my recollection is that by that stage, the negotiations between Telenor and Communicorp had advanced pretty well, and the agreement was in reasonably good shape to be accepted by both sides. There were still some issues to be ironed out, but it was basically there, and we were concerned to get IIU, which was a late comer, if you like, to the discussions, to come aboard the shareholders agreement and to we were concerned to adapt the shareholders agreement to reflect the IIU participation. And I think that refers to this I

mean, I think the word that is used here, "obstacle", seems to be a pretty strong word in terms of

Q. I suppose it must have been the word that you were using, because it's Mr. Halpenny's attendance on you.

A. Mr. Halpenny obviously used it in his note, but I think to focus on the word "obstacle" would not be, I think you know

Q. We'll look at your own memos to Mr. O'Brien in a moment and see what language you adopted yourself.

Below that you have "Licence issues about to be raised again". Do you know what that referred to?

A. I can't recall exactly.

Q. Below that you have "Acting as strategic operator/investor". Now, what does that mean?

A. The concept in the licence application and the project was that Telenor and Communicorp were the main promoters; therefore they had basically a strategic industrial interest in the whole issue, and the remaining part was set aside for financial investors.

In fact it was envisaged, I believe, that even in the bid, that this fraction that would be spun off to financial investors would actually go to about you know, I think it was 32% ultimately, but at all times it was Telenor and Communicorp. Therefore, I think the concern we had in some of the amendments that IIU had put forward in the in their initial comments on the shareholders agreement was they seemed to be

looking for rights as if they were one of the main promoters, whereas I think the view inside Communicorp and Telenor was that they would be seen as financial investors, and therefore would have a different perspective than the promoters and managers of the project.

Does that answer

Q. Yes, very fully. I am not going to go into it in detail, because we referred to it yesterday with Mr. Halpenny. But I think Mr. O'Byrne had sent to Mr. Halpenny details of IIU's comments in a lengthy memo of the 19th December, and presumably it's some of those comments that you are referring to?

A. Probably so, yeah.

Q. Then the "20 V 25% issue". Clearly that relates to IIU?

A. Mm-hmm.

Q. Presumably you must have been aware that under the bid, the capital configuration was 40:40:20, but that under the arrangement agreement, IIU were entitled to 25%, and each of Communicorp and Telenor had agreed to drop to 37.5%?

A. Mmm.

Q. And then below that, "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". I think that was a proposal you were considering at the

time, and I think it was a proposal that you

subsequently put to Mr. O'Brien?

A. That's correct.

Q. Now, the following day, I think Mr. Halpenny wrote to

you on the 9th January, and he effectively set out

what he felt was the legal position, having regard to

the proposal that you were making?

A. That's correct.

Q. Again, I don't need to go into it because we went into

it with Mr. Halpenny yesterday, unless there is

anything you want to draw my attention to; but I think

Mr. Halpenny was saying to you, yes, it could be done,

you could go ahead with a bilateral agreement, the two

of you. You could make a cash call but defer the call

for 30 days and negotiate, if you like, in good faith

with IIU during that period?

A. Precisely. I think that's the important point I would

say, is that this was an effort to try and consolidate

the progress we had made with Telenor and Communicorp

and the shareholders agreement, but still to leave

open the rights, IIU's rights to participate on a

proper basis.

Q. Yes. Were you involved at all around this time, or

did you advise Mr. O'Brien at all in relation to his

negotiations with Mr. Desmond, the ones we were

referring to where I think he was looking to acquire

roughly 12.5% of the IIU 25% shareholding?

A. No, I didn't advise him on this issue. I became aware of it at some stage, but I was not advising Mr. O'Brien.

Q. Now, I'll just take you to an attendance of a further shareholders meeting, again on the 10th January. It's at Divider 105 in the book that I am working from, and again we have typed up the attendance, and we can hand that up to you. I think it will be clearer than working from Mr. Moran's note.

(Document handed to witness.)

You see that. I'll just take you through it, because in fact it started off, I think, as a meeting at William Fry between Gerry Halpenny, Peter O'Donoghue, Richard O'Toole with Per Simonsen and Knut Haga. You were discussing there "14.2"; presumably that's 14.2 of the draft shareholders agreement. There were then a number of points regarding IIU. Then below that, "Telenor T lends to Esat Digifone. Esat Digifone issues to Esat on a 1p paid basis." That, I think, relates to the bridging finance that was under negotiation.

Below that, "Department still believes in 40:40:20 split." Do you see that?

A. Mm-hmm.

Q. Now, tell me, can you assist the Tribunal at all as to whether you would have been in a position to indicate to the meeting what the Department did or didn't

believe about the capital configuration?

A. No, because I had no contact with the Department.

Q. Then below that, "Cash call likely soon 12

million 20/1/96." You see below that, "Michael

Walsh, John Bateson, Neville O'Byrne, Sonya Price."

It looks as if they joined the meeting. Do you see

that?

A. Mm-hmm.

Q. Then "Recital E on whose behalf are IIU acting.

IIU Nominees listed need to talk to the Department."

Now, we know, I think from the evidence yesterday and

from documents we have seen, that Recital E in the

shareholders agreement related to IIU and IIU Nominees

and on whose behalf they would be holding their

shares. And you see there that it records clearly a

query has been raised as to whose behalf IIU were

acting. Do you see that?

A. Mm-hmm.

Q. Below that, "IIU Nominees listed need to talk to the

Department." Do you see that?

A. Mm-hmm.

Q. Now, can I just ask you, can you tell me what your

understanding was at that time as to on whose behalf

these 20% or 25% of shares were going to be held?

A. My understanding was that IIU came in initially as

underwriters but also had the right to place the

shares. And it was not immediately clear in the

beginning exactly whether IIU would hold these for its own account or whether it would hold them on behalf of investors, institutions or other investors for which IIU Nominees would be the party.

The main point, I think, that came across was that IIU were financial investors. They could represent either themselves or a group of financial investors in the project.

Q. Did you have any clearer view by this time, by January of '96?

A. I don't recall.

Q. Okay. Now, if we go on to Divider 109 of the book I am working from, there is your memo to Mr. O'Brien of the 16th January. Do you see that?

A. Yeah.

Q. I'll just briefly go through it. It reads "Denis, "Following discussion yesterday afternoon with Owen O'Connell and Gerry Halpenny on how we might handle the shareholders agreement in the light of the current position vis-a-vis Telenor and IIU, I propose that we now proceed as follows:

"1. Conclude the shareholders agreement between Esat Holdings and Telenor on a 50:50 basis, and inform IIU that we will do so, while leaving open the possibility for IIU to sign up at any time on the basis of the agreed Telenor/EH draft. We probably should have an early combined Communicorp/Esat Telecom board meeting

to approve the terms of the agreement and to assign Communicorp/Esat Telecom interests to Esat Holdings. We would then proceed to conclude discussions with the Department on the GSM licence on the basis of this agreement. It would also be desirable to resolve quickly with Telenor the outstanding management issues. We would also proceed to document the Telenor bridge facility on a binding basis.

"2. Continue (assuming IIU does not sign up immediately to become a party to the Telenor/EH draft shareholders agreement) to negotiate in good faith with IIU in parallel with the discussions with the Department, to conclude a satisfactory trilateral shareholders agreement on the basis of 37.5:37.5:25 ratio. We would inform the Department that we are in discussion with IIU and that we envisage that IIU would subscribe for up to 20% of the Esat Digifone plus a further 5% that we would allocate also to IIU (c.f.: line worked out by Owen O'Connell and Padraig O'hUiginn to be consistent with bid document) and that it could entail revisions to the shareholders agreement in order to accommodate IIU's participation."

Now, can I just ask you what you know about the line worked out by Owen O'Connell and Padraig O'hUiginn to be consistent with the bid document?

A. Well, the bid document envisaged that, as I say,



Telenor and Communicorp were the promoters of the project, and it envisaged allocating then, I think, a 20% stake to financial investors initially, and then further on it envisaged adding more financial investors, so that I think the figures then would end up at 68 between the two promoters and 32 amongst the financial investors. And the idea, I think, that Owen O'Connell and Padraig O'hUiginn had worked out was that to try and reconcile the situation where a commitment had been made to IIU that they would have 25%, and the bid document, it would be the approach would be to accelerate the additional financial investors' allocation and to add that to the 20 to make it 25. And it was always understood that that would have to be discussed with the Department at some stage, and the Department would have to accept it.

Q. And that's really how you could go about rationalising the 25% IIU shareholding in terms of consistency with the bid?

A. Yeah, that assumes I mean, your question assumes that the bid was set in stone. I mean, it was I think anyone with experience of negotiations of this type would indicate that parties would always fine-tune and adjust things as things would go along.

Q. They didn't, in the end, because the Department

A. I quite understand the Department in the end, you know, said "We are going to stick to this", and the

parties had to accept it.

Q. Can you just tell me what you know about when the line was worked out by Mr. O'Connell and Mr. O'hUiginn?

A. I think they must have been thinking about it fairly early on, when the IIU agreement was made, and I suspect it was sometime in the previous year that it was developed.

Q. Do you ever remember, did you have any meetings with them, or did they ever sit down with you and explain to you the approach?

A. No, I think I had a conversation with Owen O'Connell, because I was obviously dealing with the shareholding agreement, was trying to clarify some of these issues, and I think it was as I recollect it now; don't hold me to it to the best of my ability, I think I would have been told by Owen O'Connell that this was the explanation and this was the way it would have been presented.

Q. Right. And you think that they were, if you like, thinking about it and working on it at a fairly early stage?

A. It would have been in the latter part of the say in either you know, December, I would say, maybe November/December.

Q. Did you have any discussions with Mr. O'hUiginn about it?

A. No.

Q. And then you continued, "As capital calls become necessary, each party would be required to subscribe its share. IIU would face the choice of subscribing its proportionate share with or without the protection of a shareholder agreement or else permit itself to be diluted progressively.

"3. Sound out Telenor as soon as you judge it appropriate on the proposal to transfer 12.6% of the IIU's 25% stake to EH and pursue the discussions with IIU in the light of the Telenor reaction. (See attached notes of Owen O'Connell's comments on Michael Walsh's letter of January 12th, 1996).

I think it's clear by this state you certainly knew that Mr. O'Brien was looking to acquire roughly 12.5% from IIU.

"Since IIU have made Telenor's agreement a fundamental condition of the proposed deal, if we wish to pursue this transaction we will have to broach the issue with Telenor. It must be seriously open to question, however, whether Telenor will agree to the deal, particularly given the control implications, and even raising it with them is likely to cause considerable concern within Telenor. And since the proposal is contingent upon prior fulfillment of many conditions other than Telenor's consent, including the award of the licence and completion of the CSFB financing, we should, in any event, in order to safeguard the

project, proceed with steps 1 and 2 pending completion of the discussions with IIU and Telenor.

You then set out the advantages of proceeding in the way which were as follows:

Firstly, you'd have a definite shareholder agreement.

Secondly, you'd lock in the respective rights and obligations of Esat Holdings and Telenor under the shareholders agreement.

Thirdly, you could also maintain the advantages of your existing relationship with IIU, pending a resolution of IIU's difficulties with the existing draft and the various conditions to be fulfilled in relation to the 12.6% proposal.

You then identify possible disadvantages:

"Firstly, it could be argued that the conclusion of the shareholders agreement with Telenor might reduce our leverage with Telenor in regard to the 12.6 proposal and other matters such as management control."

Can I ask you just there what leverage you were referring to?

A. I believe this referred to the more open issues one had with Telenor, you know, the more issues there were there for discussions. If one agreed on the shareholders agreement and put it to bed, so to speak, then you were focused on the 26 12.6 proposal very narrowly. I suppose if you had concluded the

shareholder agreement, you know, you sort of have effectively agreed the shareholding, and it locks it in.

Q. Then all you have to focus on is the 12.6?

A. Yes.

Q. I see. "In addition and if for any reason the CSFB transaction does not close or is delayed or IIU does not underwrite our share and we cannot find funds elsewhere, Telenor will have clear rights, both under the shareholder agreement and the bridge facility, to take up our share of any capital calls, thereby increasing its relative ownership share. However loss or dilution of EH's rights to some other party is an inevitable reality if for any reason we cannot provide our share of the capital required."

Then the final disadvantage you identify, you say:

"It leaves unresolved the final IIU participation in Esat Digifone pending completion of discussions with Telenor and IIU on the 12.6% proposal."

Now, do you recall discussing all of this with Mr.

O'Brien after you sent him the memo?

A. I don't, actually. I think I sent him the memo, and I don't recall a precise conversation.

Q. Right. Now, it doesn't seem to have gone anywhere, but we know in fact, in the end, the shareholders agreement was concluded until the 16th May; but if you go ahead to Flag 112, you'll see that you sent him

another memo, just over four weeks later, on the 20th February.

A. Yeah.

Q. You say "Attached is a draft letter to IIU for your consideration. I believe that we now need to send such a letter to Michael Walsh in order, (i) to expedite conclusions of the shareholders agreement; (ii) to prepare IIU for the imminence of a capital call by Esat Digifone.

"I am concerned at the delay in finalising the shareholder agreement with IIU. It is dangerous to leave it until the last moment and this is a matter which we shall be able to tidy away now. The Department is bound to ask us shortly to deliver the agreement to them; if we delay, you can be sure that the Department will use this as a further excuse to delay the licence. In addition, the project finance banks need to see the agreement and will require signature by the parties before they start funding. In short, we need to get IIU to focus seriously on the agreement and reach rapid agreement between ourselves and Telenor.

"The draft letter also puts Michael Walsh on notice that IIU will have to fund its 25% share soon, since Esat Digifone now needs working capital from all of its shareholders. The sooner IIU puts in money, the better, since Esat and Telenor are investing actively

in the business with IIU getting a free carry for no risk whatsoever; when IIU have money in, they will become much more focused. And if they fail to fund, then their entitlement to equity may cease to exist because they could be in breach of the agreement giving them that right.

"I should also mention that I had a brief word with Knut Digerud yesterday on the shareholders agreement. Although he did not commit himself definitively, I believe as a result of a discussion with Telenor will now agree to the deletion of the two clauses you were worried about on the transfer of shares."

Can I just ask you there, were you conscious at all that there was any constraint or financial constraint with regard to IIU's contribution to the funding of the consortium at that stage?

A. No.

Q. Because what you said was they had no money in, and that effectively it was all being funded by Telenor and by Communicorp?

A. Yeah, but I don't think that was a financial constraint. My perception is that there wasn't a financial constraint on IIU's part. It was that there was the the project was in fact being actively rolled out. I mean, it was Denis O'Brien's style to move ahead with the project. He was quite determined to you know, have the new network up and running

very quickly, and because of that, working capital was being consumed that was supplied essentially by Esat and by Telenor.

Q. I think probably principally by Telenor at this stage, but

A. In fact, funnily enough, at that time was majority of the working capital had been funded by Esat.

Q. I see. Was that from bank borrowings?

A. No. Well, I mean there was bank borrowings in the Communicorp balance sheet, but the available cash that was generated out of the Esat the Communicorp businesses was presumably the plus what loans Communicorp had was being spent on rolling out the network.

Q. I see. With that, you enclosed a draft letter. I am not going to go through all of it because we know it wasn't sent. But I just want to refer you to the really the second paragraph. But I'll refer you briefly to it first, as well, to put it in context.

It was a draft letter which you prepared on the 19th February, to Michael Walsh, IIU.

"I am writing to ask IIU to progress certain matters relating to the shareholders 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 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 promotion and management of the Esat Digifone project."

So I suppose effectively you are making the same point there as well. You are saying that the rights you are looking for are rights which are akin to the rights that the strategic operators would have on a shareholders agreement, rather than, to an extent, a disinterested investor?

A. I don't think IIU could be described as a disinterested investor.

Q. No, I don't I quite agree with you; I quite agree with you. I think that's the point you were making.

A. I think they were a financial investor, and they were I mean, in any of these joint venture agreements, all of the parties have a common interest, but each of the parties has specific strengths and weaknesses, and there is jostling for a relative position, and obviously any party seeks to secure the best rights for itself.

Q. Of course, I can fully understand that. I suppose all I was drawing your attention to was that in this letter, you were again making the point that it was the view of Esat and Telenor that the rights they were

looking for were rights that you'd normally associate with a strategic operator; would that be fair enough?

A. Yeah, I think that the perception in Esat and Communicorp at the time was that the amendments that IIU were seeking to make to the shareholders agreement were looking for rights that we felt went beyond what was appropriate. But this was a negotiation, and it had to be seen how it would come out.

Q. Of course, of course.

CHAIRMAN: So at this stage, just by way of summary, Mr. O'Toole, could it be said that your two primary concerns were trying to ensure that the project had the benefit of IIU's money sooner rather than later, and also that you had some misgivings with them being accorded entirely equal rights to the two key industrial partners?

A. I think Esat's concern was to try and get the shareholders agreement progressed, because that was needed for a number of other reasons, as I think I referred to in my amendment. The finance issue was one where we were facing capital calls in the future, and clearly it was important that all of the parties would be in a position to contribute proportionately to those capital calls, because the given Mr. O'Brien's intention to roll out the network as rapidly as possible, a significant spending would start to be incurred, and therefore it was important to bed down

the shareholders and get them into a situation where they would be giving their proportionate share of finance.

CHAIRMAN: But you wanted to see that money coming from IIU rather than expressing any misgivings about their possible capacity to meet capital calls?

A. Yes, and I don't think there was any suggestion that IIU didn't have the capacity to do that or were ultimately unwilling to do that. They were negotiating from their position to try and secure the maximum rights, and they probably had a certain degree of leverage on the rest, on the other members of the consortium at that time.

Q. MS. O'BRIEN: We know this letter wasn't sent. This was the 19th February, and I think your consultancy completed sometime in March?

A. That's correct.

Q. Were you able to progress it at all between the 19th February and when your consultancy completed?

A. I don't recall so. I think that was, I think, the last you know, significant contribution I made to the project.

Q. Did you discuss that with Mr. O'Brien at all, the draft letter that you prepared?

A. I think I had mentioned that I had sent him the letter, and I outlined the reasons for sending it, and it was for him to decide what to do with it.

Q. He didn't send it. Did he explain to you at all or did you have any impression or understanding as to where why he didn't send it?

A. No.

Q. Would it have undermined at all, if you like, his efforts to secure the 12.6% that he was looking for from IIU?

A. I beg your pardon?

Q. Would it have in any way if he had sent that letter, would it have in any way undermined his efforts to secure the 12.6% that he was looking to acquire from IIU?

A. I wouldn't know.

Q. Now, your consultancy, I think, finished in March; and do I take it that was a fixed-term consultancy that simply expired by passage of time?

A. I was I took up some other duties; in fact, I was only available on this part-time basis because I was involved in another project in Switzerland, and that became a full-time project for me, and therefore it came to a conclusion at my wish.

Q. I see. So if you like, the time you had available ran out?

A. Exactly.

Q. Thank you very much, Mr. O'Toole.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. NESBITT:

Q. MR. NESBITT: Mr. O'Toole, I act for the Department.

Just in relation to the events you have described, as I understand the role you were playing, it was a role of adviser and attempting to facilitate the coming together of the three parties, as you understood them, the two operational joint venture partners, effectively, and Mr. O'Brien's side and the Telenor side, and we now had the financial investment, the 20% in IIU. Do you recall, in relation to your investment, any sense of unease or embarrassment it was taking time to finally bed down the involvement of IIU in that arrangement?

A. Sorry, could you repeat that? Do I feel which?

Q. Do you recall any sense of unease or concern time was being taken to fit IIU into the arrangement the parties were trying to work out between themselves?

A. Unease on the part of whom?

Q. Anybody.

A. I think those of us who were working on the shareholders agreement and interacting with the Credit Suisse First Boston and the project finance team, they were we were clearly anxious to progress it. So unease, as you call it, was more a question of the delay. It wasn't any unease related to IIU.

Q. Indeed. And I assume it was clear to all involved that the arrangement between the parties needed to be put in place before it would be possible to take the licence agreement that was in the course of

negotiation?

A. Yes, that was quite at the forefront, that the Department would insist on a shareholders agreement where the identity of the parties and their rights were specified in them, and it was clear that that shareholders agreement also had to be acceptable to the Department.

Q. Did you hear the Department, in your presence, ever express any unease about the time it was taking to negotiate or end the licence negotiations?

A. I didn't, but I didn't have contact with the Department. I mean, I think the main point of contact between the Department and Digifone was Mr. O'Connell. But I am sure Mr. O'Connell was also anxious to progress the matter as well.

Q. Indeed. I think when you came to be dealing with the issue of IIU, you hadn't been involved in the arrangements in relation to the presentation of the entry to the competition and getting to the stage of being the person who won that part of the competition with exclusive negotiating rights?

A. No, I wasn't involved at all.

Q. Was it ever possible, as far as you could see, the position would be other than the Department would be told exactly who was behind the licence vehicle?

A. Sorry, can you repeat that question?

Q. During the involvement you had with the process of the

shareholders agreement with IIU and how the various parts of the relationship would fit together, the two operational investors and then IIU, did you ever understand that it would be other than essential and necessary to tell the Department exactly what the arrangement was?

A. It was crystal clear that the Department would have I mean, as a former civil servant, I would have fully expected, myself, that the Department would have looked for that. And that was a common view amongst the parties that we were dealing with; all members of the consortium knew that there would have to chapter and verse as far as the identity of the participants in the consortium would be.

Q. From your point of view as a former civil servant and your European experience, did you have feel any sense of some attempt to hide the fact of the existence of IIU from either the people you were working for or anybody you were interacting with?

A. Absolutely not. In fact it was I think it was pretty common knowledge that around town, including people who were not associated with the consortium, that IIU was involved, and there was even publicity in the newspaper, in the media, about IIU having some relationship with the consortium.

Q. Thank you.

MR. FITZSIMONS: No questions.

MR. FANNING: No questions.

MR. McGONIGAL: No questions.

CHAIRMAN: And nothing in conclusion, Ms. O'Brien?

Thank you for your assistance and attendance today,

Mr. O'Toole.

MS. O'BRIEN: Mr. O'Toole's evidence has possibly

taken less time than had been anticipated, Sir, but

there will be further witnesses on Tuesday.

CHAIRMAN: Tuesday at 11 o'clock. Thank you very

much.

THE TRIBUNAL THEN ADJOURNED UNTIL TUESDAY, 24TH

FEBRUARY, 2004 AT 11AM.