

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan, SC

Mr. Jerry Healy, SC

Ms. Jacqueline O'Brien, SC

Instructed by: Michael Heneghan

Solicitor

FOR THE DEPARTMENT OF

COMMUNICATIONS, MARINE &

NATURAL RESOURCES:

Mr. Richard Law Nesbitt, SC

Mr. John O'Donnell, SC

Mr. Diarmuid Rossa Phelan, BL

Instructed by Matthew Shaw

Chief State Solicitors Office

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

Mr. Gerry Kelly, SC

Mr. James O'Callaghan, BL

Instructed by: Owen O'Sullivan

William Fry Solicitors

FOR TELENOR: Mr. Eoghan Fitzsimons, SC

Ms. Blathna Ruane, BL

Instructed by: Kilroy Solicitors

FOR MICHAEL LOWRY: Mr. Roderick O'Hanlon, SC

Instructed by: Kelly Noone & Co.

Solicitors

FOR DERMOT DESMOND: Mr. Bill Shipsey, SC

Mr. Gerard Hogan, SC

Instructed by: Michael Houlihan & Co.

Solicitors

Solicitor

OFFICIAL REPORTER: Mary McKeon SCOPIST: Ralph Sproxton

I N D E X

Witness: Examination: Question No.:

Prof. Michael Walsh Mr. Coughlan 1 - 499

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY,
25TH FEBRUARY, 2004 AT 10.30AM:

CONTINUATION OF EXAMINATION OF MICHAEL WALSH

BY MR. COUGHLAN:

Q. MR. COUGHLAN: I wonder, Mr. Walsh, could we just look
at the letter of the 29th again. It's at Book 48, Tab
64. I just want to ask you a few things about it, if
I may.

I think you told us yesterday when we were considering
the your two letters, the side letters, and the
arrangement agreement, that the position was, as of
the 29th, that you and I am using that in its broad
sense for the moment had agreed to underwrite
Communicorp's 37.5%; and in consideration, or you were
to have 25%, isn't that right, of the GSM company if
the licence was granted. Is that the position?

A. In broad terms. Obviously it was actually a right to
place 25%.

Q. Well, what you had was a right to 25% and a right to

place it with four people, if you so wished, in its real sense; is that the position?

A. Well, in its very real sense, I mean, as is absolutely clear, you know, as you go through the documentation, you know, we hadn't taken a decision as to whether we were going to take the shares ourselves, place them on with other people, you know, and a lot of the to-ing and fro-ing obviously between the various people was you know, kind of issues that had been raised by either the Communicorp side or the Telenor side in terms of, you know, the number of people we could actually place with. And I think as we talked about yesterday afternoon, you know, Telenor didn't want to end up with sort of hundreds and hundreds of people, so they wanted one of the places or allowed one of the places to actually be a nominee on behalf of, you know, a wider number of people.

Q. Yes; that's in relation to the underwriting of the Communicorp 37.5%. Isn't that right?

A. Well, no, I would have said it's actually in relation to any shares that we ended up holding.

Q. Sorry, that's in the arrangement agreement. That's the clause 5 in the arrangement agreement. We can look at that in any event, but under clause 3, and more importantly, as far as you were concerned, under your letters and the agreement that had been reached, you were entitled to 25% of the GSM business if the

licence was awarded; isn't that right?

A. We were entitled to 25% to either place or whatever.

Q. Yourself, or if you wished to place; isn't that right?

A. Absolutely.

Q. That's the position. Now, I am just wondering why the letter of the 29th didn't state what the true factual situation was.

A. In what sense?

Q. Well, the letter says "We confirm that we have arranged underwriting on behalf of the consortium for all the equity not intended to be subscribed for Telenor." That wasn't the position which pertained from the start; isn't that correct? You had agreed to underwrite or arrange underwriting for 37.5%?

A. Sorry, I mean, it is actually absolutely precisely correct, because basically what it's saying is, you know, we have committed we confirm that we have arranged underwriting on behalf of the consortium for all of the equity not intended to be subscribed for by Telenor."

Given that we hadn't taken a decision as to whether or not we were going to sell, you know, our 25% to and I use the word loosely, but I use the word "our" loosely given that we hadn't taken a decision whether we were going to take that 25%, sell it on to institutions, to have said other than we were

committing to ensure that the money was there would have been actually equally

Q. I take your point there; you mightn't have made the decision what you were going to do with your 25%, but you were to take the 25%, as you saw it, and if you wanted to, would sell it on?

A. Well, not necessarily as two separate transactions.

Q. Well, you see, I thought you told us that Mr. Desmond took the decision and agreed with Denis O'Brien that he'd go in on the same terms as Telenor, was what he saw it.

A. Yeah.

Q. In other words, to be an equal partner.

A. Mmm.

Q. And that he wanted 30%, and he ended up a 25% situation?

A. Correct.

Q. That was how the whole thing came about; wasn't that right?

A. That is correct.

Q. So am I correct in thinking that at that stage the position was that and the generic Mr. Desmond was getting 25%?

A. Sorry, Mr. Desmond clearly had the right to get 25%.

Whether or not he was going to sell that on or whether he was going to hold that himself was a decision that hadn't been made at that point in time. I say

"commitment", I mean, and let's clear about it, his commitment to the consortium was to ensure that the equity that Telenor wasn't providing would be provided.

Now, you know, he obviously had to provide that himself, in the event that it didn't come from elsewhere; but we weren't precluded from taking it elsewhere, you know, at that point in time.

Q. I understand that. But wasn't the factual situation, as of the 29th September of 1995, that you let's take it in steps now IIU had agreed for the underwriting of the Communicorp equity requirement and were to receive 25% of the equity in the GSM company for that?

A. That's correct.

Q. And that that had been assigned, both the right and the obligation, had been assigned to a company called Bottin, by virtue of the side letter of the 29th September; isn't that correct?

A. That's correct.

Q. And from your evidence, Mr. Desmond owned and controlled Bottin, as far as you knew?

A. That's correct.

Q. And from your evidence, Mr. Desmond owned and controlled IIU?

A. That's correct.

Q. So that Mr. Desmond was standing behind both, and I

think in your evidence you have informed us that notwithstanding the legal technical aspects of the company IIU or the company Bottin, that Mr. Desmond would never have allowed their position or any weakness on their part to in any way prevent him or to inhibit him from fulfilling what he would have understood to be his obligations in relation to the overall agreement. Would that be a fair way of

A. That's a fair way of putting it. I think what I said yesterday, Mr. Desmond has never reneged on any agreement or commitment, sorry.

Q. That was the factual position. Why wasn't that stated to the Department: "Look" and just bear with me for a moment you could have simply said to the Department: "Look, Dermot Desmond is coming in here. He is underwriting Communicorp, and he is going to get 25% of the equity for doing that. He may keep it all or he may pass it on, or whatever the situation may be. In giving effect to that commitment of Mr. Desmond's, or that agreement Mr. Desmond had with Mr. O'Brien and/or Telenor, if you take my point, he is using a vehicle called IIU Limited here, and a vehicle called Bottin, but he will, Mr. Desmond assures you that he will not allow those vehicles to be used in any way to prevent or to inhibit him fulfilling his obligations".

Wasn't that a simple thing to state to the Department?

A. I think Mr. Coughlan, you know, I mean, I kind of wonder a little bit whether we are living in, you know, what I would describe as the real world. You know, practical reality. I think if you go back through any of the letters of comfort that were actually given by any of the institutions, that wasn't kind of copious documentation setting out the basis on which they were doing things. I mean, it would be quite abnormal.

I mean, here we had a straight commitment from IIU/Dermot to actually ensure we were telling the Department we have arranged the underwriting on behalf of the consortium. I mean, what could be more simple? The fact that we had organised it through Vehicle A, Vehicle B or any other fashion, I mean, if they had wanted to, they could have come and asked us, and we would have been happy to tell them the detail. But the reality is, this statement is an absolutely fair and absolutely true and correct statement, and I really don't think it's appropriate to be suggesting that it's anything else.

Q. Well, the true position, as you have indicated in your evidence, that it was Mr. Desmond was doing this deal?

A. Well, sorry, the true position is actually as set out in the documentation, whereby

Q. I see, so Mr. Desmond was not behind it so; is that right?

A. To be very clear, what I have said is that Mr. Desmond has never reneged on any agreement. Mr. Desmond would have seen this as a personal commitment. The fact that it happened to be booked through Part A or Part B of one of his companies is really irrelevant.

Q. These were companies owned and controlled by him; is that correct?

A. The actual legal status or his legal relationship with Bottin, you'd have to ask him about it.

Q. Fair enough. As far as you know?

A. As far as I know.

Q. As far as you know

A. It is a creature of Dermot's.

Q. IIU was a company owned and controlled by him?

A. IIU was a company owned and controlled.

Q. Doesn't it appear in the wording of that, Mr. Walsh, that there was a sensitivity disclosing Mr. Desmond as being the backer here?

A. Well, I would have said there was absolutely no sensitivity. I mean, it very clearly highlights both my involvement and intended to actually intended to highlight my involvement, because I would have been known to the various civil servants, and it also clearly, on the bottom of the page, the list of directors, partners, and the first one, as Chairman, is Dermot.

Q. I agree with you. I agree with you about that; the

bottom of the letter clearly indicates who the directors of the company are. I agree with you. But it's not saying that Mr. Desmond is the one who is behind this transaction, is it?

A. No, it's actually saying IIU, which is a company which is actually he is Chairman of, and I am there as managing director of. You know, nobody was prohibited from picking up the phone to us, writing back to us and saying, you know, "Give us more information". And we'd have been delighted to give it.

Q. That's a fair point. But what I want to ask you is this: It doesn't say that you are in fact underwriting 37.5%; it doesn't say Telenor have 37.5%; and it doesn't say that IIU are entitled to 25% and Mr. Desmond, by virtue of IIU and/or Bottin. Why were none of these things

A. It's very clearly a very simple letter, and it says exactly what it means. It's saying, you know, "There you are. We understand from, you know, the presentations actually made that, you know, there was discomfort in relation to some elements of the financial side. We are here, we are telling you, don't worry about it, that's actually being looked after".

Q. Would you not agree that on the ordinary reading of that letter, at that particular sentence, "We confirm that we have arranged underwriting on behalf of the

consortium", that it suggests that this was being done with a third party?

A. Well, to be quite honest, you know, shall we say, if you say "arranged underwriting", it implies it's a third party as opposed to "we have underwrote", which would have meant IIU had underwritten. So I mean, given that the benefits and obligations had been assigned to Bottin, it's more technically correct to say "arranged underwriting" rather than "underwrote".

I mean

Q. Sorry, can I just ask you, was that your thinking at the time?

A. Well, I mean, the quick answer to that is it's very hard for me to tell exactly what my thinking was at the time. But I mean, I would say that if I had written down, "We confirm that we have underwritten", you would be saying to me today that was misleading because it didn't actually allow for the fact that the assignment was there.

So it seems to me that what I have written down irrespective of what I thought at the time absolutely allows for the assignment.

Q. In fact, just taking you up on that point, if I might tease it out with you for a moment, it wasn't, as I understand the side letters, it wasn't that IIU had arranged with Bottin to underwrite Communicorp; it was that the obligations and rights of IIU were assigned

to Bottin. So it was Bottin were either underwriting or arranging the underwriting, if you were to be strict about it; isn't that right?

A. Well, we had arranged with Bottin, and Bottin in turn were going to arrange or underwrite.

Q. Well, just bear with me for a moment now, Mr. Walsh.

A. I know we have a lot of arrangers in here.

Q. IIU had entered into an agreement whereby it agreed to underwrite Communicorp; isn't that right? Let's take it step by step.

A. Well, you know, as all the agreements were actually kind of completed, contemporaneous.

Q. I'll split them and bring them all together at the end. If I could take it step by step. Let's go back one step.

Mr. Desmond agrees with Denis O'Brien that he'll go in, and he wants to go in on the same terms as Telenor; that's the first step, right? Second step is, this is being done, an agreement then is reached on 25%. The way this is to be done, we are informed, is by way of underwriting. The first step is that an agreement is entered into between IIU and Mr. O'Brien qua Communicorp, and Mr. O'Brien qua Esat Digifone, whereby you agree, that's IIU agrees to underwrite 37.5%, the Communicorp 37.5%, and in consideration it will receive 25%. That is the first agreement, isn't it?

A. In broad terms, yeah.

Q. What then happened, or at the same time, all the rights and obligations of IIU that is, the obligation to underwrite Communicorp and the right to receive 25% is assigned to Bottin?

A. Absolutely.

Q. So IIU, by being involved in that particular assignment, was not arranging underwriting with Bottin; the whole deal was being assigned to Bottin. Isn't that right?

A. Yeah, I mean, I understand the point that you are actually making. I think

Q. That's what I think.

A. We are getting into extreme sort of delicacies as to whether "assignment" or "arrangement". I would have come back and said to you that you know, as far as I was concerned, I would have seen IIU actually arranging it and effectively arranging it with Bottin by assigning the agreements across to them. You can say that that's really more strictly an assignment than an arrangement, but we are really, shall I say, agreeing to disagree on the English language.

CHAIRMAN: In a sense, Mr. Walsh, what just at the moment occasions me a measure of concern is what was briefly discussed yesterday, the circa 60%. And I think you responded to Mr. Coughlan yesterday that you thought it might have sought to convey to some extent

a possible deviation from the initial 40:40:20 proposed configuration. Even if we abstract from that for a moment, it occurs to me that in an important document like this letter, to which very careful drafting attention was given by yourself and Mr. O'Connell and others, was there not a degree of inherent imprecision that was undesirable for such an important document? I mean, even putting on your pedagogue's hat in banking, if you had a student banker doing a facility letter and referred to perhaps being prepared to loan about $\frac{1}{2}$ 60,000, would you not rap him on the knuckles.

A. I think, Chairman, if somebody actually wrote a facility letter and said an approximate amount, I'd be a bit surprised. I think, to be more precise, I think this was I mean, I think we went through the earlier draft of this letter yesterday, and the earlier draft of this letter didn't have any reference to any percentage, if you recall.

And you know, clearly we took a decision that we should actually signal the fact that it wasn't precisely the same as the earlier proposal. I would imagine, but I don't recall the conversation, that we wanted to make it look as similar as possible to what had previously been proposed, but we were, at the same time, actually indicating that it wasn't identical.

I mean, the point I was making yesterday really was

that the earlier draft, while absolutely correct in, shall we say, kind of language, you know, it didn't actually allude to the fact I mean, if somebody had received the earlier draft as opposed to this draft, they would have no business basis for actually kind of querying whether or not anything had actually changed.

This was actually raising a flag which actually enabled people to follow up if they wished to.

CHAIRMAN: But, as in the other matter a few minutes ago, it was up to the Department to seek to clarify?

A. I mean, it was entirely up to the Department. I mean, you know, I go back to say that you know, I mean, I actually signed the letter. I had actually done a lot of work with the Department, particularly in the early eighties; so you know, I wouldn't have been an unknown person, from their point of view, if they had wanted to come back in any fashion.

Now, you know, they chose not only not to come back but to actually send back the letter and not consider it. But I mean, that was entirely their decision. It was nothing to do with us.

CHAIRMAN: Thank you.

Q. MR. COUGHLAN: You see, just looking at the letter, and I am just looking at a question that Mr. Shipsey asked Mr. Martin Brennan on Day 181, at Question 137.

Now, this is an

A. I am not familiar with that question.

Q. I'll read it out to you, and I want you to bear in mind, this is not an adversarial process. I am inquiring, and I am not holding anybody to what is asked in that question but I just want you to listen for a moment.

A. Actually, could I see a copy of the question?

Q. I'll put it up, because I only have the one copy there.

It's Question 137. Do you see it?

It says: "But whatever about the position of any other parties, it is at least clear that insofar as Mr. Desmond and his company is concerned" and he is referring to IIU there "they are happy to announce to the Department, on the very day that they conclude their agreement" that's the 29th "with the other member or another member of the consortium, to inform you in the Department of their interest and their involvement?"

And Martin Brennan answers: "That seems to be what the letter was for, yeah.

"Question: And at no time thereafter, I take it, that you are aware of, was there any attempt or effort or suggestion made by or on behalf of Mr. Desmond or Mr. Desmond's company that there should be no mention or little mention of his involvement; is that correct?

"Answer: I don't recall there being any such indications."

It's really the wording of Question 137, that "Mr.

Desmond and his company are informing the Department of their involvement". Do you see the question?

A. If you could move it over a little so I could see the number. Question 137 is the one begins "But whatever".

Q. "But whatever about the position of any other parties, it is at least clear that insofar as Mr. Desmond"

"they are happy to announce to the Department, on the very day they conclude their agreement, to inform them in the Department of their interest and their involvement."

Now, I must suggest to you that this letter of the 29th does not indicate to the Department Mr. Desmond's or IIU's full interest or involvement with this consortium.

A. I mean, to be honest with you, I have great difficulty in understanding that. You know.

Q. Well, just let me clarify that, Mr. Walsh. It doesn't inform the Department that Mr. Desmond/IIU/Bottin are entitled to 25% of this vehicle if the licence is awarded, does it?

A. No, I mean it very clearly doesn't go into the details of the commercial arrangements between the parties.

But for anybody to suggest that it's kind of you know, trying to hide our I mean, we have very colourful notepaper. It clearly lists the directors.

It clearly is signed by myself. So I mean, it's all about actually saying we are here. I mean for anybody to say that we are hiding.

Q. It doesn't say that the institutions, the financial institutions who had been associated with the bid were gone, does it?

A. Sorry, it doesn't deal with them at all. And you know, as I have said to you

Q. It conveys the impression, I suggest

A. Sorry, Mr. Coughlan, I hadn't finished.

Q. I beg your pardon. Sorry.

A. Sorry, it doesn't say at all that they were gone. And as I said yesterday, we were quite free to go back to them if we chose to at a point in time. You have to remember that none of those institutions had actually given proper commitments. They had all given warm, fuzzy letters "subject to", "subject to", "subject to"; none of them had actually made formal commitments. We were absolutely within our rights, if we wanted to, and we talked about the Valencia/Eircom situation yesterday as well, so you know, for us to have actually presupposed what was going to happen, you know, at that particular date, you know, would have been absolutely impossible. But nothing had been eliminated at that point in time.

Q. I am not talking about anything about your rights in relation to commercial transactions. I am viewing

this from the point of view of people carrying out a public function adjudicating on a bid process for a licence. That's what I am inquiring into just at the moment, Mr. Walsh.

A. I am not disputing that, but I am disputing the situation as to whether or not we were hiding sorry, I am just disputing whether we were hiding our involvement, whether we were being unfair. We very clearly set out here, "Look, we are involved in this. We are going to ensure that there is sufficient money there". Now, it was entirely up to anybody else to come back and say "Well, how are you going to assure us of that?" And we could have done whatever was required at that point in time.

Q. Well, why would you need to rely on somebody coming back to you? Why wouldn't you just tell them, if there was no sensitivity?

A. Sorry, why was there sensitivity? I mean, here we are actually saying we are the people who actually did it. We are not trying to hide anything.

Q. Well

A. I mean, if somebody wants to come back and clarify, they were more than welcome to. I personally don't believe there was any need for them to do that. We had written to them and said "Look, the money is going to be there".

Q. Well, you were not first of all, the letter doesn't

inform the Department that the institutions associated with the bid are gone.

A. The letter simply informs the Department that

Q. Could you answer that question?

A. Sorry, I am agreeing with you. The letter simply informs the Department that the money will be available. It doesn't go into any detail as to how it will be available, terms and conditions or otherwise.

Q. I am suggesting to you that the letter seeks to indicate, by not referring to the fact that the institutions are gone, that there is underwriting in respect of circa 60%. 62.5% is the true position; isn't that right?

A. Sorry, the question was a little bit confusing. The reality is, you know, what this letter was actually stating was, you know, "We have arranged underwriting". In other words, we were committing to ensure that the equity not being subscribed by Telenor was provided.

Now, that is the actual state of play. We hadn't said, you know, "We are going to provide it through Dermot; we are going to provide it through" X, Y, Z institution or any other institution. It was a simple statement. You know, "We will actually underwrite and ensure that this company has the money it requires".

Q. The letter doesn't say that IIU, Bottin or Mr. Desmond are entitled to 25%, does it?

A. The letter doesn't go into any detail at all other than to say that we have arranged. It doesn't deal with any of the terms and conditions.

Q. It doesn't say that Mr. Desmond, IIU or Bottin are entitled to 25%, does it?

A. No. I mean, sorry, I have answered the questions a few times before. It clearly

Q. It's a simple yes or no.

CHAIRMAN: He has agreed with that, Mr. Coughlan.

A. I mean, I think I have both agreed with it and said it doesn't deal with any of the terms and conditions.

Q. MR. COUGHLAN: And was that because there was a sensitivity about Mr. Desmond being identified up front in relation to this because of the Johnston Mooney and O'Brien sale issue?

A. Mr. Coughlan, if there had been any sensitivity about us being involved, we wouldn't have sent it in on IIU headed notepaper signed by myself with Dermot listed as a director on the bottom. You know, we were effectively in business; we were trying to develop new business. We were not going to sort of hide our light somewhere and try and pretend that we didn't exist. It was our interest to actually advertise our involvement.

Q. Okay. Now, we might move on now, Mr. Walsh, to I think that's probably it in that book. I wanted to move on, I think, to Mr. Haga's letter. Sorry, Mr.

Haga's letter is probably at the end of this book.

The 12th October letter. It's Mr. Digerud, I beg your pardon. I think it's at Divider 79 sorry, I beg your pardon, I should have dealt with the return of the letter on the 2nd October. I should have dealt with the return.

The letter came back to Mr. Denis O'Brien; isn't that right?

A. So I understand, yeah.

Q. Under cover, or attached to a letter from Mr. Martin Brennan?

A. I mean, I can't remember what element of the divider is that at? I know I have read it, but I can't recall.

Q. 69, I think, is the divider.

"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."

I think you said you may have seen the letter, but you were definitely told of the contents of this letter,

and it must have been from Denis O'Brien or Owen

O'Connell or somebody like that?

A. That's correct, yeah.

Q. And what was your reaction?

A. From my point of view, very little reaction. Because

from my point we had, what I referred to yesterday,

completed our end of the bargain by issuing the

letter. The fact that the Department had decided not

to take it into account, you know, was their decision.

So from our point of view, you know, it was neither

here nor there. We actually had our agreement in

place, and you know, we were issuing the letter, you

know, really in consideration for the agreements. So

you know, shall we say

Q. I was just trying to

A. As far as I was concerned, you know, as long as our

agreements were in place, I really didn't care what

the

Q. As far as you saw it, and you did you had an

agreement with Denis O'Brien on behalf of the

consortium and Denis O'Brien on behalf of Communicorp,

and would I be correct in thinking that it would have

been your state of mind that even if the licence were

granted and the Department said no, they can't have

25% in the company, that you would have taken the view

that you would have gone to Denis O'Brien to satisfy

what you believed you would be entitled to ultimately?

A. Absolutely. And in effect, that was what the Department did do in the sense you know, in the sense that the Department insisted that the, shall we say, kind of shareholding at the date of the grant of licence should be 40:40:20. And you know, we did receive compensation from the other consortia members for the reduction from the 25 to the 20.

Q. Yes, by way of selling the shares; isn't that right?

A. Yeah.

Q. They were bought out?

A. That 5% was bought out to bring it back into the line.

So your hypothesis in terms of our actions or reactions in the event of, you know, us being ruled out in some sense, are probably absolutely correct.

But as far as we were concerned, you know, we had an agreement.

Q. Can I take it and I just want to had you ever been told of the ground rules of the competition?

A. I mean, not

Q. As indicated here, no fresh information or no fresh

A. Certainly not as I recall. I mean, the reality is I mean, the way we would have seen it at the time is Denis was the person running the consortium from the Irish point of view. And you know, if he felt that this should be done, then we would have actually done it.

Q. You did what you were asked to do?

A. We did what we were asked to do.

Q. On the basis of information furnished to you by Mr. O'Brien?

A. Absolutely, yeah.

Q. And can I take it that if you had been aware that there was a ground there were rules that you couldn't provide any further information, could I take it that you probably wouldn't have sent him the

A. I think the reality is if Mr. O'Brien himself had actually felt that he couldn't supply the information or it was going to damage his case, then the letter wouldn't have actually issued. You know, it would be kind of nonsensical, you know.

Q. So as you understood it, Mr. O'Brien was driving for this?

A. Absolutely, yeah, and presumably hoping that he would have a better chance of success at the end of the day.

Q. I take your point.

Did the Department ever contact you directly about this? After all, it had come from you, as you say, big coloured banner head, "IIU", signed by you?

A. They had obviously forgotten my phone number.

Q. If we go then to I think the next document in the paper trail is Mr. Digerud's letter, isn't that right, of the 12th October, which is at Divider 75, I think; isn't that right?

A. '75, yes.

Q. Do you see that? Now, you had never met Mr. Digerud prior to this, and the letter is in the following form:

"Dear Mr. Walsh,

"Although we have not had the chance to meet, let me take this opportunity to welcome you aboard as a stakeholder in Esat Digifone Limited. We appreciate your underwriting of the Irish side of the bid and sincerely hope that this step will remove any doubt within the Ministry about our consortium's financial capabilities and commitment in the race for the second GSM licence.

"A matter of concern for Telenor is, however, the side letter signed by Denis O'Brien and yourself on September 29th, especially clause 2, assigning the arrangement agreement to Bottin International Investments Limited. In order to determine our follow-up on this issue, we urgently need the following information on Bottin:

"Date of foundation.

"Owners.

"Board of directors.

"Balance sheet as of the 30/6/1995

"Annual report for the last three years.

"Please forward such information to Knut Haga and Per Simonsen."

Finally, "As we intend to finalise the shareholders

agreement and articles of association within the next few weeks, I will contact with you within a short time to arrange for the necessary meetings. I look forward to meeting you soon."

Now, I take it that when you received this letter, the first paragraph would have been in accordance with your own view, that you were on board, you were a stakeholder in Esat Digifone, and you were being welcomed on board by another stakeholder; would that be as he states here?

A. That seems to be a fair reading of it, all right.

Q. Then he goes on to deal with the assignment to Bottin, and he asks for, I suppose, what looks like fairly standard-type information, isn't it? Just date of foundation of the company, owners, board of directors, balance sheet as of the 30th June, 1995 that must be 30th June 1995 annual reports for the last three years.

Now, could you have got that information?

A. I have no idea whether I could have got it. I know I didn't try to get it.

Q. First of all, how could you have got date of foundation of the company? I think Mr. Fitzsimons has been able to put it to a witness here that the company was incorporated, I think, in the beginning of 1994, is that right, Bottin?

A. I mean, a quick answer is I have absolutely no idea

about the details of Bottin. You know, I mean, those are more appropriately addressed to Dermot, as I have indicated before.

Q. Well, how could you have got this information? Could you have asked Mr. Desmond for that information?

A. If I had wanted to get it, I could have asked Mr. Desmond. But you know, the reality is that I think this letter went into my permanent in-tray and it never was responded to.

Q. Why?

A. Why?

Q. Yeah.

A. Well, frankly, it was irrelevant at that point in time.

Q. Why was it irrelevant?

A. Because well, I mean, there were two possible events. One, you know, we got the right or more precisely, the consortium got the right to actually negotiate in relation to the licence, in which case, we would actually meet with Telenor and we would actually do whatever they needed in terms of comfort. The other alternative was that we didn't actually get the right to negotiate the licence, in which case, we had never have a business relationship with them. So you know, why would it have been relevant in those circumstances?

Q. Well, wasn't it relevant in relation to an agreement

that you understood that Telenor had consented to, and that was Mr. O'Brien signing the side letter on behalf of Esat Digifone with Communicorp whereby the arrangement agreement was assigned to Bottin?

A. Sorry, it was relevant in the sense it was clarification from their point of view. It wasn't actually material because the agreement had already been signed.

Q. The agreement had been signed, yes; was there any reason why there should have been any reluctance?

This seems like a fairly, I don't know, friendly enough letter, being welcomed aboard as a stakeholder.

This was another stakeholder in Esat Digifone Limited.

It doesn't strike me as being an unreasonable request; would you agree?

A. Sorry, I am not suggesting Telenor were being unreasonable in any sense. But equally well, frankly, it wasn't high up on my priorities to actually deal with.

Q. But I wonder, why is that? What was

A. The reason it wasn't high on my priorities, because we already had the agreement. You know, the decision was still outstanding. If a decision was actually made, which actually kind of named the consortium that we were involved with as the, shall we say, the winners in some senses, then obviously we were going to meet with Telenor and we were going to provide them with

whatever satisfaction they actually wanted. It was totally irrelevant that point in time.

Q. Right. And that was the view you took?

A. Well, I am great at just putting stuff into the in-tray until they become, shall we say, urgent or important. I am sure if Telenor had come back a few times and said "Look, we need something", then we would have actually been happy to sit down and talk to them and see what they really needed.

Q. Well, do you think it might have been relevant to Telenor to know who the stakeholder was? Because when they write to you welcoming aboard the stakeholders, I suppose they should have said, "could you send that on to Bottin, because they are the real stakeholder here because of the side letter"?

A. Well, I am sure there are lots of things that could have been done, but I suppose the reality is, from my point of view, you know, this wasn't particularly important. And I suppose if I were going down your line of argument, I'd say I had already sent them Dermot's CV, you know.

Q. They had sorry, could I just clarify that; I am just trying to follow through on that. You had already sent them Dermot's CV, and was it your understanding that from your point of view and from their point of view, this was an irrelevancy; they knew about Dermot Desmond. Is that

A. Sorry, I mean, they knew about Dermot Desmond. I mean, by definition, from this letter, they didn't know anything about Bottin, you know, because that's what they have actually asked for information on here.

Q. Can I take it if the whole thing if the rights and obligations were assigned to Bottin, that you were in fact acting for Bottin there on in after the assignment?

A. I suppose that's a fair question. Not one that I have thought about up to today.

Q. Well, perhaps you might just think about it in logical terms. Doesn't that seem to be the situation, that you were acting for Bottin?

A. Well, I suppose I'd have to ask my legal advisers as to whether that's legally correct or not. But the practical reality is I suppose I always saw myself acting for Dermot. You know, irrespective of what particular hat it was.

Q. Now, can I ask you, as of the period, let's take it, 29th September or the 20th September, let's take a period to, say, the 25th October, that sort of period.

A. Mmm.

Q. Could IIU itself have subscribed for 25% of the equity as

A. Sorry, IIU itself, you know, if it had to pay it out of its own resources without any additional resources being put in, no, it couldn't have. I think you have

a copy of the balance sheet of IIU as of the end of

December. At least I'd be surprised if you don't.

Q. We do. Do you know if Bottin could have? You don't?

A. I mean, as I said before, you know, I have no information on Bottin.

Q. And do you know anything about Mr. Desmond's personal position, whether he could have?

A. Well

Q. Or is that a matter I'll deal with him?

A. I suppose the quick answer to that, if you were asking me, as a judgement call, could he, the answer is, as a judgement call, I would have said yes, he could have.

If you are asking me do I know for a fact or had I examined his you know, books, bank balances, etc., no, I hadn't examined his books or bank balances.

Q. That's fair enough.

Now, could I just ask you, if you'd just look at Tab Number 76, and this is Mr. Arthur Moran, who had recently become Telenor's solicitor here in Ireland, wrote on the 12th October of 1995, and he is offering advice and views in relation to matters which had been brought to his attention by Telenor people. And really what I wanted to go to is, if you go to the second page of the letter, and under that paragraph which reads: "I have considered your draft shareholders agreement. I will make the following general comments:

"I do not propose at present to deal in detail with the draft agreement.

"1. Clearly IIU or Bottin will have to be added as a party to the agreement and certain of the provisions of the arrangement agreement reflected in the agreement.

"2. Generally, I think that the draft will need considerable work to remove some provisions which apply by operation of law, and they are fairly technical matters.

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

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

And the breach of good faith which Mr. Moran is opining in relation to there is the failure to disclose to the Department of the side letter and the assignment to IIU or to Bottin. Do you have any comment to make on that?

A. Well, I mean, I suppose I have two comments to make:

One, obviously this is kind of, you know, Telenor's legal advice to Telenor. It wasn't advice that they shared with us at this point in time.

Secondly, I suppose that the date that Mr. Moran obviously drafted this, I presume he would have also been aware of the fact that the Department had written back saying they weren't going to take it into account.

Q. I don't think he was aware on that particular date. But soon afterwards, it seems to be the situation, or there or thereabouts.

A. I am simply looking at it from the fact that this is dated the 12th October, and the response from the Department came ten days earlier.

Q. Why would the Department sending it back have any effect in relation to the letter itself and the lack and the breach of good faith in the letter not disclosing the

A. If the Department actually sent it back on the 2nd October saying they weren't going to take it into account, then you know, it seems to me that on the 12th October, the whole thing was completely irrelevant.

Q. Is that the whole what was irrelevant?

A. The letter to Mr. Brennan was irrelevant.

Q. Irrelevant?

A. Yeah.

Q. Now, were you aware that Telenor were also writing to Mr. O'Brien trying to find out about Bottin?

A. I mean, I think the actual record shows that

Q. You were copied a letter.

A. I was copied a letter with I think a compliment slip

I am sorry, I am not sure where it is in the dividers, but there was a compliment slip, I think, you know, on it from Denis saying "please discuss" or "let's discuss" or something to that effect.

Q. Did you have a discussion with him?

A. I don't think I did, but I can't recall at this point in time.

Q. Can I ask you, why were the rights and obligations under the arrangement agreement assigned to Bottin?

A. Because basically, you know, IIU, as you have kind of asked the question a few minutes ago, didn't have sufficient resources in its own books to actually do it, why wouldn't we assign it to whichever part of Dermot's involvement that he felt he wanted to actually do it through?

Q. Do you think it was of any significance to inform the Department, bearing in mind that Bottin was not the company incorporated in this jurisdiction?

A. No, I don't think so. I mean, I think what was very clear in my mind was this was an absolute commitment, as I said before, you know, by you know, kind of

IIU/Dermot/Bottin to actually ensure that the money was in place. I suspect from the Department's point of view, that's what they actually wanted to hear.

You know, I said to you, I think a number of times before, that the precise arrangements I don't think were particularly relevant; if anybody had wanted to ask us, we'd have been happy to go through them.

Q. Well, you couldn't have gone through the position of Bottin yourself, could you, because you didn't know?

A. No, absolutely not. To, you know but, you know, the reality is when it came to due diligence later on, towards May, you know, there were meetings with the Department, for the Department to be satisfied, and we satisfied them on that occasion. I mean, I suppose, I mean, I apologise for being sort of slightly you know, kind of over-responsive, but the practical reality is that you know, we entered into commitments. We honoured those commitments at all stages. And you know, people were trying to speculate, "Well, maybe you wouldn't have". You know, the practical reality is we did honour those commitments.

Q. I am not questioning you at all. And I don't doubt it. Why wouldn't you, in the circumstances of receiving the licence in the situation? Of course you honoured the commitments. And I'm not suggesting for a moment that if the licence hadn't been awarded, that

you wouldn't have honoured your commitment to meet a proportionate share of the bid costs. I am not suggesting that for a moment at all.

That was your exposure, wasn't it, really?

A. That was our exposure, yeah, absolutely. Assuming that our judgement was right that if Telenor were doing it, it was a good idea.

Q. If things didn't work out, that was your exposure.

That was the exposure, the proportionate

A. Absolutely.

Q. share of the bid costs.

A. Yeah.

Q. Now, I think the result of the competition was announced on the 25th October of 1995; isn't that right?

A. I mean

Q. You can take it from me that's when it was.

Now, I take that as of then, you saw the position that your involvement was something you were proud of?

A. I mean, I think from the very beginning we were actually happy to be involved with it.

Q. Why wasn't your involvement disclosed on that date, the date of the announcement of the result of competition?

A. To be honest with you, I mean, I don't remember precisely what was disclosed or wasn't disclosed at that date.

Q. I can assure you that your involvement was not announced on that date. Do you know why?

A. Well, sorry, I mean, I have just said to you I don't know what was or was not disclosed on that date. I mean, the only focus I had on that date was, you know, I heard the consortium had won the right to actually negotiate. But you know, beyond that, we weren't particularly focused on

Q. Well

A. You know, I think the comment actually arose subsequent to what date was it?

Q. Your involvement was not disclosed, I mean publicly disclosed, until the 16th May of 1996, when the licence was signed over.

A. Sorry, it may not have been formally publicly disclosed, but certainly I think there was suggestions both in the media and in the commentary from I couldn't tell you when, but certainly November/December.

Q. I'll come to those in due course. There was an article there are various articles showing various degrees of potential involvement, but and I mean your involvement as stakeholders, participants, partners, whatever term you use; that wasn't disclosed, isn't that right, to the best of your recollection, best of your knowledge?

A. To the best of my knowledge, it wasn't.

Q. Do you know why?

A. I mean, not particularly. I mean, I wasn't actually focused on the thing. I mean, the main operational people were Esat and Communicorp, whatever, and Telenor. You know, I don't know whether they talked about the funding arrangements at all for the company.

Q. This wasn't a question of funding arrangements. This was a question of who was involved in the consortium.

A. But I mean, effectively we were there as a providers of finance. We weren't, shall we say, the main issue, I would have thought.

Q. I beg your pardon?

A. Sorry, we were there as the providers of finance. The main focus was obviously on the you know, kind of Esat and Telenor side, the kind of operating components.

Q. So the position changed, so, from Mr. Desmond wanting to be involved on the same terms as Telenor, being a partner, looking for 30%, In that respect, achieving almost that, in 25%, and as you told us that, you and he were very actively involved in this company, rolled up your sleeves when the going got tough and got involved in it, and you're now saying that that was just in the capacity as just providers of finance; is that right?

A. Well, I think to be very clear I think what you are trying to infer is somewhat different, I suppose, is the best way to put it. I mean, the reality is, as I

said to you yesterday, if we actually invest money in a company, and indeed if anybody sensible invests money in a private company, they look for a shareholders agreement which gives them appropriate controls and protections, but they are still primarily the financial group. They are not there to run the project in any sense.

Q. Not run the business?

A. Not there to run the business.

Q. Other than a very active role by directors representing financial shareholders, for example, in the Barry Maloney situation; isn't that right?

A. I mean, there were lots of examples where, you know, we actually got involved in various aspects of the thing. But I mean, the practical reality is that we were getting involved as financial players. We weren't there to actually run the business for anybody. We weren't there to actually build the networks.

Q. Oh, yes, I accept that. I accept that.

Would you look at a note made by Mr. O'Connell. You weren't at this meeting. It's on Book 49, Tab 84.

There was this was on the 3rd November of 1995. Do you have that?

A. I am looking at the typed version.

Q. All right. Yes. The typed version is better.

You can see there Denis O'Brien, Leslie Buckley, Paul

Connolly and John Callaghan are there.

"IIU issue. Bullet point for press release.

Probably re material change in shareholders versus bid."

Do you see that?

A. Yes.

Q. "Group of institutional and other investors to be located by underwriters IIU."

Now, were you told that there was a discussion taking place about a potential press release?

A. I don't know, do we have a draft of the press release?

Q. No, if you just go down, you can see there is a reference to "Had to upgrade financing arrangements, primary criterion from comfort to underwriting. IIU willing to give underwriting commitment and did so.

Clearly gave control of 20% to underwriter.

Understanding is that underwriter will be placing shares with investors and institutions".

Then there is a question mark, "Michael Walsh call?"

Now, I don't know whether that is somebody saying "Will we call Michael Walsh" or "Michael Walsh called"; I don't know. Do you remember any discussion with anybody around this time or any of these

A. Well, to be honest, that's why I was wondering whether we had a copy of the press release. Certainly there was as to, you know, what was going to be said about IIU at what stage. You know, as I have indicated all

along, there was a lack of clarity on our side as to what exactly was going to happen to the shareholding: whether we were going to place it all with institutions, whether it was going to be taken by Dermot or otherwise. And we had no firm decisions until much later in the day.

Clearly, you know, and if you look at I think Kyran McLaughlin's draft letter of whatever it is, 22nd November, you know, there was sensitivity from a number of quarters about the fact that we were involved, you know, potentially that you know, there were a number of people aggrieved, now that the thing had in some senses passed the winning post, because they weren't involved.

Q. Why was there no decision as to whether Mr. Desmond would be taking the 25 percent or it would be placed at this stage? This was a great opportunity, wasn't it?

A. Yeah, but

Q. It was good enough for Telenor; it was the original basis he got in on it.

A. But I mean, why would you actually tie yourself down to making a decision at that stage?

Q. Why wouldn't you?

A. Basically, certainly in my life, you tend to keep your options open so as to see when you are going to maximise your value.

Q. Were any steps taken, at that stage or subsequently, to secure interest from other investors?

A. No. There were no steps taken because I think from a fairly early stage, shall I say, the whole shareholding thing became completely confused, because I think more or less as soon as the announcement had actually been made, Denis was trying to actually take control of the company. So there was always kind of a greyness as to what the ultimate shareholding was going to be.

Q. But even at that and when you say "take control of the company", he'd have to purchase the 12.5% from you; isn't that right?

A. Absolutely, yeah.

Q. But you would be left with 12.5%, on that scenario?

A. Yeah.

Q. Were any steps taken at any time to secure interest from other potential investors?

A. With respect, Mr. Coughlan, that's not the way the real world operates. You know, you go to investors when you actually know exactly what you are offering them. The terms on which you are actually going to offer it. You couldn't go along to somebody and say "Well, here we have, shall we say, a situation where we are not sure of what shareholder this is going to represent; we are not sure what control it is going to represent". I mean, it would be nonsensical.

Q. All right. When was it decided that Mr. Desmond was going to take it all?

A. I'd say the actual decision probably wasn't taken until, you know, sometime you know, in April sorry, I have to be a little bit careful now, because it may have been as late as May, you know, because I mean, the jockeying was going on about the shareholding positions right up to, as we see from the documents here, the 11th or 12th May.

Now, I mean, clearly, from sometime at least early in May, but it could have been late April, you know, I mean, there would have been a decision: "Look, we can do nothing about placing these on until, you know, everything gets sorted out here".

Q. Just on that question of the jockeying for position, it was a jockeying for position by Mr. O'Brien; isn't that right?

A. That's right, yeah.

Q. And he was going to have to pay for them?

A. He was.

Q. And that was going to be paid to you, so anything that was going to Mr. O'Brien was going to be result in a payment to you; isn't that right?

A. Hopefully, yes.

Q. That would be the mechanics of it. So can we take it that

A. I think the only minor problem was he didn't have the

money to pay.

Q. Can I take it that in all of that, so, that there must have been some thinking that Mr. Desmond was going to keep at least that number of shares, whatever would be sold to Mr. O'Brien?

A. I mean, as I said, it was a completely fluid situation. I mean, Denis made proposals, counterproposals, I think you know, we I suppose largely believed they wouldn't come to anything, because I think from very a very early stage, once he made the first proposal, we set as a precondition that we'd more or less do anything provided Telenor agreed. And given that Telenor were sensible people, they were unlikely to agree to somebody taking control of the company.

I mean, I think this should also be said: It's clear, even if you go to the shareholders agreement of the 16th May, that we were still keeping our options open to actually sell the shares.

Q. I am going to look at that in closer detail. You needn't worry; I'll get there.

A. I don't doubt that you'll look at it.

Q. I'll get there eventually.

A. But nonetheless I think there was a clear indication that there was fluidity up to and including that date.

Q. That's the side letter you are talking about?

A. That's the right that you know, Dermot had to

actually

Q. The one free transfer?

A. The one free transfer, exactly.

Q. I'll look at that, don't worry.

I suppose you weren't at the meeting, so I am not going to open it, but there was a first post-competition meeting with the Department, members of the consortium and the Department, on the 9th November of 1995. You weren't there. Were you told anything about it, or it was to discuss the licence.

A. I mean, sorry, I may or may not have been.

Q. It was with the Department, and Mr. Michael Andersen was there, I think.

A. Sorry, is there a minute of that meeting or

Q. There is, but you weren't there, and I am just asking, were you told

A. I mean, I have no recollection of being there.

Q. You weren't. You weren't.

A. I have no recollection of being told anything about it, but you know, equally well, without seeing the minute and reviewing what was said, it's hard to

Q. The only thing is it wasn't the Department weren't aware on that occasion of the full involvement of IIU?

A. I take your word for it. As you say, I wasn't at the meeting.

Q. You weren't at the meeting?

A. So I mean, to be honest, I am not familiar with the minutes, so I have no idea what was really discussed.

Q. You needn't be concerned about that for the moment.

You see, the Department say that they knew nothing about the involvement until Owen O'Connell the 16th April, when there was a phone call from Owen O'Connell to Regina Finn, and the letter of the 17th April you know, that letter of the 17th April; I'll come to it in due course after it was sent in.

Now, I'm just looking at a few documents and asking you what your state of knowledge of the situation was.

Mr. Owen O'Connell has given evidence that the true nature or the full nature was not disclosed to the Department until around that time, although that there may have been matters in the media. And I think, even without me asking him a question, he volunteered that if I was to push him on the matter, he would say that this wasn't as a result of an accident or omission; that it was part of the strategy.

A. Well, I mean, I think it's clear from his file note on the 11th the 3rd November, you know, that they were, you know, concerned about, shall I say, various people being upset by our arrival.

Q. But you mean "various people": You mean the likes of institutional investors and matters of that nature?

A. I would say the other institutions who had lost out were probably upset, all right.

Q. But why would that affect telling the Department?

A. Well, to be honest, I have no idea why. I mean, I suppose I would have taken it in some senses, obviously from their evidence, it's not the case; but I would have taken it from their side that, you know, I had written a letter on the 29th September saying, you know, "Here we are; we are involved". They wrote back saying they are going to take it into account in the competition. But you know

Q. Well, in fairness to Mr. Brennan, his view and he didn't see the letter, or if he did, he doesn't remember, and the contents may have been indicated to him by

A. I wasn't trying to be unfair to Mr. Brennan in any sense, but I am simply saying that my perception of the situation and, shall we say, his perception could have been totally at variance, even though we both had our own beliefs. You know, I would have taken the view that you know, we had actually notified the Department through that letter of the 29th. You know, what they did with it afterwards, other than return it and say they weren't going to take it into account in the competition, I had no idea about. But I mean, I had no contact with the Department.

Q. Right.

A. I am sure if I had, if there had been any conversation, it would have been quite open about it.

Q. Well, let me there was a newspaper article it's at Book 58, Section B, Tab 5.

A. Actually, I don't have Book 58.

Q. All right, I'll organise, and also at Tab 6. I'll tell you, I can I'll put it up on the screen; it might be this is the first one is in The Irish Times on the 18th November.

And Mr. Dermot Desmond's financial services company has been appointed to handle the sale of a 20% stake in Esat Digifone, the company which won the second mobile phone licence.

"The Chairman of Esat, Mr. Denis O'Brien, last night confirmed that Mr. Desmond's company, International Investment & Underwriting Limited, has been appointed as advisers for the sale of the stake. However, he would not comment on industry sources' belief that Mr. Desmond" or one or some of his or one of

his sorry, I beg your pardon; I'll read that again:

"that Mr. Desmond or one of his companies has purchased a portion of those shares. When the 20% stake is placed, Mr. Denis O'Brien's holding company, Communicorp, will hold 40% stake in the company. The remainder will be held by the Norwegian telecommunications company, Telenor. Esat Digifone is estimated to be valued at $\frac{1}{2}$ 100 million. Last month Mr. Desmond paid 14.5 million for London City Airport. Given that the airport was originally on the market

for $\frac{1}{2}$ 30 million, Mr. Desmond is seen to have driven a hard bargain in the deal.

"Mr. Desmond is perhaps best known as the man behind NCB Stockbrokers. He sold his stake last year. He has since invested $\frac{1}{2}$ 4 million in Glasgow Celtic Football Club. Esat expects to begin providing a nationwide mobile service by the end of next year."

Did you ever see that article, or do you remember?

A. I mean, I don't remember. It wouldn't surprise me if I did see it, if it was in The Irish Times.

Q. It's inaccurate, isn't it?

A. In multiple respects, yeah. I mean, amongst other things, if it was worth 100 million at the time, we did a very stupid deal selling out the 5%.

Q. It's inaccurate in relation to more material aspects, isn't it?

A. It's inaccurate in relation to quite a few things.

Q. Yes.

There's another article on the same day, which is The Irish Independent, and it's at Tab 6 there, just put that up.

A. Thank you. This is the Shane Coleman piece.

Q. The Shane Coleman piece, yes.

"A financial services company owned by financier Dermot Desmond is advising Esat Digifone on the placing of 20% of the consortium's shares with institutions or other investors, it emerged yesterday.

"A statement from Esat Digifone, the winner of the second GSM mobile phone service, said Dr. Michael Walsh ... IIU has been appointed to advise the consortium on this aspect of its financing.

A spokeswoman said that IIU would arrange for the placing of 30 percent of the group's shares, but she declined to comment on reports that Mr. Desmond's company would be underwriting this sale.

I think that's a reference to Ms. Gleeson there as spokesperson.

"There was speculation last night that Mr. Desmond himself or some of his companies were likely to take up some of these shares. IIU was established by Mr. Desmond to deal with a limited number of clients and selected investment and property-trade its own capital. A spokeswoman said the identity of the investors would be revealed in a few weeks' time.

The day after winning the GSM licence, Esat Telecom Chairman Denis O'Brien said the shareholding in Digifone would be 40:40:20 between Esat, the Norwegian State phone company, Telenor, and unnamed investors.

He said the overall investment was underwritten by Esat and Telenor. Mr. O'Brien has consistently refused to be drawn on the identity of the other investors in Esat Digifone. He said on winning the licence that the funding was there but that the institutional investors don't write cheques until they

see the terms of the licence. It is not clear what the present market value of the 20 percent stake in the consortium would be worth.

"Mr. O'Brien has said that the group will invest around 100 million in building a network. Given that he also said that the debt/equity ratios of the business usually ranged between 50:50 and 40:60, a 20% stakeholder might be expected to invest a minimum of $\frac{1}{2}$ 10 million in the group. Any investors likely to have to pay a premium in respect ... of the licence.

The consortium has also said that it would consider floating 20 percent of its shares in about three years' time, depending on the state of the market, giving investors an opportunity to cash in their gains if the licence proves as successful as expected. The news that IIU would be advising Esat Digifone comes only a couple of weeks after the announcement that Mr. Desmond had purchased London Industrial Airport in a sterling $\frac{1}{2}$ 23.5 million. He also made a $\frac{1}{2}$ 2 million investment in Glasgow Celtic for a 10% share."

Do you remember either of those articles?

A. I mean, I have no direct recollection of them, but I mean, we may well have seen them at the time. As I say, I'd be surprised if I didn't see them in The Irish Times. The Irish Independent I'd be less certain of.

Q. Ms. Gleeson believes and I think her firm were

advising your company as well?

A. That's correct.

Q. As well as Mr. O'Brien's, isn't that correct? And she feels that she would have made contact with both Mr. O'Brien and perhaps with you. Or Mr. Desmond.

A. It certainly wouldn't be abnormal. I mean, we normally never comment directly to the media or anything, so any comments would have actually gone through Eileen.

Q. Yes. Do you remember making any comment at all, or

A. Not particularly, no.

Q. Right. You, at least, or IIU, didn't decide at that stage to make public the fact that you had a 25% stakeholding in relation to this matter; isn't that right?

A. No, we wouldn't have handled any of the media contact at all.

Q. No, but you didn't instruct Ms. Gleeson to say that?

A. No, we wouldn't have instructed Ms. Gleeson to say anything.

Q. Could I ask you why that should be so? Like, this was first of all, as you have described yourself, a coup in respect of Davys, although I don't understand that, and perhaps it doesn't arise now.

A. I suppose, Mr. Coughlan, it's like when you go into something, you know, and you have somebody who you respect on the other side and you actually win, of

course you view it as a success.

Q. I know you viewed it as a success; I understand that.

This was an exciting business to get up and running;

isn't that right?

A. It was an exciting investment opportunity.

Q. An exciting investment opportunity from Mr. O'Brien's

point of view, and from Telenor, and perhaps from

their point of view an exciting business to get up and

running?

A. Yeah.

Q. Why would there be any reluctance to indicate what the

actual position was?

A. Well, I mean, you'll have to ask Mr. O'Brien why he

decided at the time to say it was 40:40:20. You know,

it seems to me that there is a reasonable number of

inaccuracies in that document.

Q. I know. Did you ever ring up Denis O'Brien or do

you remember, did you ever ring up Denis O'Brien and

say, "What are you saying there, Denis? It's not

40:40:20."

A. To be honest, you know, from my point of view the

media is entitled to say whatever the media is

entitled to say.

Q. I understand that.

A. I really wouldn't

Q. But this is a quote being attributed to Denis O'Brien.

I am not asking to you ring up Shane Coleman or the

other journalists. Do you remember, did you ring up

Denis O'Brien and say "What's this all about?"

A. I'd be absolutely astonished if I rang up Denis and complained to him about something he said to the media. I mean, whatever way he wanted to handle the media was entirely up to him.

Q. But it wasn't true?

A. I mean, I don't think I have any responsibility to tell Denis how he handles his media relations.

Q. Yeah, but it reflected on your position.

A. But irrespective of the fact that you know, he had misled the media as to whether it was 40:40:20 or 37.5:37.5:37.5, you know, that was a decision for him.

I mean, it wasn't something that I was going to have sleepless nights about.

Q. All right.

A. With due deference to the members of the press present.

Q. Well, can I ask you, you know that note of Mr. O'Connell's of the meeting Gerry Halpenny's note of the meeting on the 21st November, 1995 you weren't at this meeting 1995 Divider 90. This is you weren't at this meeting.

You can see that Richard O'Toole, Peter O'Donoghue, Knut Haga, Per Simonsen, Arthur Moran and Gerry Halpenny, and: "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 SA SP.

Then there is "CSFB, position paper was being marketed, good reaction so far."

Then there is "Replace? DOB with Advent." That's a different matter.

Then "Carve out the radio division" that's to do with resolving a dispute he had with the Department and carving out of the radio division.

Then you see "40:40:20 issue should not be a problem.

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

Now, do you remember around this time that the question of IIU and the question of 40:40:20 was an issue that was concerning people?

A. Not particularly. I mean, first of all, obviously kind of this looks like some sort of planning meeting in terms of bringing things forward.

Obviously we weren't involved, as I say, at the time.

And it looks very much like it's kind of the two, shall we say, the kind of main partners getting together to go through all the issues that are there.

So I have no

Q. Did anyone

A. I have no idea whether we were given any, shall we say, feedback or list of issues following that

meeting. I am not aware that we even knew that meeting was on.

Q. Yes, but do you remember any general discussion, even, that the 40:40:20 split was an issue, or would be an issue for the Department, or could be an issue for the Department at that time?

A. Not at that stage. I mean, it clearly becomes an issue later on.

Q. From April into May?

A. Yeah, I mean, I certainly don't well, I mean, you'd really have to go back and look at all the various times to see the first solution. If you like to put it that in financial engineering terms, to the 40:40:20 versus the 37.5:37.5:37.5 was being considered.

Q. That's at the end?

A. I am pretty sure it's at the end, but I have no idea whether there was consideration given to it at an earlier stage. But certainly I don't recall any particular anxiety being expressed in relation to

Q. Being expressed to you, anyway?

A. Yeah. As I say, the only thing I am really conscious of is, shall we say, Denis's desire to effectively get majority control of the company.

Q. Yes. Were you aware of any contact Mr. O'Brien or anybody may have had with Martin Brennan?

A. No, I wasn't aware.

Q. I think the next document might be I'll just briefly touch on this; this is Tab 99. It's from Neville O'Byrne. It's a memo from Neville O'Byrne to Gerry Halpenny. I think at this time Neville O'Byrne was acting for

A. He was acting for us, yeah.

Q. When was that when was he appointed as solicitor in this?

A. I mean, I am not really sure. You know I mean, sorry, you know, this seems to be the first, shall we say, kind of note that Neville actually did in relation to any of this. So I presume that you know, somewhere in the kind of previous week or two weeks, he had become involved, but as a matter of fact I couldn't tell you what date he became involved.

Q. Was there any particular reason why you chose a solicitor in the firm of solicitors who were acting for Digifone and Communicorp?

A. Well, I mean, the reality is, I think you know, if I go back through the transactions that I had done that year, you know, Pembroke Capital, I had used Neville. You know, basically, I sold a business in July, and I had used Neville for that. I had used Neville both in terms of you know

Q. He would have been your solicitor he would have been a choice of solicitor for you?

A. Yeah, I mean, I had used him in the previous four or

five transactions that I had just completed. So it was kind of a logical extension to continue to work with him.

Q. Now, this is a just notes on the draft shareholders agreement; isn't that correct?

A. Yeah.

Q. Now, you were if you look at clause, or sorry, paragraph number 4, Clause 1.8, do you see that there:

"Our client requires the power to veto the issuing of new shares in the capital of the company, capital contributions to the company and subordinated loans and any combination of any one of more of them."

I am just going to pick out a few.

"6, Clause 1.22: "It is our client's opinion that a decision to create subordination loans should be a unanimous one."

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

Then at 10, Clause 4.5: "Our clients are not happy with the figure of 75% and suggest a figure such as 75.1%."

And there are a number of others, but I think it all seems to indicate that you were looking for significant changes in the draft shareholders

agreement, something more akin to a strategic partner;

isn't that correct?

A. Well, I mean, I wouldn't accept the term "strategic partner". But I mean, we were going to put a lot of money at risk here. We were going to look for every protection that we could get. I mean, why wouldn't we?

Q. And in fact, in relation to the final shareholders agreement, did you get protection, as you saw it?

A. I wouldn't say we got everything we wanted. Unfortunately there were two other people there who were also trying to protect their position.

Q. Yes, but you got significant protection; isn't that right?

A. Absolutely, and you know, I think as is even clear from you know, my letter of the 29th, the condition of us putting in the money was that there'd be a shareholders agreement appropriate for a minority shareholding in a private company.

Q. At this stage, so, on the 19th December, of 1995, when you were pushing for

A. Everything we could get.

Q. Everything you could get, and you say because you were putting considerable capital at risk here, or investment involved here?

A. I suppose potentially.

Q. That's what I was just going to ask you about. It

looked like that you weren't doing this on your own behalf at this time?

A. We were definitely doing it on behalf of protecting, you know, whoever the money came in from, yes, absolutely.

Sorry, I wonder, through the Chair, could we have a five-minute comfort break?

Q. Sorry, yes, of course.

THE TRIBUNAL RESUMED AFTER A BREAK AS FOLLOWS:

Q. MR. COUGHLAN: I wonder, if you just I think, Michael Lowry, as Minister, spoke in the Dail I think on the this was in November of 1995, 22nd November, I think. Now, questions were being examined about the ownership in respect of Esat Digifone. I accept, you were aware of that

A. Sure, sure.

Q. And I am not going to go into this in detail, but Mr. Lowry invoked confidentiality in that regard in not disclosing who the owners were as disclosed in the bid. You remember that?

A. I mean, not precisely, but I mean

Q. You can take it

A. I can take it that that's correct.

Q. Do you remember that, and do you remember wondering about it or what was going on here?

A. Not particularly, I mean, in the sense that I don't actually remember you know, Mr. Lowry per se

actually giving any particular statements or otherwise. You know, I am quite happy to accept that he actually did, but you know, I haven't read the stuff. Dail debates wouldn't be kind of top of one's priority for reading.

Q. At that time there was some controversy about matters, and you knew that you had an agreement. You knew that the financial institutions associated with the bid were gone, didn't you?

A. Mmm.

Q. Did it ever

A. Well, I mean, sorry, I knew that we had an agreement.

Q. Yes. And you knew did you not know that Mr. Callaghan had gone to see Kyran McLaughlin?

A. I was quite aware of that, because John went to Kyran on whatever it was, the 29th September.

Q. But do you remember being in any way surprised, puzzled, wondered why the Minister was doing this?

A. Why he was invoking confidentiality?

Q. Yeah.

A. Not at all no, isn't he quite free to do that?

Q. Were you aware that there was a mandatory obligation under the RFP to disclose who the licence who would be the licence holder?

A. No. I think, as I have said before, I wouldn't have been familiar at all with it.

Q. That's fair enough.

Now, at Document 104, this seems to be the beginning of the paper trail. I am not going to go into this in detail, of Mr. O'Brien seeking to acquire the 12.5, 12.4, 12.6%, to gain control of the company. That seems to be the beginning of the paper trail, at least, in relation to it.

A. Yeah, I mean, I think as I indicated to you before, my feeling is it actually began kind of earlier than this, that it began in December sometime, but

Q. Right. These are documents, anyway, they are certainly clear that that is what he is seeking to do; isn't that right? He is communicating with you?

A. Yeah.

Q. And I think if you then I am not going to go into that in any detail. That came to nothing, but that's the beginning or the documentary the documents relating to it, at least.

Now, if you go to Tab 105, I just wanted to ask you about one thing in this. Now, this, I think, was the first shareholders meeting. It was at William Fry's.

It's Gerry Halpenny, Peter O'Donoghue, Richard O'Toole, with Per Simonsen and Knut Haga. Then you can see "IIU points", and they are dealing with aspects of the draft shareholders agreement.

Then you go down, "Department still believe in 40:40:20 split. Cash call likely soon, 12 million, 2/1/96.

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

A. Certainly on the typed-up version, it says "John Bruton", but I don't think John was present at anything.

Q. "Neville O'Byrne, Sonya Price." You were at this meeting, I think, weren't you?

A. Well, to be honest, I don't actually know. You know, sorry, when I say I don't know, I mean I just have no recollection one way or the other.

Q. All right. Because I think Mr. Moran and all the other people have given evidence to the effect that you were there.

A. Yeah, sorry, the only reason I am questioning it is on the basis of the document that's actually here, you know, it talks about the various people who were at William Fry. You know, which is effectively all the Telenor people and the Esat people, and then sort of in the body of Mr. Moran's note, there is a reference to myself, as I say, John Bateson, Neville O'Byrne and Sonya Price. But whether or not, you know, that was intended to imply that we were at the meeting or whether it was

Q. You joined the meeting?

A. We joined the meeting, did we?

Q. That's the evidence, anyway.

A. Sorry, it may well be; I just have no recollection of

it.

Q. I am just wondering, do you remember any discussion about the Department's that note, "The Department's belief that it's still 40:40:20 split"?

A. A quick answer is, no, I don't have any recollection.

As I say, I don't really recall this meeting per se.

Q. Right. Now, if you go over the note. You'll see there at the bottom, "Participation in Digifone 37.5:37.5:25."

"40:40:20". That's one in place of the other. Do you remember discussing that?

A. I mean, as I said to you earlier when we were discussing you know, when the 40:40:20 became, shall I say, an important thing for the Department, as I said, I had a vague recollection that we looked at kind of financial engineering solutions to the thing at an earlier stage. Now, I think you thought that they were all in May. But I mean, I would have a very vague recollection that we had some, what I would describe as kind of, you know, financial engineering discussions earlier on. When I say "earlier on", maybe kind of as early as January.

Q. Could you just explain, what are the financial engineering discussions, or what are what is financial engineering? Can you help me?

A. Quite a broad definition. If somebody wanted us to have ordinary shares at 40:40:20 and to have the

economic effect of 37.5:37.5:25, it would be very easy to structure something to enable that to take effect.

Q. I see. How would you do that?

A. I mean, you know, one of the suggestions was that I think there would be some form of convertible, so that effectively it would convert into ordinary shares in certain circumstances.

Q. Can I take it, then, that there must have been a sensitivity or a discussion or a consideration about the bid document and what had been disclosed on the bid document?

A. I mean, I don't remember it in the context of the bid document. I remember, you know, there was sensitivity as to whether or not it should be 40:40:20 or 37.5:37.5:25.

Q. Had you been informed that what had been in the application was 40:40:20?

A. Well, I mean, I am pretty certain that we were. I mean, I am probably informed of that at a very early stage, in the sense that you know, I am sure well, I mean, I can't recall at this stage, but I'd be surprised if Denis somewhere along the line didn't use it as an argument for keeping us below the 25.

Q. Yes, and did you consider that to be of significance, that that's what the application had been?

A. No. I mean, I didn't consider it to be of significance. I mean, I was focused on what was in it

for us, not for

Q. All right.

You see there on the typed note, after you're recorded

on this note as having joined the meeting,

"Recital E on whose behalf are IIU acting? IIU

Nominees listed. Need to talk to the Department."

Do you remember a discussion about that?

A. I don't, really. I mean, normally we would actually

do most things in the name of IIU Nominees, because

then it's very easy to draft the documents on that

basis and then actually decide kind of closer to the

end of the day whether we are going to be holding them

in trust for, you know, Dermot or whoever.

Q. Well, you had only started operating as an entity,
isn't that right IIU?

A. Yeah.

Q. When was IIU Nominees Limited incorporated?

A. I mean, a quick answer is I don't know. That wasn't

one of the things you gave me for homework last night.

Q. Sorry, I beg your pardon.

A. International Investment & Underwriting Limited itself

was incorporated on sorry, I have the document

here International Investment & Underwriting

Limited was incorporated on the 1st December '94.

Unfortunately I don't have a note when IIU Nominees

was actually incorporated. It wouldn't have surprised

me if, you know

Q. Would it have been in March of 1996?

A. To be honest, I have absolutely no idea. You know, the practical reality is

Q. It's something we can check.

A. Yeah. I mean, sorry, the practical reality is we would have expected to have a nominee company, you know, because it would have been the normal part of actually doing business in the type of investment that we do or any of the other people who are in the investment business do.

Q. This is a nominee company to conduct Mr. Desmond's business; is that right?

A. Well, sorry, it's a nominee company to actually hold shares on behalf of whomever. I mean, if I deal through, you know, Davys or Goodbodys or NCB, you know, they all use kind of Davy Nominees or Goodbody Nominees or whatever.

Q. Yes. At this stage, you were still conducting Mr. Desmond's private business apart from the advice you had given in relation to the disposal of another company; isn't that right?

A. Sorry, absolutely, in the sense that

Q. And I am not asking for any names or anything like that, because I seem to remember we did discuss this matter at some stage, perhaps when we spoke in private session. That advice was to somebody who was known to or an associate of Mr. Desmond; isn't that right? I

am not asking for any names.

A. Sorry, which advice?

Q. The advice in relation to the sale of the company.

A. Sorry, it was certainly somebody who would have been known to Mr. Desmond, but to describe him as an associate

Q. Sorry, I am using it in a loose I am not using it in a business sense in relation to that company.

A. Sorry, I find the comment peculiar, because you normally only do business with people you know.

Q. Well, this wasn't some I won't go into it in detail at the moment.

But we can help you there: IIU Nominees Limited was incorporated on the 21st November of 1995.

Now, I think this is if you go to Tab 111?

A. I mean, that's actually quite a useful tab to go to, because that actually highlights the fact that certainly as of the 8th February, 1996, there was some discussion about a convertible structure so as to maintain kind of the 40:40:20 ordinary shares.

Q. I think there is Neville O'Byrne and you, Denis O'Brien and Owen O'Connell.

"Michael Walsh talked, DD does not want to sell out fully. Happy with convertible structure.

Uncomfortable about shareholdings in multiple companies.

"Some discussion with DD co-investing with CSFB, but

is very tentative.

"Current position IIU will go to 12.4%.

"Will resolve 5% problem by convertible

Same effect as share" that's the point you were making, "See Michael Walsh memorandum lot of difficult points.

"Problem for IIU in coming up with capital in interim.

"Owen O'Connell draft convertible preference share (conversion subject to Minister consent) convertible debenture?"

So there is that discussion of what you describe as financial engineering being discussed there. It's also noted

A. I mean, the only part of that I don't understand is what Owen O'Connell is suggesting in terms of problem for IIU in coming up with capital in the interim.

Q. Owen O'Connell isn't suggesting that. Owen O'Connell is noting what is being said to him at the meeting.

A. Well, whether he is noting or otherwise, I still don't understand that statement.

Q. Why don't you understand the statement? This is a solicitor taking a note of a meeting. He notes what is said to him, or he notes things that he has to do.

And he has noted here, "Problem for IIU in coming up with capital in interim." Can I take it that the only one he could receive that information from at that meeting was you.

A. I am sorry, that's why I can't actually understand the note because there was never any problem with access to capital. The only issue was actually getting things properly tied down.

Q. What capital did IIU have at that stage?

A. Well, I mean, IIU/Dermot/Bottin

Q. I am asking first of all, what capital did IIU have?

A. I think we already referred

Q. It is February, sorry, the same applies, I suppose.

A. The same applies.

Q. Okay. You don't know what capital Bottin had yourself?

A. I don't know what capital Bottin had, what capital Dermot had.

Q. Right.

I think it's Tab 115, I think you received a fax from Arve Johansen on the 12th March, '96, and he enclosed a copy of a letter he had sent to Denis O'Brien. Do you have that?

A. Yeah.

Q. And in his fax to you, he said, "Dear Michael,

"Please find attached a letter to Denis O'Brien

stating that an equal basis is the principle behind

our participation and development of Esat Digifone.

To secure all investors' interests, it is vital to

maintain the balance between the operating partners.

"Should part of your 25% stake be available currently,

I feel confident at the present time that we will be offered such shares on a pro rata basis. Please do not hesitate to contact me."

And he sent the letter we have opened the letter to Denis O'Brien on a number of occasions, and that's illustrating the point you were making there that Telenor weren't going to agree to Denis O'Brien getting majority interest in the company; isn't that right?

A. I mean, that's absolutely the case. I mean, they would have been mad to, because they would have been

Q. Well, from this time on, it seems clear, doesn't it, that whatever Denis was trying to obtain, Telenor weren't going to agree to it unless they got the same take as him, and you were in a position where the 25% was something that you were going to hold onto?

A. Sorry, yeah, absolutely.

Q. From this note, at least, anyway?

A. I mean, to be very clear, you know, I think from the first time that Telenor you know, shall we say, commented on the matter one way or the other, I mean, my recollection is that you know, I had a breakfast meeting with Knut and Denis down in our offices, and Denis kind of raised the issue. And basically Knut sort of set out the Telenor position was you know, they weren't interested in actually selling anything

to anybody at that point in time. Denis I think wrote to Knut afterwards saying that he intended to continue the discussion with us, and you know, we basically said, you know, "We are happy to do this provided Telenor are actually happy, and provided" but I think, as practical people, we didn't expect Telenor to agree.

Q. Can I ask you: Why would you I am just wondering, why would you have been happy to sell out 12.6% of the shares if Telenor agreed?

A. Why would we?

Q. Yeah.

A. Well, I mean, the reality is, if we could have made money on the 12.6 I suppose Dermot and I might have had different views. I probably would have been happy to sell the full 25%. He, on the other hand, would be much more interested in kind of playing for the long haul, but probably would actually have been at the other end of spectrum.

Q. Could it be that you were considering, subject of course to Telenor's agreement, selling 12.6 to Denis O'Brien have some bearing on that note of Owen O'Connell's about IIU inability to come with capital in the interim?

A. No, as I say, I mean, I can't see any rationale for Owen O'Connell's note. But certainly, no, that had no inclination. I mean assess investments on the basis

of the amount of risk. I would be more risk-averse than Dermot, which is probably why he is twice as successful. He would have probably played for the long haul. On the other hand, if I could have actually cashed in and taken all the money off the table and been very happy, I'd have been delighted, even if the sums had been much lower.

Q. I am going to ask you now, there was an article in The Irish Times, I think, on the 28th February, of 1996.

It was written by Mr. John McManus, and can I just ask you

A. Do you have a copy of the article?

Q. I'll get that for you, yes. It's at Book 58, B7.

A. I think the books here only go as far as Book 51.

Q. These are different books.

CHAIRMAN: I think it's probably a more sensible use of time, Mr. Coughlan, since we have had that article up numerous times, and everybody probably except understandably Mr. Walsh, has read it, it probably makes sense to give you an opportunity to glance at it over lunch. There are two quite short articles, and we will, in view of the time factors mentioned yesterday, we will resume a little earlier, at ten to two. Thank you.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF MICHAEL WALSH

BY MR. COUGHLAN:

Q. MR. COUGHLAN: Sorry, you didn't have the article over lunch, but you have had a chance to have a quick look at it?

A. I have had, yes.

Q. I am not going to get involved with the whole article with you at the moment, but you see at the in the first column there, second paragraph, the company is hoping to raise the bulk of the money in the US. And as chief executive, Mr. Denis O'Brien is understood to have been making presentations to US investors over the last two weeks.

Communicorp is 37.5 percent shareholder in the winner of the second licence Esat Digifone through its holdings in Esat Telecom. The Norwegian phone company, Telenor, owns another 37.5%, while Mr. Dermot Desmond's company, International Investment & Underwriting Limited, holds the remaining 25 percent."

Now, having heard evidence from Mr. O'Brien and Ms. Gleeson, because you can see a spokeswoman is referred to later in the article, that information wasn't put into the public domain in this form by Mr. O'Brien or Ms. Gleeson or Esat Digifone or anyone on that side, as far as we understand. That but it was information which was contained perhaps in documentation which had been used in the United States for the purpose of fundraising by Mr. O'Brien. And I

am not going to ask Mr. McManus's source, but it looks as if he got that information from across the Atlantic.

A. You are welcome to ask Mr. McManus's source.

Q. That looks to be that information was contained in documentation which was being used

A. I mean, it looks to me, having read the thing, it's a fairly well informed article; it's very precise.

Q. Yes. And that was the position, wasn't it, because what's that was being sorry, that's what Communicorp were projecting to the market in the United States?

A. Yeah, I presume that's what they were saying of the intent.

Q. Yes, but sorry, that was the commercial reality of the situation, wasn't it?

A. Yeah, I mean, that was the story that they would have been selling, yeah.

Q. That's right. And they were entitled to, as far as you were concerned, sell that?

A. I mean, that article, from the quick look through it, wouldn't have caused me any difficulties.

Q. Did you see it?

A. Not that I recall, no.

Q. You don't remember anyone raising any query? I was just wondering, you know, you said that Mr. Loughrey contacted you, and you and you place it sometime

after Cheltenham. And I think that is always helpful, because you have a specific event in mind and you place the time. This of course would have been prior to Cheltenham?

A. Yeah. I mean, Mr. Loughrey is more the racing fan that I am, I am afraid, but

Q. But you don't remember whether any query was made of you at this time to ask you, "Well, is that the situation?"

A. No, I mean, the only recollection I have of hearing anything from anybody was, as I said to you yesterday, really, a sort of vague recollection of a kind of two calls from Mr. Loughrey.

Q. And you place one of those after Cheltenham, which you think was late March or the beginning of April; and the other one is perhaps October/November of that time-frame?

A. That time, yeah.

Q. Of 1996?

A. Of '96, yeah. Because I think, as I said yesterday, the second call covered not only press speculation but also the stories about the disagreement between the various shareholders.

Q. Right. So that's why I can fix that, perhaps.

I am now looking for just a document sorry, just on newspaper articles, again, if you go to Tab this is back in Book 49; I think it's Tab 119A. I think you

received a fax from Ms. Gleeson's company

A. Right.

Q. on the 9th April of 1996. And that contained an

article by Shane Coleman. This is The Irish

Independent, 6th April, 1996, and there is a

reference at the bottom, in the final paragraph there,

in fact on the final line, but you can see there:

"The group received the final draft from the

Department" this was discussing the licence "of

Communications early last week, and the new service is

expected to be up and running by the autumn. Esat

Digifone is made up of the Irish telecommunications

company, Esat Telecom, and the Norwegian State

company, Telenor, who own 40% each, and Dermot

Desmond's investment company, International Investment

and Underwriting."

Do you remember receiving that?

A. Not particularly. I mean, I think at the time, and in

fact I think possibly still does, Eileen's firm has a

cutting service.

Q. That's fairly standard, I suppose, to have a cutting

service. I think we have heard from the Department as

well that they had a cutting service.

A. I mean, it is an it isn't in the sense that you

know, I mean, I don't

Q. You mightn't pay much attention; you might be able to

find stuff if somebody asked you about it?

A. If somebody asked. But I mean, to be honest, with the kind of computer retrieval and stuff nowadays, I think it's irrelevant, you know.

Q. There was just something I wanted to ask you about, if I can find it now. I have found it; I just haven't come to it yet.

Now, if you go to Tab 121 just for a moment. Just very quickly. This is a minute of a meeting of of the board of directors of Esat Digifone on the 12th April, 1996. I think you see that you were present?

A. Yeah.

Q. And then the resolution was the increase of the share capital. And you can see how it's allocated there; do you see? And then it was intended that there would be a further increase. Do you see that?

A. Yeah.

Q. And that was subject to the signing of the shareholders agreement. In fact, it was increased prior to the signing of the shareholders agreement. An explanation has been offered to us, and do you remember that that may well have been because the project finance people wanted that to come in as equity?

A. I mean, the quick answer is I don't particularly recall why. I mean, I know, you know, really kind of all along, and I suppose even thinking of kind of, shall we say, kind of minute of Owen O'Connell's kind

of earlier on. I mean, I would have resisted putting money into this all the way until we actually had the shareholders agreement in place. And you know, I mean, I would have been basically saying, well, you know, "When the shareholders agreement is in place and we are properly protected, you can have all the money you are entitled to".

But you know, I mean, there was a bit of a game going on, if you actually kind of read Richard O'Toole's stuff in particular, where they could kind of see how actually, I suppose, could squeeze us a little bit, and I suspect I was squeezing back, which would be reasonable. But I think what actually happened, because obviously the shareholders agreement wasn't signed the next day, so I suspect, you know, I took a judgement the next day: Well, shall we say, there was a sufficient amount of agreement, and you know, at the end of the day, 750 grand was neither here nor there in the total context of the thing.

Q. Now, I think if you then go to the next it's Tab 123A; this is a draft of a letter sent to you by Owen O'Connell, which would be sent to the Department and of the 17th April, he sent you this draft?

A. Okay.

Q. Do you remember that?

A. Let me just reread it for a sec. I am not sure this letter actually went to the Department or whether it's

just a draft.

Q. No, no, do you remember receiving this draft? Because it's just I wanted to ask you about

A. I certainly received the draft. I think the kind of scrawl at the top of the right-hand side is mine.

Q. Just it's the final paragraph on that first page, you can see there where "25% of Esat Digifone Limited held by IIU Nominees Limited effectively represents the institutional investor shareholding referred to in Esat Digifone's bid for the licence. You will recall that this referred to an ... 20% with a further 12% in the short- and medium-term stage. Of the anticipated 12%, 5% has already been pre-placed with IIU Nominees Limited. It is understood... will in due course be disposed of ... institutional investors."

Now, Mr. O'Connell has described this increase from the 20 to 25% being a pre-placement of 5 percent of the intended placing of 12,% in due course, as being a rationalisation which he worked out, he believes, with Mr. O'hUiginn. Do you have any involvement in working out that particular rationalisation?

A. Certainly not that I remember. I mean, the reality is, all the interface with the Department, you know, bar kind of a very small number of meetings, was between Owen O'Connell and the Department. So you know, I mean, I would have been given this probably just for information at the time.

Q. And in any event, as far as you were concerned, you had 25%, isn't that right, and when it went to 20%, you extracted your value for your 5%?

A. That's correct.

Q. Now, you know the shareholders, or the meeting of the directors on the 12th April, 1996, and the allocation of the shares to Esat Telecom, Telenor and IIU Nominees Limited?

A. Yeah.

Q. You were present at that particular meeting of the directors; isn't that right?

A. That's correct.

Q. Were you representing Bottin at that meeting?

A. I would actually have been representing Dermot/IIU, but I think it's absolutely clear at that stage that the IIU Nominees holding was actually on behalf of Dermot as opposed to on behalf of Bottin.

Q. And I have been curious to find out, where had Bottin gone?

A. I don't know Bottin had gone anywhere in particular.

Q. I mean in this deal.

A. Well, I presume at some stage I am sorry, I am only saying that on the basis of the fact that when you actually look at the document that you promised to go on to, I think, later, which is, you know, kind of a letter I think drafted by Neville O'Byrne in relation to kind of the beneficial owner, when it says IIU

Nominees beneficially owned a hundred percent by

Dermot.

Q. We'll come to that, perhaps in the context of that,

so.

A. It's the next document, is it, it's 125.

Q. It's Neville O'Byrne writing you.

"Dear Michael,

"Subsequent to our meeting yesterday, I arranged a meeting with Arthur Moran and Gerry last evening when

we reviewed the position in this case. I discussed with them the points we had discussed at our meeting,

and I relayed to Arthur our position with regard to

the various matters.

"With regard to Recital D of the agreement, he is

going to revert to the original draft of that but will

add a further clause at the end of the agreement

covering the point which concerns him with regard to

the underwriting agreement. I think this is probably

the best way to handle this particular end of the

matter".

Then he goes on: "With regard to the number of

directors, Gerry is to go back to Denis O'Brien on the

basis that there is a clear requirement from yourself

and Telenor for either 3.3.2 or 2.2.1.

"With regard to clause 12.2" and that is the

preemption element, isn't it, of the shareholders

agreement "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.

"We had a discussion on clause 14 and" we needn't concern ourselves with clause 14 in relation to that.

A. Okay.

Q. Now, if we just look at the draft, and this is the side letter or a draft side letter with regard to clause 12.2, which was the preemption.

And "Dear Sirs,

"We refer to the agreement and in particular the provisions of clause 12.2 and clause blank thereof.

"In accordance with our discussions, we are writing to you to confirm that the shareholders of 25% in Esat Digifone Limited (the Company) held by us is beneficially owned by the following names.

"IIU Limited, blank percent.

"Bottin International Limited, blank percent.

"This letter is further to record ... Listed above will be subject to the terms and conditions regarding the transfer contained in the agreement and the memorandum and articles of association 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."

Then to signify the others are to sign; isn't that

right?

A. Sorry, that's correct, yeah.

Q. Now, that says "in our own name" there; was it intended to include Bottin, do you know?

A. I mean, to be honest, I couldn't comment, really, because just looking at the thing at this point in time, you know, it's not clear to me whether Neville was trying to indicate that some of it might be in IIU and some of it might be in Bottin.

Q. Leave that aside

A. It certainly looks to me that kind of at the stage of this draft, you know, Neville at least wasn't clear as to what the ownership was actually going to be.

Q. Had anyone told him?

A. The quick answer is he wasn't clear; I probably hadn't told him.

Q. From the evidence which we have heard at the Tribunal, I think from Mr. Owen O'Connell and from a number of the other solicitors, that the understanding or the need for this particular side letter was that if IIU, and we'll include Bottin here at the moment, were underwriters, that they would need to be able to transfer the shares to whoever they were placing them with without triggering the preemption under clause 12.2; that would be the reasoning, and it would be fairly reasonable and not an unusual position?

A. I mean, very clearly, we had come in as, you know,

kind of financial investor. You know, really, the intention, you know, even though it never actually carried through at the end of the day, was that, you know, we would have the flexibility to sell those shares to whoever, you know, and you know, be it some of those institutions.

Q. They would be held in that name, and you weren't trading in them in your own right, in effect, but

A. We weren't trading in them, but basically whoever actually held the shares, be it Bottin, IIU or Dermot

Q. I want to come to Dermot in due course.

A. Whoever held the shares would actually be free to sell them on a once-off basis without the preemption clauses in the

Q. And I understood from the solicitors who have given evidence already that that was because in an underwriting situation, if one was placing them, one couldn't sort of say, "Well, I better go back to the other shareholders and offer them to them first, and then I'll come back to you"; that this would be normal enough in an underwriting situation?

A. I would say it was more than, in a sense, that you know, when we, shall I say, go right back to the very beginning, talked about the 25%, never mind the kind of underwriting of Denis's side, I mean, when we talked about that, I mean, as I said to you all along,

we were never absolutely clear as to were we going to hold some of those, all of those? Were we going to sell some of them on to Allied Irish Investment Bankers, Bank of Ireland investment managers, Standard Life?

Q. Or individuals?

A. Or individuals. So you know, basically Telenor had an issue with the individuals as previously alluded to.

Q. Do you remember considering

A. The restriction at the time of you know, we were kind of limited to transferring them to four.

Q. But had yourself and Mr. Desmond considered placing them with Investment Bank of Ireland or like institutions?

A. No. I mean, as I said to you before the lunch break, you know, we were keeping that open as an option, but there was never a good time to actually go out and contemplate, because everything was moving around too much.

Q. Had yourself and Mr. Desmond discussed had you considered that you would do this, place them with financial institutions?

A. No, we had never discussed the matter. I mean, it would be quite abnormal, because you know, if I were discussing something like that with Dermot, it would be because I believed it was the right thing to do.

This thing never got sufficiently tied down to make it

the right thing to do.

Q. But one could understand if IIU or Bottin were underwriters, and that was the position under the arrangement agreement in respect of matters, isn't that right, in respect of the 37.5%?

A. Well, I suppose you distinguish between the two, whereas certainly in my reading of the agreements, my understanding of the agreements was that we were getting 25%, which we could either hold ourselves or we could sell to others.

Q. Sorry, I read that as well, the 25%. I read the 25% like that as well. That's why I asked you about the letter that went to the Department on the 29th. But I won't go back to that again; I won't revisit that. But here, what you are saying is that you were arriving at a situation where you were looking for there was a draft prepared of a side letter, that you would have one free transfer, isn't that right, without invoking the clause

A. Preemption clause? That's correct, yeah.

Q. Right. Now, if you then go to the next tab, 126, you will see Mr. Arthur Moran, this is Telenor's solicitor, Mr. Arve Johansen sending on various matters. And if you go this is in relation to the draft shareholders agreement, and if you go to the second page, the second-last paragraph: "I have received from Neville O'Byrne, acting for IIU, a draft

letter in relation to the possible transfer of shares by IIU to its investors where they effectively seek consent in advance to a once-off transfer from IIU to its investors without sparking the preemption provisions contained in the articles of association.

I believe this concept is agreed and that with some tidying up of the draft letter is acceptable."

Now, that seems to indicate there that what was being indicated to Telenor that IIU had investors. Were there investors or potential investors behind this?

A. Sorry, I mean, to be very clear, what's actually being said here, I mean, this is actually a clause to get around the preemption provisions of the shareholders agreement. So I mean, basically what we were looking for was a right to actually transfer those shares, you know, without the preemption clause coming into play to investors.

I know Mr. Moran used "its investor" in kind of line 2 "its investors" in line 3, so I can only presume that he wasn't being particularly precise, because certainly at that point in time, you know, I wouldn't have said that there were any investors actually identified.

Q. Other than Mr. Desmond?

A. Other than Mr. Desmond, who was ultimately standing behind everything.

Q. Sorry, if you just go back to Tab 123, sorry.

You can see this is on the 16th April, 1996. You can see that Arthur Moran wrote to Neville O'Byrne

A. I was looking at 123A; apologies.

Q. 123. "Further to my letter of yesterday attaching Draft 2 of the shareholders agreement, I attach suggested wording for the resolution of the board pursuant to clause 4.3. I think that 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."

That seems to be that there was a discussion which identified four investors, or sorry, indicated four investors, doesn't it? I am not saying "identified."

A. I suppose I would somewhat disagree, in the sense if we could go right back to the agreement of whatever it was, the 29th September, that actually identified that we could place them with up to four places, one of those; so I presume Mr. Moran, instead of referring to "places" just referred to "investors", but

Q. Yes, I take that point. But what he seems to have been discussing there with Mr. Neville O'Byrne was that Mr. O'Byrne, from a discussion they had, was to prepare a draft side letter in respect of the four investors without invoking the preemption clause?

A. Yeah, but I think sorry, if you are trying to say

that there were four identified investors, I think that's misleading. I think where that comes from was the concept that there would be under, you know, effectively Telenor's requirement, a maximum of four investors, four places.

Q. Yes, I take the point about "placee" and "investor". But this seems to be Mr. O'Byrne's discussion with Mr. Moran about drafting the side letter for the transfer to four.

A. Well, I mean, sorry, they may have had a discussion, and you know, they may have been careless on the wording, but I am telling you there were no four investors identified at that point in time.

Q. It certainly raises a line of inquiry, doesn't it, that particular document?

A. Well, I suppose I don't think so, because I think it was very clear from day one that we were allowed to place up with up to four placees, one of whom could be a representative of large number of people.

Q. Well, can I just try and get this picture in my mind, so, from your evidence. As of this time, because you say that you hadn't made your mind up or perhaps hadn't thought it through fully or hadn't arrived at a decision, it was unknown to Telenor, and it was unknown perhaps to Neville O'Byrne, because you hadn't told him, and it was unknown to Communicorp/Mr. O'Brien who the potential investors or investor would

be?

A. Well

Q. But that Dermot Desmond was standing behind things?

A. Yeah, I mean, it probably wasn't. I mean, if you actually go through the correspondence, it's even much later than this. You know, I mean, I think we get to a stage where the Department are looking for clarification as to, you know, which Telenor entity is it? Which Esat entity is it? You know, which you know, IIU/Dermot Desmond entity is it? So you know, it was, what I would say, kind of relatively fluid at that point in time.

Q. But we knew that there was going to be a Denis O'Brien entity, and we knew that there was going to be a Telenor entity; there was no doubt about that, and the Department knew about that?

A. I think it's equally true Denis O'Brien and Telenor knew there was going to be a Dermot Desmond entity.

Q. How did Telenor know that?

A. Sorry, I mean, we had been meeting since whatever date it was, in

Q. I know that. That's what that seems to be the type of information they appear to have been looking for?

A. Well, sorry, at this point in time, I don't think they were looking for that. This is actually about a side letter which actually is an ability to avoid the preemption clauses.

Q. We'll come to the shareholders agreement in due course, and the side letter, because things had moved on by then; isn't that correct? In the side letter, the beneficial owner of the shares was described as Dermot Desmond 100 percent?

A. In the final executed side letter, that's clear, yes.

Q. Isn't that right?

A. Yes.

Q. And Mr. Dermot Desmond, in that side letter, was given a right of one transfer in respect of those shares; isn't that right?

A. That's right.

Q. That resulted from negotiation; isn't that right?

A. Yeah, I mean, there was perpetual negotiation on this, right up to and including the day the shareholders agreement was signed.

Q. Why, once it was identified that Mr. Dermot Desmond was the beneficial owner of the shares, did he receive the benefit of the side letter, which put him in a more advantageous position than the two, as you describe them, operating shareholders of the company who held a higher stake in the company?

A. I mean, for the very simple reason, I mean, as I said before, we came in as financial investors. You know, I mean, the reality is you know, shall we say, I think as I described earlier, Mr. Desmond and I would have had diverging views as to when the appropriate

time was to actually sell those. You know, if we were precluded from actually selling to third parties, then effectively Telenor and Esat could have got together and effectively manipulated the price against us. So we had to the flexibility to go outside, and if you want to maximise the price, you ensure that there is no tags or ties on it.

Q. So is that what financial institutions obtain normally when they have a shareholding in a company?

A. Well, I suspect the one thing that keeps lawyers happy is the fact that every shareholders agreement is different.

Q. You see, isn't it open to this interpretation, Mr. Walsh, that the reason why, when the beneficial owner was disclosed, so there was no need to have a free transfer to make a technical move from the likes of an IIU Nominees, or an IIU to Mr. Dermot Desmond, or from let's say Bottin to a Mr. Dermot Desmond, the reason why Mr. Dermot Desmond should have been given the right to a free transfer was because, on one view, there were other people behind Mr. Dermot Desmond in relation to this transaction?

A. No, I mean, I think that's totally incorrect. You know, the simple reality is that, you know, we were coming in as a financial institution

Q. You weren't a financial institution.

A. Sorry, we were a regulated financial institution, if

you want to be precise, but we were coming in

Q. Say what you were again, please.

A. We were a regulated financial institution.

Q. Now, let's go through that again. What okay, I won't go on.

A. Simple reality: We were coming in here as the financial player. We were putting up the money. We wanted the ability to be able to sell the shares. You know, why wouldn't we want to be able to do that?

Q. Let's go back now for a moment. What were you regulated to do?

A. Are we going back into yesterday's conversation, Mr. Coughlan?

Q. We certainly are. Because when this information was made available what were you regulated to do in September 1995?

A. Well, Mr. Coughlan, I have my notes; I did my homework last night.

And Chairman, I'd just like to put on the record, you know, I came here in good faith to actually cooperate.

I was asked four sets of questions by the Tribunal.

And I answered all those to the best of my ability. I studied all the material that I was actually supplied

with. And yesterday, without notice, Mr. Coughlan stood up and effectively made a suggestion of

illegality in terms of our actions, and I rejected that completely.

This is a private arrangement between two private companies. We weren't dealing with the public in any sense. Mr. Coughlan effectively asked me about the Investment Intermediaries Act 1995 and pointed out that underwriting was an authorised activity under that. Mr. Coughlan stood there and actually quoted from the Act. Now, the reality is that, you know, either Mr. Coughlan knew, and if he didn't know, he should have known, that there was absolutely no wrongdoing; that within that Act there is a transitional arrangement which effectively gives you three months to actually apply for authorisation. That Act came into force on the 1st August, 1995, so that as of the 29th September, which was where he was focused on yesterday, we couldn't have been in breach of the Act because of those transitional arrangements. The Central Bank then had six months to actually approve any activity after the date that you actually applied. As it happens, just for the record, I actually met with the Central Bank on August 2nd, and we formally sent in our application on August the 23rd. The Central Bank, in return, gave us the authorisation on the 8th February.

I just find it kind of unacceptable somebody should stand up here you know, I mean, I had forgotten that I had met the Central Bank on August 2nd; I had forgotten that I had actually sent in the application

on the 23rd. It wasn't stuff that I had been actually asked to consider in advance of coming down here. You know, I am not as familiar as maybe I should be with the transition provisions in the particular Act. But if somebody is going to stand up there and actually suggest that in some sense, we didn't actually comply with the rules or the regulations, I think either they knew or they should have known what the truth was, and they should have actually put that clearly to the place. I think

CHAIRMAN: Well, Mr. Walsh, sorry, I am only interested in getting the actual facts on it. And I am conscious that it's a matter on which you have an expertise in as well. The Tribunal's dealings have been limited with the Central Bank because of confidentiality, and I am placing considerable reliance on what you can tell about this situation. So, I mean, I am interested in getting the facts.

A. I appreciate that, Chairman, but you know, the practical reality is that you know, the Act itself makes it very clear what the transition provisions or the transitional arrangements actually are. And I mean, I don't know whether Mr. Shipsey would want to comment on the matter, but you know, the practical reality is that on the basis of the public documents, you know, there were transitional arrangements actually in place in terms of the Act itself. Those

transitional arrangements came into effect from the 1st August 1995, so that as of September the 9th, we couldn't have been in breach even if we had wanted to be, because you know, effectively we would have had until the end of October to actually apply.

Now, as I say, as a matter of fact, I met the Central Bank on the 2nd August, and we actually put our application in on the 23rd August. But you know, I just feel, if somebody is going to stand up and suggest that we behaved in an illegal fashion, or at least cast aspersions on our activities, the practical reality is that they should have, you know, fairly disclosed the fact that you know, there were transitional arrangements actually in place rather than having you know, me to actually go back and find that out.

Q. MR. COUGHLAN: Now, Mr. Walsh, I just want to take that up with you now, because I did not suggest that you behaved in any illegality yesterday. I said you were conducting the business of Mr. Dermot Desmond, private business; isn't that right?

A. Sorry, to be very clear, I asked you whether or not, if you had done this arrangement, you would have said it was fine. And you pointed out that we weren't talking about a private individual; we were talking about a company. And the company

Q. I was talking about this being scrutinised, not what

you were doing. You were perfectly entitled to carry on Mr. Desmond's business, I said to you yesterday.

A. Sorry, you suggested that IIU wasn't in a position to carry on the business.

MR. SHIPSEY: I wonder, could I perhaps I appreciate what you have said, Sir, in relation to your interest in getting at the facts. And I appreciate what you say in relation to the limited ability to find out information from the Central Bank. But in relation to what Mr. Walsh has said and in relation to Mr. Coughlan's questions yesterday, that's not a question of obtaining information from the Central Bank. Section 13 of the 1995 Act is as it was when it was enacted in July of 1995. And contrary to what Mr. Coughlan is now suggesting to the witness, at page 127 of yesterday's transcript, there was a clear implication, if you read the bottom of page 127, to the effect or a suggestion that IIU were not authorised to carry out underwriting activities as of the time they entered into the agreement in September of 1995.

Now, what Mr. Walsh has done, and what he's been able to do overnight, is to himself, and with the assistance of his legal advisers is ascertain what the true legal position is. If the Tribunal are suggesting that IIU were not legally entitled to engage in underwriting, then they should say so. If

it is the case that they are not making that suggestion, then the suggestion that was made at page 127 and 128 yesterday on the transcript should be withdrawn.

MR. COUGHLAN: The Tribunal is only interested in the representation that was made to the Department in this respect and how they were so authorised. There is no suggestion being made that they behaved illegally in this regard. And I stated that yesterday when I asked Mr. Walsh about this particular matter. I pointed out that authorisation had not been granted at that stage.

I take his point about the transitional period. But what was being represented to the Department, and the evidence that has been given here before this Tribunal and the evidence in terms of witnesses from the Department, questions put by counsel to those witnesses was that this was a well-recognised financial institution. This is my only interest in Mr. Walsh or IIU as of that time.

And in fact, Mr. O'Connell gave evidence that they were a financial institution; that to his knowledge, they took deposits. Now, Mr. Walsh has said they were never authorised to take deposits. Not then and not now. So it was in that broad context. I was not making any suggestion that Mr. Walsh behaved illegally.

CHAIRMAN: I have to say

MR. SHIPSEY: Sorry, Sir, I don't

CHAIRMAN: Mr. Shipsey, we have made reasonable progress. I am anxious that we don't get into needless controversy. If Mr. Walsh has to any degree been taken short or been treated in any way less than he is fully entitled to, that is the last thing I would wish. I have noted fully the explanation and the details that he has provided, and if it's one possible aspect that I can simply cease to have any serious regard for, I'll be only too glad for that.

MR. SHIPSEY: Yes, I would, but unfortunately, Sir, on the record yesterday, as I have referred to, Mr.

Coughlan says: "I am not being critical of you or Mr. Desmond in relation to Mr. Desmond carrying out private business. But as I understand the situation, and correct me if I am wrong, that the carrying out of investment an investment business service, of which underwriting is one of those activities, is an authorised activity and has to be authorised under the Investment Intermediaries Act of 1995. Isn't that correct? And the reason I ask you that is because, as I understand it, and from information available to me from the Central Bank on the public register, that IIU was authorised under Section 10 that is, the carrying out of investment business services on the 8th February, 1996, to provide investment advice in relation to one or more investment instruments."

And then a number of them are listed, including underwriting. And Mr. Coughlan then continues: "I am just wondering, was there any authorisation from the Central Bank prior to the 8th February, 1996, as regards IIU to carry out any type of activity? I just wonder, can you help me on that."

Now, if that doesn't carry with it the implication that as of the 29th September, 1995, IIU did not have authorisation, then I don't understand I don't see how any fair reading of that question could lead to any conclusion other than that it did carry the implication that it was being carried out without authorisation. If that is not the case that's being made by the Tribunal, and if it's now accepted that IIU did have authorisation or didn't require it because of the transitional provisions, I think, in fairness not only to Mr. Walsh but to IIU, the Tribunal should withdraw any suggestion of an allegation that IIU were not authorised to do what they did in September of 1995. That's the point.

Q. MR. COUGHLAN: First of all, I am thankful to My Friend for reading the transcript, because I couldn't remember exactly what I said to you yesterday, Mr. Walsh, and I didn't have the transcript to hand when this arose. And first of all, let me just clarify for you and your counsel.

There is no allegation contained in that. I wondered,

and I wondered if you could help me, Mr. Walsh. That is what I asked. Now that My Friend reads the whole thing, I made no allegation.

A. I suppose, like many conversations, there can be different interpretations.

Q. Yes.

CHAIRMAN: Let's try and seek to finalise this evidence.

A. Sorry, Chairman.

Q. MR. COUGHLAN: Now, if you just now go to I think it's 49, 127, I think. Perhaps I'll just look at that.

A. That's the letter from myself to Denis O'Brien.

Q. This is a continuation of the discussions, isn't that correct, in relation to the "Under the agreement, Esat Holdings and Telenor both own and have subscribed for 37.5% of the shares in Digifone, and IIU owns 25% and has subscribed capital accordingly.

"You have indicated that the investors being arranged by Credit Suisse First Boston would ideally require Esat to own 50%." This is where Mr. O'Brien was contending for getting 50% or above 50%, and he was still looking for more; isn't that correct?

A. That's correct.

Q. Now, that situation, that was as of the 1st May 1996.

Now, were you aware that Mr. O'Connell had sent the letter in to the Department on the 17th April of 1996,

that is the disclosing the makeup of the consortium?

A. Sorry, which letter?

Q. That is the letter on it's not in this book, in fact. It's in Book 43, 184. I'll put it up.

It's in like form again to the draft that was prepared for you. If we just move along, I think the only matter of concern is, you see that final paragraph there, he sets out the shareholding, and then the 25% in Esat Digifone, again the pre-placing of the 5% out of the 12%, and the 20% representing the institutional investors referred to in the bid.

A. Yeah, that looks like the draft.

Q. Yes, and the letter and he goes on then to describe Esat Holdings and the Esat Telecom Holdings, what Mr. O'Brien's makeup is, and other companies associated with him. Were you aware that this letter had been sent in to the Department by Mr. O'Connell as of the 17th April?

A. Yeah, to be honest, I have no particular recollection, but it looks like my lines on the side, so quite possibly.

Q. Now, when did you become aware that the Department were in some way concerned about the configuration of the 37.5:37.5:25?

A. Well, I think again, as we discussed before lunch, you know, there is obviously discussions as early as

was it the beginning of February? in relation to the 37.5:37.5:25 versus the 40:40:20, so I presume, you know, that was certainly whether it was coming from the Department or whether it was, you know, shall we say, decided independently by

Q. You didn't know whether it came from the Department or whether it was being discussed independently?

A. Yeah. I mean, it may well have been, you know, kind of a sensitivity to the Department's expected views as opposed to actual interaction with the Department, but as a matter of fact, I don't have any idea.

Q. You don't have any idea. It could have come from as far as you know, or it could have been independently been discussed, but it wasn't something you had a knowledge of at that stage.

Before this letter went in on the 17th April, I think you told us that you received a phone call from Mr. Loughrey after Cheltenham in 1996; isn't that right?

A. I mean, sorry, after Cheltenham, I couldn't be sure whether it was kind of a week, two weeks or three weeks afterwards, but there was a reference to Cheltenham in the conversation, which is why it sticks in my mind.

Q. And you fixed that in your own mind as the end of March or the beginning of April; is that it?

A. Cheltenham is usually around St. Patrick's Day.

Q. And could you tell us about that conversation you had

with Mr. Loughrey?

A. Not an awful lot, in the sense that you know, I suspect it was a very brief conversation, usually they are, and I can't remember even what the speculation was. I think there was speculation that you know, there is a particular individual identified as being, shall we say, behind Dermot or a shareholder behind Dermot, and you know

Q. Did Mr. Loughrey ask you about that, do you think?

A. Well, I mean, it's impossible to tell exactly what he said at this stage. But I mean, my recollection is that there was some reference in one of the papers to Ben Dunne being involved, and you know, you know, John might have said something to the effect, "What's all this about you being involved with Ben Dunne?" And I would have said, you know, "There is absolutely no truth in that whatsoever". Sorry, I am paraphrasing. I have no idea precisely what the words were at that point in time.

Q. Or words to that effect. But when you had that discussion, it wasn't in the context, or was it in the context of you just being a placer or an underwriter or anything of that? I think you indicated in your statement that you informed Mr. Loughrey that Dermot Desmond was the person involved.

A. Yeah, I mean, certainly that's what I would have said to him. I mean, the problem is you know, I mean,

in those days John was a very busy person, so we didn't get quite as much time as you would get with him today. So I suspect it was a very brief conversation. So, you know, whether I basically said that you know, "This is all Dermot and we have the rights to actually place them on with other people", or you know, whether I got into any aspects of that conversation, I have no idea.

Q. Well, would it have gone so far as to say it was all Dermot, do you think?

A. The quick answer is I couldn't tell you. You know, I mean, his primary focus was, as I recall, the suggestion that somehow or other this was actually a Ben Dunne, you know, activity.

Q. And did he seem concerned about that?

A. Well, he wanted to know whether it was true, so, I have no idea whether he was concerned or not. But I mean, there was no truth in it, so it wasn't a conversation I paid any particular attention to.

Q. Was the inquiry along the line as you say, you can't remember exactly, but you believe that you would have told him it was Dermot Desmond?

A. Well, I mean, to be honest, I couldn't tell you precisely what I said. But I would have said this is IIU, this is Dermot's company.

Q. Right. In approximate terms.

A. This is a telephone conversation

Q. This is a Dermot Desmond

A. I mean, this is a telephone conversation that took place whatever, nine years ago.

Q. So if Mr. Loughrey made an inquiry of you, what he really what he wanted to know was who really is behind this, if there is speculation; isn't that right?

A. Well, yeah, I suspect, you know, he was, you know, kind of more querying "What's this IIU and Ben Dunne", as opposed to, you know, "Who is really going to be taking up the shares?"

Q. And who did you tell him it was?

A. I don't know that actually became a topic of conversation. I mean, you know, my focus at the time would have been this is all IIU. You know, I am not sure

Q. I understand that, and would you have conveyed that view to Mr. Loughrey, or that focus?

A. You see, the problem is I am not sure you know, I keep going back to Davys, but you know, if, shall we say, John phoned up Kyran or somebody and you know, Kyran said Davys are doing this, you know, he would have had a view that well, you know, he didn't know whether they were taking it themselves or placing it on. He phones up IIU and, you know, IIU/Dermot are doing this. You know, he would have potentially seen us as the arrangers, whereas I might have had a

completely different perception.

So it's in that sense I don't know what was in his mind or what was in my mind.

Q. Well, you were friends. He told us that you probably had lunch a couple of times a year.

A. Well, certainly since he has retired, probably a couple of times a year.

Q. He said at this time.

A. Well I mean, certainly we had contact. I mean I had actually worked with John, I think the first time back in whatever, about 1981 or '82. I was actually looking at the funding of the gas pipeline from Dublin to Cork. And John had just returned from the European Investment Bank, and we were trying to look at, you know, potentially some sort of equivalent public/private partnerships at that stage.

So I went over to talk to him because, you know, having been in the European Investment Bank, being back in the Department of Finance, you know, he was somebody who would have had insight into what could be done. So you know, I would have had, shall we say, on-and-off contact with him, really, from that point in time.

Q. And you have had some sort of social contact, as he indicated; you might have had lunch a couple of times.

But if you received a phone call from him like, he was the Secretary of the Department, and this was a

fairly big issue, this licence?

A. Mmm.

Q. And he is inquiring and I am using a name you have used, now "Is Ben Dunne involved in this", or words to that effect, or "What's going on here?" It's not, I suggest to you, a frivolous type of inquiry being made.

A. It's not frivolous, but you know, I mean he clearly, you know, I mean, I couldn't tell you how often I heard from John in those days, but very seldom, I would have thought. But I mean, it wouldn't have been frivolous; he wouldn't have called me on a frivolous matter.

You know, the practical reality is he was calling to know whether, you know, as I say, that gentleman's name was actually associated with the thing. And I would have said "No, this is IIU that's actually doing it, and IIU is Dermot, and Ben has no association with us one way or the other".

Q. And when you say "doing it", do you mean, are the investors in it? Because he couldn't have been asking you about Ben Dunne in the context of being a placer or arranger or an underwriter. It had to be in the context of being an investor; isn't that right?

A. That's why I think you can have parallel conversations sometimes. You know, I could have been saying, you know, this is all IIU actually doing this. You know,

whereas he could have taken that to mean IIU is acting purely as an arranger. But I mean, as I say, this is a telephone conversation that probably took two or three minutes nine years ago. It's pretty difficult to be precise as to what was said.

Q. Yes, I understand.

I think you dealt with this in one of your memoranda; isn't that correct? And I am just looking for it now.

A. I think it was, relatively speaking, towards the end, because I think, you know, we clarified it when we talked about it yesterday.

Q. That's when you told me that the two contacts were, you believe, after Cheltenham and in October/November?

A. It's Question 23, 23A.

Q. Right. You say that "I have no detailed recollection or notes of any meeting with the Department. As indicated above, I was contacted by Mr. John Loughrey at an earlier stage in relation to the ownership of the IIU shareholding. I had at least one meeting with the Department attended by Mr. Loughrey at which the main focus" we know about that meeting later. But I think it must be prior to that, so that you yes, it's 21 and 21A.

"To the best of your recollection, on two occasions following media publicity stating that the IIU Nominees shares were held for parties other than Dermot Desmond, I was contacted by phone by the

Secretary of the Department, and on each occasion I confirmed to him that Dermot Desmond was the beneficial owner. I do not recall any detailed discussion in relation to the letter from William Fry's dated 17th April, 1996; however, this letter confirms an intent that on the date of issue of the licence, IIU would hold 25% of the shares of the consortium."

So when you were reflecting on this some time back and preparing your statement, you were obviously of the view that you confirmed to John Loughrey on two occasions that Dermot Desmond was the beneficial owner; isn't that right?

A. Yeah, absolutely.

Q. And

A. I think all that I am saying is that I could see how somebody could have parallel understanding.

Q. Sorry, all I'm interested in is what you recollect about the thing, that you and one of those was in late March or early April, and the other was in October/November, that period of time?

A. October/November, yeah.

Q. 1996.

Now, if you go to Tab 128, please: This is a note made by Mr. Owen O'Connell of a meeting in the Department on the 3rd May 1996.

By the way, did you know that the Department had

written to Mr. O'Connell on the 1st May of 1996, by any chance, seeking certain information about the ownership of the consortium at that stage?

A. Sorry, the ownership of each member of the consortium?

Q. The ownership of Esat Digifone, at that stage.

A. I mean, sorry, not that I actually recall, I mean, I am sorry, in the sense I can't recall it in terms of the specific dates, but certainly the Department, they were doing their own inquisition, I suppose. Basically the Department were very clear, kind of, around this time period, that they wanted, obviously, absolute full details of what the ownership structure was going to be.

So while I can't actually tie it in to a particular date, certainly that would have been an issue as they went through their due diligence.

Q. Did you realise that this was in the context of the evidence given by witnesses from the Department that when the letter of the 17th was received, it caused the Department to become concerned?

A. I mean, sorry, I am not sure that I am actually conscious of that, but you know

Q. Well, this is a meeting on the 3rd May, 1996. And you're recorded as being present at this meeting by Mr. O'Connell, and it's in the Department. And the note is: "Clear a political football. Identity of each shareholder, legal and beneficial ownership.

Esat Digifone changes relative to bid."

That's in somewhat similar terms to the letter of the 1st May.

"Change in institutional investment, replacement of Advent and Davys by IIU.

"Need detailed information/quality about IIU.

Confirmation that Telenor is same as at bid date.

Difference (in detail) as to expertise and asset strength between Communicorp and Esat Telecom Holdings.

Numbers re IIU.

"Telenor 'backdrop' statement as operator as last resort.

"Arve Johansen: That's the way we see it anyway.

'we'll never abandon this one'.

"Not requesting statement but would be helpful per Martin Brennan.

"Project finance, POD bank 60/equity 40. Then the banks ABN and AIB, 25 million bridging.

"Though no presentation. More the better provided thought to presentation, more the better provided agreed in advance.

"Donal Buggy plus Billy Riordan, maybe Andersen."

That's to look at some numbers.

"Better than 50% chance that Commission will send us Persona." That's neither here nor there.

Now, do you remember being at this meeting?

A. I mean, I don't remember it particularly, but in the

sense of, I think, originally you asked me do I remember it in terms of dating it; but I mean, certainly I remember being at a meeting in the Department, or meetings, and

Q. With a number of people?

A. With a number of people. And this type of material would have covered, certainly.

Q. Do you remember that type of discussion taking place?

Do you remember do you have a memory of there being some sort of concern that there was a political problem, what was the position about the institutional investment as opposed to the bid, what was the share configuration? Do you remember all that type of discussion taking place?

A. I mean, in a general sort of way. I mean, it's important that you kind of roll back the clock a little bit, because I think, you know, you had each of the disappointed bidders going around complaining at the time and the Department were actually trying to manage the whole situation. So you know, clearly, from the Department's point of view, they wanted to tread as carefully as possible.

Q. But do you know why?

A. Well

Q. Like, what was the problem?

A. Well, if you had every disappointed under-bidder in town sort of saying "why did they get it? Why didn't

we get it", naturally they are going to be concerned

they handled the problem.

Q. I can understand that issue. What was the problem here?

A. What do you mean, "what was the problem"?

Q. What was the problem that the Department were identifying?

A. Well, sorry, the problem was they had to make sure that they didn't make any mistakes, I suppose.

Q. Well, did you get the impression that they had to try and make sure that this conformed with the bid?

A. I can't remember that being, you know, particularly the issue. But

Q. Where did the 40:40:20 come from so, do you think?

A. As I started to say, I mean, I can't remember the particular issue. Clearly the Department wanted to have things, you know, as close as possible to being exactly as they were in the earlier stages so as to avoid any recriminations/complaints, whatever, that you know, the people who were actually being awarded the licence weren't different from, shall we say

Q. The people who were in the bid?

A. Yeah.

Q. That's fair enough.

A. Which I would have thought was totally reasonable from their point of view.

Q. And can I take it from your point of view again, I

think we discussed this earlier, as far as you were concerned, if the Department told you you were out all together, you were out all together and you were going to seek your compensation from

A. In practical terms, you know, we wouldn't have been happy, so we would have seen, you know, what our legal advisers were able to achieve. I am sure kind of each of the other consortia went to their legal adviser to see what they could achieve, you know.

Q. You had never been in the original bid; isn't that right?

A. Absolutely. We didn't become involved at all until I suppose formally the 29th September.

Q. Now, if you go to Tab 130. This is a note which was made by Mr. Arve Johansen on the 4th May, 1996. It was the day after this meeting in the Department where he records his views in relation to certain matters.

And he records there, at paragraph 1, that Denis O'Brien came to see him in Oslo, "probably sometime during September last year". We know it's the 22nd September.

"He informed me that based on information from various very important sources, it was necessary to strengthen the Irish profile of the bid and get on board those who would take a much more active role in fighting for Digifone than the neutral banks, who basically would like to keep a good relation to all consortia."

Now, had any had Denis O'Brien ever indicated to you that he needed to strengthen the Irish profile of the bid?

A. He had never indicated to us, at least I don't think he had; certainly I am not particularly conscious of it.

Q. You are not conscious of it?

A. No. I mean, I think, reading some of the, shall we say, transcripts, or some bits of the transcripts, you know, it's clear that it was an issue, but it wasn't one that he particularly raised with us.

Q. With you?

A. Because I think, you know, there is a suggestion somewhere in the documentation that there were going to be more votes for the Irish people than there were for Advent. But

Q. Sorry, that's right. That's the weighted voting in the Advent in the Communicorp situation?

A. But I don't remember that as being an issue that he ever discussed with us.

Q. Do you remember having any discussion with you about taking an active role in fighting for Digifone?

A. No.

Q. Now, he says Mr. Johansen records there that "Underwriting wasn't given as an explanation to him on 22nd September", but you weren't at that meeting?

A. No.

Q. Then he said that "this is information Denis would have given him. IIU should apparently be the ideal choice for this function. The only string attached being that they demand a 30% equity participation for the job."

Well, you were looking for 30% for whatever the job was; isn't that right?

A. Yeah.

Q. "Denis had managed to reduce this to 25%, but it was impossible to move them further down."

And then he goes on to describe about them having to Denis trying to get them, as you can see, according to this note, to swallow more dilution. And then they go on, as you can see there, to describe how they decided that they'd share the pain equally.

Now, if you go over the page, because if you go to you see Number 6: "As we go along we learn more, but it all serves to disclose more details which again more and more prove the above scenario.

"In the meeting with the Department of Communications, Friday May 3rd, it became evidently clear that IIU was not a favourable name from a 'Irish public' point of view. On the contrary, the Ministry basically asked for help for how to explain why we had substituted Advent, Davy Stockbrokers and other recognised named institutional investors in the bid."

Then he outlines them there.

"Eventually the project coordinator from the Ministry, Mr. Martin Brennan, actually appealed (off the record) to Telenor to write a letter of comfort that we would serve as a last resort for the Digifone company for funds and operational support. My feeling was that if Telenor had owned it alone, he had been more comfortable than with the current shareholders."

I just want to ask you, do you remember a discussion about IIU and it being or Mr. Desmond and it being considered to be a compromise

A. Not a favourable person.

Q. Not a favourable person, or not using that particular word, but a problem, a concern, or anything of that nature?

A. No. I mean, certainly I would recollect a sensitivity as being much more to do with the fact that you know, shall I say, they were being attacked from all sides by, you know, kind of the losing consortia, and they wanted to make things look as close to the original as is feasible. I mean, I don't particularly remember, you know, Martin Brennan saying kind of with you know, "We don't like IIU". I mean, if nothing less, he wouldn't be that impolite.

Q. I want to tease that out with you there for a moment. Because you were aware that there was a sensitivity about being attacked from losing consortia, and they wanted to keep things as lose as possible to the bid.

That was your sense?

A. That was my sense, yeah. I mean, I think it's fair to say that you know, you would have had none of this sensitivity if everybody else had actually accepted the result. But everybody was looking, as is clear from the documentation here, as to what legal action to take, right up to the last minute.

Q. And I suppose likewise there wouldn't have been any of that sensitivity if things were, at that stage, as exactly as they had been in the bid; isn't that right?

A. I think the reality is these things always change a bit through the process.

Q. That's another day's work, but again, would you agree, there wouldn't have been any sensitivity if things had been exactly as they had been in the bid document?

A. Probably not. But who knows what basis people would have been attacking him on?

Q. The problem here was that things were different, weren't they? We know that.

A. Well, they were different in the sense that in the sense there would probably have been the evolution of time from August to May, you know. In August, effectively, when Denis put in his proposal, he had kind of letters of you know, kind of "Come and talk to us once you get this licence". Whereas, in actual fact, Denis had arranged with us at the end of September that you know, kind of win or lose, we

would actually be involved; not on the basis of subject to a hundred different approvals, but on the basis of commitment.

Q. And he could have done all of that before he submitted the bid, as well, I suppose, in commercial terms. You know

A. I suppose hindsight is a wonderful thing; you know.

Q. All I am asking you is, there was a competition. He submitted one thing, and I think we are not disagreeing things were different now?

A. Things were different in the sense that

Q. And things were different in the sense at least of the 29th September?

A. Well, I wouldn't have said things were different from the 29th September to now, but certainly things were different in a sense that the institutions who had put in kind of the qualified letters, you know, were no longer involved as of May the 16th, other than as of kind of lenders.

Q. And you were in?

A. We were in.

Q. And at that stage, before the signing-off on the licence, you were in for 25%; isn't that right?

A. That's right.

Q. So the two differences was that you were in, and the configuration; isn't that right? Those were the differences?

A. Mm-hmm. I think it's also, it's clear, sorry, obviously less sensitivity, there was some shifting around of, shall we say, I think, some of the Communicorp thing and

Q. Yes, I know that, the Esat Telecom Holdings thing. I don't think anything much turned on that, how it transpired. That's fair enough. Those were the differences.

And I take it that you appreciated it wasn't a major concern for you, but you appreciated that there was a sensitivity in the Department about this, anyway?

A. I mean, I think everybody was probably aware there was sensitivities by this stage. I mean, this is kind of whatever, a week or ten days before the licence was actually signed.

Q. Yes. And we can see, because we have been through these documents on a lot of occasions now, there was a lot of discussion in preparing for a press conference, divert attention away from ownership, talk up things like price and

A. Quality of service.

Q. and quality of service and all that. And you have seen all those documents, I think?

A. Yeah.

Q. And that is your understanding of the type of atmosphere that existed, because there was a

sensitivity that things were not as they had been in the bid, and there was an attempt to get them as close as possible as they could be to that; isn't that right? That's the general

A. Absolutely, and you know, as I said, the kind of, shall we say, losing consortia were threatening all sorts of legal actions to try and overturn the thing.

So you know, I am sure the Department didn't want a fiasco on their hands.

Q. Now, I am just wondering, because Mr. Johansen, who was Norwegian and didn't wasn't in Ireland that much, it's just his note there; you see that: "IIU was not a favourable name from an 'Irish public' point of view."

A. Mm-hmm.

Q. Now, at this stage the Department, because of the at least the letter from Mr. O'Connell of the 17th, were appreciative of the fact that IIU and Mr. Desmond's name were linked, isn't that right, at least?

A. Yeah.

Q. It hadn't been disclosed at this stage that Dermot Desmond was to hold was the beneficial owner of the shares; isn't that right? We can see that coming, I think, in due course.

A. Okay, I mean, I just can't remember what date.

Q. I know there are only days involved here, but now,

doesn't it seem likely that there must have been some discussion about that at that meeting for Mr. Johansen to form such a view?

A. Yeah, I mean, to be honest, you know, I don't doubt that there was discussion, you know, at some stage around then, you know, about sensitivities, etc. But you know, whether it was actually at that meeting sorry, we already looked at Owen O'Connell's

Q. Not being favourable from an 'Irish public' point of view could only have related to one aspect of Mr. Desmond's life, isn't that right, and that was the involvement in the Johnston Mooney & O'Brien site; that was the conversion issue in his life?

A. Yeah, well, I think

Q. Would that be fair to say?

A. Dermot has courted controversy since

Q. I know, from a kind of a public-non-favourable point of view, being fair to the man, if he was hard in business, that's his own business, but from an Irish public point of view, as far as I can recollect, in any event, the one sort of public issue was controversy about that; isn't that right?

A. I think he has also been castigated for being supportive of Charlie Haughey on occasions, but however...

Q. That's not being unfavourable from an Irish public point of view, because half the Irish public might

find that a proper thing to do or a right thing to do or be favourably disposed to him for doing it. But wouldn't you agree that that was the one controversial matter?

A. Well, I have to say I don't remember, shall we say, any discussion in relation to kind of those aspects.

Q. No, no, but isn't that isn't that in the public's mind, or in a public official's mind in relation to this, this was the one issue that was controversial; does anyone dispute that, that it was controversial?

A. Well, I mean, I suppose nobody disputes whether it's actually controversial, but you know, I mean, all I can say is that you know, I think people just, shall we say, people either will love or hate Dermot in the same way as they possibly love or hate Charlie. So from that point of view, I think, you know, they were probably conscious, but you know, whether they were tying back to the Johnston Mooney thing or not, I have no idea, but I am sure that was part of the overall culture.

Q. Fair enough.

A. I suspect it was wider, to be honest.

Q. And there is no doubt about it, there was a report published concerning Mr. Desmond, isn't that right, Mr. Glackin's report?

A. That's correct.

Q. So can I take it that you wouldn't whilst you can't

confirm or deny the actual language used by Mr.

Johansen here, you had some sense of concern, sensitivity in the Department surrounding matters at that time?

A. Yeah, I mean, I think, you know, I mean, the way it's actually described in Owen O'Connell's note is probably kind of the way I would have tended to believe it, which is that the whole thing was a political football. You know, I mean, I think, as I say, because everybody was actually clearly coming out complaining about the fact that they hadn't got it, you know, various politicians were obviously being briefed, I am sure various media people were being briefed. So I mean, people would have been very sensitive to make sure.

I don't remember it, I have to say, in the context of Arve's comment, but certainly the general sort of concern about it being, you know, a political football would have been there. I think, if you remember, the Department actually postponed the award or, sorry, the formal signing of the licence, from was it the 13th to the 16th? because they were actually meeting the various disappointed bidders at that point in time.

Q. That's right. They didn't want to offend the sensibilities that's correct. But

A. If you look at it from a civil service point of view,

I mean, these are a group of people who sat down, tried to do the absolute best, you know, you know, tried to follow kind of a whole series of procedures to protect the thing and you know, turned around and they were being attacked from all sides, as if you know, they had done something that wasn't absolutely appropriate and above board.

So you know, of course there was sensitivity within the civil service.

Q. I think you identified the sensitivities, I suppose, in relation to the position vis-a-vis the bid, and it was the configuration, the 25 the 40:40:20

A. versus the 37.5:37.5:25.

Q. and the fact that you hadn't been originally in the bid, they say were the things that were different?

A. There would have been an element of people around town who were obviously disappointed that they were no longer in, now that it had crossed or were about to cross the finishing line.

Q. That may be a commercial matter, but

A. Aggravation comes from commercial matters.

Q. I am looking at this from the point of view of the people who were conducting the public's business on this side. I know that wasn't your concern.

A. From the point of view of the people conducting the public business, I would say that they were probably careful at every step to make sure that they didn't do

anything, you know, that was inappropriate.

Q. But there was sensitivity about the configuration, and you understood there was sensitivity about the fact that you were in and you hadn't been in the bid; isn't that right? Those were the two

A. Sorry, I mean, we are surmising. There was certainly sensitivity about the 40:40:20 versus the 37.5:37.5

Q. I thought a moment ago you agreed there was certainly sensitivity about you being in and you weren't in the original bid. Wasn't there a sensitivity about that

A. If you'd actually let me finish the sentence. I was about to say there was certainly sensitivity on the 40:40:20 versus 37.5:37.5:37.5, and I was going to go on to say that clearly the fact that we were there as opposed to, you know, the people who would have liked to have been there, was going to cause disgruntlement on their part.

Q. That's a different issue.

A. I don't think so, because I mean, we are talking about sensitivity.

Q. But what these people carrying on the public's business had to do was, having run a process, to make sure the result of that process was as close to what the process had been in its outcome, I suppose. That was their obligation, I suppose, in relation to running this process.

A. Absolutely. I suppose, you know well, I don't know what advices the Department actually took at the time as to whether or not, shall I say, the ownership was or changes were acceptable or not acceptable, but I mean, the practical reality is that you know, we were putting up money as opposed to kind of other people putting up money. But the operators in the form of Telenor and Esat hadn't actually changed. So you know, I mean, money is a fairly fungible commodity; so while they may have had sensitivities in a political sense, I can't see why they would have had any sensitivities in a departmental sense.

Q. I see.

You know that on a number of occasions, and as late as of the 30th April of 1996, the Minister had been questioned in the House and made statements in the House about the second GSM licence?

A. I mean, to be honest, I couldn't tell you what the Minister said on the 30th April, '96.

Q. Well, on each occasion, he was asked about or made speeches about the second GSM licence in relation to the, what are described as the investors remember this originally, the Minister had disclosed, in relation to this particular consortium, that there were Telenor, Communicorp and four named investors.

That's what

A. Sorry, my recollection of what we put up on the screen

this morning was that he actually said that the financing arrangements were confidential, isn't it?

Q. Sorry, but he couldn't disclose who they were. This was

A. I just can't remember.

Q. on the 4th August, I can assure you, on the 4th August.

A. We were talking about what the Minister was saying in the Dail. But when we put the stuff up this morning, there was some Dail statement; I can't remember whether it was at the end of October or beginning of November. And at that stage, I thought what we read was something to the effect that you know, he couldn't disclose the funding arrangements, which were confidential.

Q. That's right. The names of the investors. He couldn't divulge who they were.

A. Sorry, I don't have a copy of it here

Q. It commenced with a statement made by him in respect of all of the consortia on the 4th August. And in relation to this consortium, he referred to them comprising Telenor, Esat they were Communicorp at that stage, perhaps and four investors. And he couldn't, for confidential reasons, disclose who they were. That was the first thing.

We then saw the statement, the statement again where he invoked when he was being asked to name those

investors; he invoked the confidentiality aspect of matters not to disclose it, and every time he was in the Dail in relation to this, he was asked about that, and each time he invoked confidentiality in relation to it.

A. I mean, I am sorry, I have to take your word for it.

I don't have the transcripts from the Dail here.

Q. Now, as far as you were concerned, you were delighted to be involved in this; it was a good investment opportunity. Isn't that right?

A. That's correct.

Q. You were a new company and wanted to get up and involved in things; isn't that right?

A. That's correct.

Q. And as far as you were aware, you were bringing a lot to this particular project in respect of not just, I suggest, your financial investment in the matter, but also that if you had board representation, that you would have a contribution to make to the company and thereby ensure that your investment was protected and perhaps grew?

A. I mean, sorry, in relation to the last statement, I mean, by definition, if we are on the board, we expect to make a contribution. You know, I mean, anybody

Q. Can I take it that you understood it that Communicorp that's Mr. O'Brien and Telenor understood that you had a contribution to make as well, that they were

happy to have you on board?

A. Well, I would expect, to be honest, if Telenor or Mr. O'Brien were to look at the historical track record of either Dermot or myself, they would expect us to be able to make a positive contribution to anything. But I mean, you know, the reality is any time we invest, you know, we would normally join the board, and we would normally expect to you know, shall we say, shepherd the money in some fashion.

Q. Does it seem puzzling to you, in the period from the 29th September right up to the 16th May, that I am sorry, right up to the 17th April, when Mr. O'Connell wrote his letter that nobody and I know you say you weren't the interface with the Department nobody informed the Department of the true nature of your involvement or the full extent of your involvement?

A. I mean, it doesn't particularly you know, how can I be surprised when I wasn't really at the meetings? I mean, I have a feeling that most of the meetings were to do with the licence, but I really couldn't tell you.

Q. And are you surprised, or do you know why according to Mr. O'Connell, at least there was some form of strategy as to when it should be disclosed about your involvement, that there was no public announcement about your involvement?

A. To be honest, I have no recollection of Mr. O'Connell devising a strategy in relation to that. But I mean, if he did, he did.

Q. Now, as you say, that you got the feeling that there was sensitivities around the period of May of 1996, and that you believe that this could have been driven by concern about pending litigation from disappointed consortia. As far back as September of 1996, when there were no disappointed consortia, because the competition wasn't over at that stage '95, I beg your pardon the competition wasn't over at that stage; it was not disclosed to the Department in the letter of the 29th about the 25%. Isn't that right?

A. We have been over that ground so many times. I mean, what was disclosed to the Department on the 29th was a commitment by ourselves to ensure that all of the non-Telenor equity would be provided.

Q. And Mr. O'Connell, in his evidence, has agreed that at that time the full nature of IIU's involvement was not disclosed. It wasn't disclosed at the first meeting, and he said after the announcement of the award, and I think he made the point it could have been disclosed at any time, but it was decided, and it wasn't by accident, that you would pick your time or that somebody would pick the time to disclose it.

Now, what sensitivity could there have been in September of 1995, when there were no disappointed

consortia?

A. Well, I mean, very clearly, at the time we actually did it, in September of '95, you know, the only people who were actually relevant were the Department. You know, I mean, I don't know how you conduct your business affairs, but we normally try to conduct them kind of relatively quietly except where we have to go into the public domain.

You'll see in my letters of the 29th there is a very clear confidentiality clause requiring that Denis would only use the letter to Martin Brennan for the purpose of actually informing, and it would be very abnormal for us to actually disclose things into the public domain.

Q. I am not talking about into the public domain. Disclosing it to the Department.

A. Sorry I mean, we disclosed to the Department, you know, that we were prepared to underwrite all of the non-Telenor stuff. You know, as I said, if the Department had wanted to come back and ask us questions

Q. All right, is that the way you'd normally conduct business in a public process like this if you were involved in it?

A. I suppose a quick answer is I haven't been involved in a phenomenal number of public processes. You know, each situation is actually different and individual.

If you were to ask me would I do things different today, with complete hindsight, I think the answer is no, I wouldn't. The purpose of the thing was to confirm to somebody that we were going to provide all of the equity that was required, or going more precisely, going to ensure that it was there. And that's exactly what it did.

Q. I think I might if you go to 131 now. This is a note of Owen O'Connell's. He receives a phone call from Fintan Towey, and this is the Department.

"Minister very strong preference for 40:40:20". You see that note? "At the time of licence". I take it you must have been put into the picture on this sometime soon thereafter?

A. Well, I mean, in practical terms, sorry, I am not conscious of whether I was aware of this particular conversation, but

Q. In practical terms, you knew it was going to happen anyway?

A. This had been an issue since whatever, February.

Q. I just want to go to a document now which is a memorandum sorry, perhaps before I do that, I should just deal with yes, it's Document 135 A, perhaps: The only thing I want to ask you about this, in the letter of the 1st May from the Department to Owen O'Connell, and at the meeting in the Department on the 3rd, Owen O'Connell was asked, as we see, for

certain what we'd call the housekeeping

documents, certificates and that sort

A. A due-diligence type of thing.

Q. A due diligence. And he was also asked for an explanation of the a full explanation of the makeup of each of the shareholders; do you remember that?

And this was a draft he prepared in the first instance, and you can see it goes into a long explanation.

A. Sorry, the draft letter I have is one dated the 10th May, you know, which starts off with "I refer"

Q. It's three pages. It's a long letter. It goes on it deals with IIU; it gives an explanation about IIU and all the rest of it.

A. Yeah.

Q. It's been read over and over again here in the Tribunal. I am not going to read it to you. The letter which went eventually to the Department really only contained what you have described as the due-diligence aspect of this letter; that is the list of documents.

A. Right.

Q. And the rest was excluded. I am just wondering, did you ever see that draft?

A. I mean, the reality is I may have, I may not have. You know, I mean, it's impossible to tell, really.

Q. I am just wondering, and I'll put you further in the

picture. Mr. O'Connell said that the reason why that which is contained was not included in the final letter which went to the Department was, that was at either the request of or with the acquiescence of Fintan Towey in the Department. Did you ever hear of any such discussion or request or acquiescence?

A. No, I mean, I have no recollection of it, but you know, I think, as I said before, Owen O'Connell really was the sort of person dealing directly with the Department.

Q. Right. But you don't have a recollection of this?

A. No, I don't.

Q. Now, I think Document 136 is a copy of a letter sorry, sent by Mr. Johansen to Mr. O'Brien on the 10th May, 1996, and he copied it to Dermot Desmond. Do you know if you ever saw it, or would you have dealt with it?

A. I suspect Dermot didn't deal with it, being polite about it.

Q. All right. You can see there that do you remember the letter, first of all?

A. I mean, very vaguely. I mean, this clearly goes back to you know, I mean, Denis in some sense is trying to get additional funding in different directions, trying to take control of the company in different directions.

Q. And the explanation given for your initial involvement

and the dilution and all of that sort of thing, do you remember receiving such a letter?

A. I mean, the whole time period around this was extremely fractious and heated, so there was lots of discussions of various temperatures going on.

Q. So you were in the frame that there was a heated discussion going on?

A. I think we were trying to calm them down, from memory.

Q. Because I think the next document is Document 138.

Again, I am not going to go into this in great detail.

This is Mr. O'Brien's note of a meeting on Saturday, the 11th May, 1996, where he records you as coming

to it's at 138 "Michael Walsh came to Paul

Connolly's office at 7pm on Saturday the 11th May. He said"

A. Sorry, the typescript version, at least in my binder.

Q. Sorry, I do too, yes.

"He had just had a meeting with Arve, the Telenor lawyer Rolf Busch, and Arthur Moran ... Addressed to

IIU. He said AJ was getting entrenched. I told

Michael Walsh that I had been to a meeting with D.

Desmond at 6 o'clock, and DD had proposed the

following. We would agree to buy 2.5 to add to our

37.5. Tell Arve if he is not going to take up IIU's

offer of the 2.5, we will be agreeable to sign the

shareholders agreement on the 40:40:20 basis. IIU or

Dermot Desmond would give Communicorp a loan of the

cash required to fund 40% or 6 million.

"Dermot Desmond says once we have the licence we were all in the one boat. Dermot Desmond said he would be in one transaction all together to do the following:

"A. 5% each to Telenor and Communicorp. That would increase to 45% each.

"Insist on Communicorp be granted an option for a further 5% of Esat Digifone, which would bring Communicorp holding to 50%. DD thought that the option would be exercisable 12 months later. This was Communicorp to consolidate its 50% showing as per request from CSFB in Year 2 that is 1996.

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

Do you remember

A. I mean, sorry, I remember vaguely, because it was actually quite a pleasant evening, sorry, outside, whatever, but inside in the meetings. And you know, there was a number of kind of elements of fraction.

Obviously this particular you know, kind of note that you have just read out, is it looks like either Paul Connolly or Denis O'Brien

Q. It's Denis's note and witnessed by Paul Connolly.

A. All right. Basically, Denis telling me what he had actually said to Dermot and agreed with Dermot. And

you know, then, you know, I obviously talked to Dermot and came back.

Q. The note follows "At 8:00pm Michael Walsh phoned Denis O'Brien to say that he had spoken to DD.

"1. He did not want any piece of paper around reflecting what was discussed".

Do you know why that was?

A. Well, I mean, very clearly, I mean, what was actually being proposed here is that you know, we would shift to 45:45:10 as opposed to 40:40:40. And I am sorry, earlier in the day, or the weeks, it would have been, you know, the shift from 37.5:37.5:37.5 to 40:40:20. So really what was happening here was part of the total compromise package was you know, we were agreeing to sell 2.5% to each of Telenor and Esat, and we were also agreeing to sell a further 5% to each of Telenor and Esat, and basically sorry, that agreement that I referred to in my questions and answers was something that you know, was never actually formally written down, and you know

Q. We see an ultimate note where we see that Dermot Desmond, through you, I think, delivered the message that Denis O'Brien would have to trust take his word.

A. I think there were kind of gentle words along those lines, yes.

Q. I won't go into the rest that was the way things

were evolving; is that right?

A. That's the way things were actually evolving. As I say, it was a very fraught time period.

Q. I want to ask you about I wonder, could you get Book 50, Mr. Walsh, please. And just Tab 143.

And this is a minute prepared by Mr. Owen O'Connell of a meeting he had at the Department on Monday the 13th May with Knut Digerud, and Martin Brennan and Fintan Towey were there for the Department.

Now, I wonder if you'd just go over to the second page, and it's the third paragraph. He said: "Fintan Towey made the point that the bid had referred to 20% of the company being placed with the blue-chip institutions, acknowledging that the institutions in question were not identified".

And I think what has been given in evidence here was I think not identified in public.

"He queried IIU's intentions in regard to placing of its holding. Owen O'Connell replied that IIU was a financial institution and qualified under the bid description. So the placing question should not arise; and that while it might place its shares in future, if queried now on the point by journalists, might reply that the recent turmoil over the licence made such a placing unlikely for market reasons for some time. (Stressing that this was not Owen O'Connell's view but was based on comments made by

Michael Walsh)".

I'll just tell you what Owen O'Connell has said in evidence: that he was informing the Department, in this paragraph here, that that was your view, and that was never that wasn't his view. He was expressing it then, and he says in evidence that was your view; isn't that right?

A. I mean, I can't remember in particular me saying that to Owen, but you know, that would be my view then and it would have been my view even today, in the sense that, you know, there were too many things moving around in this thing, as I have said already, for anybody to sensibly go out and consider placing and maximising value.

Q. But where were the things moving around by reason of

A. But sure the licence hadn't been awarded. There was fighting going on between the shareholders as to what the percentages were going to be. The shareholders agreement hadn't been signed. I mean, you couldn't possibly go out and offer shares, you know, with so many loose ends.

Q. The turmoil within the consortium was making that impossible, wasn't it, at that time?

A. I mean, turmoil within/without, whatever way you like to describe it. The very fact that you had all the other various disappointed bidders going around

complaining and threatening to actually sue, I think filing complaints against you is not entirely conducive to maximising value.

Q. Now, the letter, the draft of which is that is the draft of the 13th May, and which we have looked at, containing the due diligence I'll get it for you again now in a moment. That included the various documents, and

A. Sorry, back in the previous folder, I think, is it?

Q. Yes, it is, it's in another folder. I am just getting them for a moment. It's not in the previous folder.

It's in fact the various certificates may be in another folder. The letter is in the previous folder.

You will see the actual letter itself in this folder of 144A. Do you see that?

A. One second.

Q. It's the final draft, anyway. This is the one that went do you see 13th of May 1996 from Esat to the Department?

A. Yeah.

Q. And those are the various enclosures, then. "Letter from Telenor ... Copy of letter from Arthur Andersen & Co. in Oslo ... Letter from Farrell Grant Sparks, financial advisors and auditor to Dermot Desmond, the beneficial owner of IIU Limited. Letter from Paul Connolly. Letter from KPMG, auditors to Communicorp. Letter from ABN-AMRO concerning the project financing.

"The company will, on or before the grant of the licence, be owned as to 40% each by Telenor Invest, a wholly-owned subsidiary of Telenor; 40% by Esat Telecom Holdings... And 20% by IIU Nominees Limited Holding on behalf of Mr. Dermot Desmond.

"IIU Nominees Limited is a wholly-owned subsidiary of International Investment & Underwriting Limited, which in turn is wholly owned by Mr. Desmond".

A. Yeah.

Q. This is the formal declaration that the shares are beneficially owned by Mr. Desmond; isn't that correct?

A. That's correct.

Q. Now, when the Department received these documents, they raised certain queries; is that right?

A. That's correct.

Q. And can you remember what happened?

A. I mean, I think it's actually set out in, whatever, the next divider, 145, you know, basically there was some statement to me somewhere along the line that, you know, I had to go and see

Q. John Loughrey?

A. John Loughrey, the next morning.

Q. Who told you that? Was it

A. To be honest, I can't tell you whether it was Denis or Owen; one or the other, though.

Q. Right. And when you went to see John Loughrey we can look at the documents but when you went to see

John Loughrey, can you remember what the discussion was about, generally?

A. I mean, the discussion, I think, was actually fairly straightforward. My recollection is by that date, you know, we had actually supplied the sort of more expanded letter from Farrell Grant Sparks which adjusted various assets of Dermot, and, you know, as we covered yesterday, I met with Loughrey and others, and I couldn't tell you who the others actually were, or indeed whether there was one or two or more of them, but you know, basically I actually met with them, and I think Loughrey's basic comment was "Well, you know, that is all very fine, but, you know, really, I need to be certain that this project is going to have cash to meet its needs over, you know, kind of the next period of time". And his focus was on, you know, liquidity. And you know, basically, I mean, I think he probably proposed something totally unreasonable. But, you know, we had an arrangement certainly as to how much liquidity was necessary to prove, because, I suppose, from his point of view, he would have liked to have seen every penny in the bank. Equally well from my point of view, I would like to only put it into the bank the day it was actually required.

So eventually we came to an agreement that we would get, you know, a letter of undertaking from the bank

to confirm that, you know, there would be $\frac{1}{2}$ 100 million actually available for the project from or to meet kind of Dermot Desmond's needs during 1996.

Q. Now, you did have a meeting or there was information furnished to Donal Buggy you might not remember Mr. Buggy specifically, I think or information may have been sought from you. That was when he was carrying out, I suppose, what you have described as due diligence. This was when he received the certificate from Farrell Grant Sparks at that time.

A. Right.

Q. And that listed the assets of Mr. Desmond; isn't that correct? It didn't

A. That's correct, yeah.

Q. And it didn't include a list of liabilities, and I think Mr. Buggy may have been raising questions about that, and he felt that there was a reluctance to give him any answer to that; that seems to be the position.

A. Yeah. To be honest, I don't remember that so much as, shall we say, kind of John's comment about being kind of asset-rich is one thing, but you being, shall I say, liquid, is another. John's focus was not so much on, you know, you know, shall we say, what was the value of the assets or getting certification on the assets or liabilities. John's focus was, you know, I want to make sure that there is enough cash around to actually meet the needs of this project, and the

easiest way to do that is for me to get a certificate from a bank confirming that effectively there is money, and, you know, as I say, it was agreed that, you know, we would get a certificate to confirm that there was 10 million cash available and the bank was standing over that to meet any equity requirements of Dermot Desmond during '96.

Q. And I think you prepared a draft for the bank.

A. That's absolutely correct.

Q. At Tab 151A

A. I think there is actually a typed-up version at 151B.

Q. Yes, there is, at 151B.

A. Except XYZ Bank becomes Anglo Irish Bank.

Q. Yes. Why was that? Just can I ask you why XYZ Bank, in the handwritten document becomes Anglo Irish Bank?

A. In the first typed version it's also XYZ Bank. I mean, basically I would have just been drafting the thing up, you know, and not thinking particularly on terms of signatures or otherwise, but I mean, Anglo would have been the obvious people for me to go to.

Q. Go to for what?

A. Well, more or less for anything. If you want a decision the same day and get something done the same day, you go to Anglo. If you want a decision taken in a few weeks' time, you go to somewhere else.

Q. Do I take it you went to Anglo to raise this money?

A. No, we went to Anglo to actually get the letter

issued.

Q. You'd get the letter from anybody if you had money there, wouldn't you? Did you go to Anglo to get a decision to make this money available?

A. No, we went to Anglo because basically the Department were looking for a letter, you know, confirming that the money was actually available and, you know, basically we had a good banking relationship with Anglo. They are the type of organisation that will actually react immediately, which is why they have been so successful, and, you know, there wouldn't have been kind of a whole pile of delay in actually getting it done.

Q. Did you have 10 million in cash in there?

A. We did, yeah.

Q. You did?

A. Mm-hmm.

Q. So you say

A. But, sorry, I have to say that I think that question is totally irrelevant, because irrespective of what our banking relationships actually are, the reality is what the Department wanted was a letter of undertaking from a bank that the money would be available and Anglo were prepared. Now, whether they had been doing that because we had cash on deposit for a fee or for any other reason, maybe just because they liked me

Q. Say that slowly again, Mr. Walsh, because you had cash

on deposit for a fee or otherwise; is that what you say?

A. I said that really, from the Department's point of view, the Department were focused on, you know, we want a letter of undertaking from a bank to say that this cash would actually be available. It was irrelevant from the Department's point of view as to whether they had that banking arrangement done on the basis of cash backing or some other arrangement with them. I mean, you know, if they had decided to issue the letter simply because they liked me, it still would have been an undertaking from them to which they would have had to stand over.

Q. I understand that, but you said that Anglo was one you could go to and get a decision from quickly. If you had 10 million on deposit in any bank, I take it that you could ring up the bank and perhaps get a letter sent over by courier immediately if the money was there?

A. Well, I have to say, in my experience, trying to get letters out of most institutions takes forever. But, you know, that is not the case with Anglo.

Q. You see, it's your own it's the words you used yourself; you said that Anglo was the one to go to because you had to get a decision quickly from them.

A. Well, absolutely, yeah.

Q. But why would you need a decision if you had the money

there on deposit or in a current account and all you

wanted was a letter to confirm that it was there

A. I think, irrespective of where you were going to, if

you go to a bank and ask them for, you know, a letter

of guarantee, a letter of undertaking, the first thing

they do is actually employ their kind of legal

advisors to actually draft it up. I wanted a letter

which I needed effectively that day, and by far the

best place to go to was Anglo.

Q. Were you looking for a proof that you had the

facility, rather than proof that you had the money?

A. Sorry, what the Department were looking for, and this

letter was drafted really at the request sorry, the

undertaking was actually given at the request of the

Department, so this letter was actually drafted so as

to actually get an undertaking from a bank that the

needs of the Department were actually being met. In

any event, it's nothing to do with whether I wanted a

facility or anything. It's entirely a simple

undertaking, you know, "The sum of 5 million will be

provided to the company prior to the signing of the

licence. We undertake that the balance of 5 million

will be available to the company at any stage during

1996 to meet any obligation Mr. Desmond, through IIU

Nominees Limited, to subscribe for equity in the

company".

I mean, what could be more clear, if you were

receiving that in the Department from a bank?

Q. Sorry, that's not why would you need an undertaking from the bank in respect of your own

A. Sorry, it's not an undertaking to me. It's an undertaking to the Department.

Q. Why would they need that?

A. Because the Department were basically saying they wanted proof that liquidity was going to be available.

Q. So did you provide any other documentation or make any other arrangements with the bank in relation to a balance of £1/25 million?

A. I mean, as you know, on a confidential basis, we did, but you know, equally well, you know, irrespective of what our banking arrangements are with Anglo, the reality is, in terms of the Department, we were actually undertaking sorry, the Department had required an undertaking from a bank that 10 million would be available, 5 million of which was payable prior to or on signing of licence and the other 5 million would be available during 1996, and that's exactly the undertaking that we actually provided, you know, from Anglo to the Department at the Department's request. You know, the details of our banking relationships, you know, are really a private matter, and I mean, are not relevant because the Department was only concerned with actually receiving the undertaking from the bank. They weren't concerned as

to the private arrangements we had with the bank at the time.

Q. What Mr. Loughrey was concerned about was liquidity; is that right?

A. Absolutely.

Q. And that could be resolved in two ways: the actual cash, or a facility; isn't that right?

A. What Mr. Loughrey was concerned with was that, you know, there would be the cash available during the time period, and, you know, he wanted something that was an undertaking from a bank to confirm that that would actually be available. And that's exactly what he received.

Q. Was this a facility, or was it your own money, I want to know.

A. Sorry, this is an undertaking from Anglo Irish to the Department to say that the money is actually available and will be available to the project to meet any obligation of Mr. Desmond through IIU Nominees to subscribe for equity.

Q. And you made that arrangement with Anglo Irish Bank?

A. I made that arrangement with Anglo Irish Bank, yeah.

Q. Did you have any discussion with Mr. Desmond before you did it?

A. No, I didn't.

Q. And you weren't aware personally of Mr. Desmond's financial position?

A. No, I wasn't, but I would have been aware that Dermot obviously did quite an amount of business with Anglo, but equally well, I would have been familiar with the fact that Anglo were quite aware of our being in activities.

Q. Look, it's not a loaded question. It's just

A. Sorry, it's entirely a loaded question, because

Q. What is the problem? Was it based on cash or was it based on facility? That's all I am asking.

A. Well, it is a loaded question, because you are basically seeking to go behind this. Now, you know and I know that you actually have the information, but you also have got it on a confidential basis.

Q. I don't, Mr. Walsh. I don't, Mr. Walsh

CHAIRMAN: Look, Mr. Walsh has stated in the first instance that there was cash to meet it, and he then made the remark about privacy. So I mean, there is sworn evidence to that effect.

Q. MR. COUGHLAN: Now, let's look at the shareholders agreement, then, if we can. And all I am really concerned with in relation to the shareholders agreement is, I suppose it arises out of a question I heard Mr. McGonigal ask the other day about the arrangement agreement; there was a condition in the the arrangement agreement, the condition in the arrangement agreement. I'll get them for you and I'll read them out to you.

The condition: "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 license to it on or before 31 December 1995.

"B. If the condition referred to in the subparagraph (a) is not fulfilled on or before that date, this agreement and everything contained herein shall be void and of no effect, and the Arranger shall have no claim against the company, nor shall the company have any claim against the Arranger for costs, damages compensation or otherwise."

It's just I heard Mr. McGonigal ask somebody about that, and I don't know why, but I am just inquiring: First of all, you never saw the Government decision in relation to this particular matter. You may have seen it in these documents here.

A. I can't recall, certainly, yeah.

Q. And you did you ever see the letter from the Department notifying the consortium after the 25th October, 1995? You may or may not have.

A. Not that I am aware of.

Q. But in any event, am I correct in understanding that the arrangement agreement or the underwriting agreement continued right up to the signing of the shareholders agreement on the 16th May of 1996, and this was acknowledged by everybody in that

shareholders agreement; isn't that right?

A. I think that's correct, yes.

Q. Because it's just put up I think it's clause 17.11 of the shareholders agreement. I'll put this one up. I just have a copy of it.

"IIU has joined in this agreement as the Party nominated by International Investment & Underwriting Limited (the Underwriter) pursuant to a certain arrangement agreement entered into on the 29 September 1995 made between the Company and the Underwriter (the Arrangement Agreement) and it hereby expressly agreed and confirmed that in consideration of IIU entering into this agreement the arrangement agreement shall terminate with effect from the signing of this agreement and is of no further effect."

And that was signed off by all the parties; isn't that right?

A. If that's the clause in the shareholders agreement, the shareholders agreement was signed by both parties, absolutely.

Q. That is the clause.

Now, can I ask you this: Again, where is Bottin here?

Where has it gone? I mean in this

A. I think if we actually look at the side letter, you know, I mean

Q. This is the side letter where Mr. Desmond is identified as the beneficial owner of the shares?

A. Absolutely.

Q. All right; I'll get that out.

A. Somewhere along the way, and I can't actually give a precise time or date, you know, it was decided that it would all be done in Dermot's name.

Q. I have that here now. I can put this up as well.

This is the side letter: "We refer to the agreement and in particular to the provisions of clause 12.2"

This is the shareholders agreement.

"In accordance with our discussions, we are writing to you to confirm" this is a letter to Telenor and to

Esat Telecom "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:"

And then "Dermot F. Desmond, 100%".

"This letter is further to record our agreement that any transfer of the beneficial ownership listed above will be subject to the terms and conditions regarding transfer contained in the agreement and the memorandum and articles of the company, save and except that the shares beneficially owned by Mr. Desmond may be freely transferred on a once-off basis" this was the right, the once-off transfer; is that right?

A. Mm-hmm.

Q. " without invoking the preemption provisions. If, at the time of the share transfer, Esat Telecom

Holdings Limited and Telenor Invest do not hold equal amounts 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" I think that's "not directly or indirectly to purchase shares or interests in Esat Digifone Limited from any party holding such other 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 ... Esat Digifone the opportunity to participate and purchase on equal terms and pro rata to their shareholding in the company".

Then you are asked to sign acceptance of that. Can I ask, why wasn't that in the shareholders agreement?

Do you know why?

A. To be quite honest, I have absolutely no idea why.

You know, you'd really want to ask some of the legal advisers as to why.

A. It would be stuck into the clause 12; I suppose I mean, to be quite honest, we had discussion yesterday as to what the difference was between arrangement and assignment in an agreement, and I think, as I said to you, there were always side letters, as far as I was aware, in most agreements, but exactly where you had one versus the other

Q. You see, this was never given to the Department; the

shareholders agreement was. And there was a side side letter or a series of side letters furnished to the Department; those were in fact the proportionate guaranteeing of the company by you and Telenor. This one wasn't. Do you know why?

A. I mean, the quick answer is no, I have absolutely no idea why. I mean, my focus in relation to that letter was I wanted our ability to actually share the shares, transfer the shares, whatever you'd like to describe it as. Equally well, I think the tension from both the Esat side as well as the Communicorp side and the Telenor side was to make sure that if we were giving them to one side, we also gave them to the other.

Q. I know that's a further development of this here.

A. I am simply saying what my focus was at the time, and for anything else, to be honest, you'd have to ask.

Q. You won't go back. You have expressed a view, and I have asked you, doesn't it leave it open to a line of inquiry that was this there to allow that there was, to enable Mr. Desmond to do this, because there were investors behind Mr. Desmond in this particular

A. Well, I mean, sorry, if there were investors

Q. Or the potential for investors.

A. There were potential for investors, absolutely. And you know, I mean, I think I have said it multiple times, you know, we always would have taken the view

that we wanted the option to sell, you know, to other people, institutions, whatever I'd like to describe them as, at you know, future dates. As it happens, we never availed of that opportunity; but I mean, that was certainly the intent, to preserve that flexibility.

I think the view from the Department, just from memory, in terms of kind of the substance coming back, was you know, they wanted, you know, powers to control any transfers.

Q. Well, I suppose the information furnished to the Department by reason of the shareholders agreement showed what would be, I suppose as you say, all shareholders agreements are different. But in this shareholders agreement, that the parties were equal in terms of Clause 12.2; they were entitled to invoke the preemption provisions. But in fact IIU sorry, Mr. Dermot Desmond was in a different position to the other shareholders as of that date as well; isn't that right?

A. Sorry, that's correct, but I suppose what I'm saying is that my recollection, and I think it's actually covered somewhere in the documents, wasn't there some discussion, was it Article 8 or whatever, which I think ultimately resulted in another side letter, which was to do with kind of further transfers of shares to people other than those well,

particularly to people other than those actually identified which actually gave some sort of requirement of approval from the Department.

Q. That I suppose that's slightly different. That relates to departmental control as opposed to intershareholders arrangements, doesn't it?

A. My recollection, to be honest, is that when we sought to actually transfer the further 5% to each of Telenor and Esat Telecom, I suppose, at that stage, that you know, certainly I think we wrote and got permission from the Department. I can't be a hundred percent certain of that, but my feeling is that the Department you know, had set it up so that they you know, had some element of veto. They probably had to behave reasonably, but I can't remember the details of it.

Q. Thanks, Mr. Walsh.

A. Thank you, Mr. Coughlan.

CHAIRMAN: Well, gentlemen, I'd better inquire into the feasibility or logistics obviously, Mr. Shipsey, I indicated to you I'd try to show some flexibility. And it does seem that the main examination is over, but I'd better have some indication of how long questions by other counsel are likely to be.

Mr. O'Donnell?

MR. O'DONNELL: I would have thought ten to fifteen

minutes.

CHAIRMAN: Mr. McGonigal?

MR. MCGONIGAL: I don't have to have any questions.

CHAIRMAN: Anything on your side, Mr. O'Hanlon?

MR. O'HANLON: Very short.

CHAIRMAN: How long, Mr. Shipsey, do you anticipate being?

MR. SHIPSEY: I'll try to keep it maybe 20, maybe 25 minutes. It could be less if

CHAIRMAN: I am just conscious Mr. Shipsey, we don't have backup for stenographers. I am anxious to facilitate, but I am conscious and I am very keen to facilitate you, Mr. Walsh. I know you have had two long days, and it's been quite tiring for you. It's also quite tough on the stenographers, who have to record everything.

And I am conscious of the fact that since Mr. Desmond is scheduled to give evidence relatively soon, a large number of people connected on your side, Mr. Shipsey, will also be attending. And it may be just that it may make more provision if there is only, let's say, an hour at most left of Mr. Walsh, that it be left to be dealt with in tandem with that.

MR. SHIPSEY: I do know I understand that Mr. Walsh has a problem on Monday, but I am not sure about other days next week.

A. I have serious problems for the next few days.

CHAIRMAN: We'll fully meet you on it, Mr. Walsh, if you'd like to have a word with Mr. Shipsey and with the Tribunal lawyers

A. I mean, if it were helpful, I could probably do an hour tomorrow morning, but you know, really after that, I just would have to

CHAIRMAN: And we have some other shorter witnesses tomorrow, I think.

MR. COUGHLAN: We don't, Sir, no.

CHAIRMAN: I mean, I have a certain I think it's probably better being deferred to some date next week, rather than

MR. SHIPSEY: Yes.

CHAIRMAN: I think, Mr. Walsh, I'll ask you, in conjunction with the lawyers on the various sides, to maybe have a discussion. We'll get some date within the next fortnight that's suitable to you, and I appreciate your concentration and cooperation thus far. It will only be a small part of a further day.

Thank you. Resumption Friday, then?

MR. COUGHLAN: Monday, Sir.

CHAIRMAN: Monday. Very good.

THE TRIBUNAL THEN ADJOURNED UNTIL MONDAY, 1ST MARCH, 2004 AT 11AM.