

THE TRIBUNAL RESUMED ON THE 16TH JUNE, 2005 AS FOLLOWS:

MR. COUGHLAN: Mr. Liam Horgan.

LIAM HORGAN, HAVING BEEN SWORN, WAS EXAMINED BY

MR. COUGHLAN AS FOLLOWS:

Q. MR. COUGHLAN: Good morning, Mr. Horgan.

There is a memorandum of intended evidence of yours; I wonder, do you have it with you there?

A. I have, yes.

Q. What I'll do, Mr. Horgan, is I'll take you through this, and then we'll come back and deal with a few matters, if that's all right.

I think at paragraph 1 you have indicated to the Tribunal that you were a tax partner with Touche Ross & Co. in Cork, and you were for many years an adviser to the Trustees of the Dunnes Settlement Trust and to the Dunnes Group of Companies; is that correct?

A. Correct.

Q. I think you have informed the Tribunal that as the Dunnes Settlement Trust of 1964 was potentially reaching its natural conclusion in March 1985, there was a concern on the part of the Trustees, the beneficiaries and their advisers that either the Dunnes Holding Company would be obliged to raise funds publicly or part of the Dunnes Group would have to be sold to discharge the tax payable in the event of the trust determining and the shares vesting in the beneficiaries.

I think you have informed the Tribunal that the Trustees

determined that they should seek expert advice through the Deloitte & Touche affiliate office in London. Mr. Frank Bowen and Mr. Noel Fox travelled to London and retained appropriate experts, and a possible solution was proposed which would in effect extend the trust period by making certain appointments before the 21-year period had elapsed in March of 1985.

A. That is correct.

Q. I think you informed the Tribunal, apart from the extension of trust, there was also the issue of Discretionary Trust Tax which had been introduced by the Finance Act of 1984 in respect of the annual 1% charge and in respect of the deaths of the late Mr. Bernard Dunne and Mrs. Norah Dunne.

I think just very briefly, the 1984 Act introduced the charge in respect of the deaths of settlors; I think that there was a 3 percent

A. That's correct.

Q. And the 1% continuing Discretionary Trust Tax relates to the Finance Act, I think, of 1986, but that's just a point.

A. Correct, yes.

Q. Now, you say that the Revenue had raised an assessment to Discretionary Trust Tax which was appealed by the Trustees to the Appeal Commissioners and was listed for hearing on the 16th March 1987. You were not in attendance at the hearing before the Appeal Commissioners and you were not present for the settlement negotiations. You understand that a contrary impression may have been created by the

contents of a letter dated the 4th March 1988 from Deloitte & Touche to the Revenue Commissioners. We'll look at that in a moment.

And you say that you recall that you discussed the matter with Mr. Bowen sometime after March 1988 and confirmed to Mr. Bowen by telephone that you had not been present at the settlement negotiations on the 16th March, 1987?

A. That is correct.

Q. We'll look at the letter in a moment, but what you were correcting Mr. Bowen in relation to was there was a reference in a letter written to the Revenue that you were present when the negotiations were taking place and when the Trustees were certain that certain settlement terms were arrived at in relation to their responsibility to Income Tax in the future; isn't that correct?

A. That is correct.

Q. I think you informed the Tribunal that this was always your understanding, that the settlement agreement struck between the Revenue Commissioners and the Dunnes Trustees in connection with the Discretionary Trust Tax assessment was to be a global agreement. In order to fund the payment of Discretionary Trust Tax, the Dunnes Holding Company paid dividends to the Trustees; and from a taxation point of view, there were two potential tax implications in consequence of these payments which, as you understood, were as follows:

Firstly, there was a potential exposure to a surcharge upon

the undistributed investment income of the Discretionary Trust, which surcharge had been introduced by the Corporation Tax Act 1975. However, as the Revenue Commissioners had issued a practice note confirming that such a surcharge was not applicable to income in the hands of Trustees for the sole purpose of discharging payments to tax, such a liability did not arise. That was your understanding?

A. Yes.

Q. Secondly, income tax payable at the standard rate of tax, against which the Trustees were entitled to a dividend tax credit so long as the standard rate of tax and the tax credits were at the same rate. No liability would arise.

A. That is correct.

Q. I think what is involved there is that if a dividend was declared, there would be, in effect, retention out of that dividend, isn't that correct, payable to the Revenue?

A. That's right. It would be income of the trust.

Q. Income of the trust?

A. And as such, liable to income tax.

Q. Liable to income tax, but they would be liable to a credit?

A. A countervailing dividend tax credit.

Q. And as long as both

A. At that time, both were equivalent.

Q. So they'd be they'd be nil, in effect?

A. I think that is an important point.

Q. They would be nil.

Now, I think you then go on to say that it's your understanding that the agreement which the Trustees believed they had concluded with the Revenue Commissioners at the time of the Discretionary Trust Tax negotiations related to their potential exposure to income tax. You have informed the Tribunal that Mr. Bowen and Mr. Fox, notwithstanding, I think, what you said to them

A. Mm-hmm.

Q. were genuinely convinced of the correctness of their position in relation to the settlement. However, you were of the view that they must have misunderstood the position of the Revenue Commissioners when the deal had been struck. You say that it is your belief that Mr. Bowen and Mr. Fox were incorrect, and you indicated to them, when you discussed the entire pare with them some four or five years ago, that it has always been your view that the Revenue Commissioners would not have concluded an open-ended agreement to forgive income tax forever, notwithstanding a divergence in the standard rate of tax and the dividend tax credit.

A. I always held that opinion.

Q. Now, just to fill the picture a little further, and I'll come back to deal with Mr. Fox and Mr. Bowen and the strength of their belief, but I think you would have felt that the Revenue would never have agreed to a situation where the write-off in respect of the dividend element, the tax due on the dividend and the income tax liability of the

Trustees were there was a divergence, that this would have allowed a forbearance in respect of income tax or tax due in an open-ended matter?

A. That's correct. In the event of a change of the tax legislation, all bets would be off.

Q. Now, I think you have informed the Tribunal that you had no knowledge of or about any discussions between Mr. Bernard Dunne and Mr. Seamus Pairceir concerning a proposed settlement figure for Capital Gains Tax on the 1985 deed in the sum of 16 million. You had for many years known Mr. Pairceir, both professionally and personally, and would have happily agreed to arrange any meeting between Mr. Dunne and Mr. Pairceir if you had been asked to do so?

A. Yes, indeed. Mr. Pairceir was very open on these things. He felt that it was, I think this is my own impression that it was his obligation as Chairman of the Revenue Commissioners to see people, taxpayers with genuine problems.

Q. And you knew him?

A. Oh I did, yes. I knew him in other walks of life, and indeed I had arranged another meeting with Mr. Pairceir for another client.

Q. For another client?

A. Around that time.

Q. Yes. Now, I just do you know, I suppose do you know if Mr. Dunne was aware of the fact that you knew Mr. Pairceir?

A. No, I doubt it. I think the last time in fact that I met Mr. Dunne was at his father's funeral.

Q. Right. There are just a few documents I want to have a look at, and we'll just have a brief chat about them. But can I, first of all, so that we just try to understand the global picture that was involved here Mr. and Mrs. Dunne, in 1964, were settlors of a trust; isn't that correct?

They created a trust?

A. Correct.

May I interject?

Q. Yes, indeed.

A. In fact they would be far better off if they hadn't executed that trust deed.

Q. That may well be the position, and it may well have been matters which gave rise to difficulties that involved all of these dealings

A. Quite so.

Q. subsequently, yes. But in any event, they created this trust in 1964. It was a Discretionary Trust, and the objects of that trust in other words, the people who might receive something out of that trust at the discretion of the Trustees were their six children; isn't that correct?

A. Correct.

Q. And the assets, or the property in that trust was, in effect, the ordinary shares in the Dunnes business, the Dunnes Holding Company?

A. Correct.

Q. And that trust was to last for 21 years; isn't that right?

It had to finish in 21 years?

A. Well, that's a moot point.

Q. That's what the trust said?

A. Yes.

Q. So that brought us up, I think, to the 15th March 1985

would have been the 21 years, I think?

A. Correct.

Q. And of course Mr. Dunne himself died in 1984 1983, I

think, and the question then arose of this Discretionary

Trust Tax issue; isn't that right?

A. Correct.

Q. And that was a matter which was dealt with when an

assessment was raised, based on a valuation of the company

which was subsequently compromised when the matter was

listed for hearing before the Appeal Commissioners?

A. It was an assessment to Capital Gains Tax.

Q. In Capital Gains Tax. It was an assessment in Capital

Gains Tax?

A. On the basis that the conclusion of the trust period,

ownership of the trust assets passed, so therefore that

triggered a Capital Gains Tax liability because there was a

disposal of the assets. That triggered the Capital Gains

Tax assessment.

Q. No, I think we may be talking about two different things

now at the moment. Sorry, if you just bear with me

Mr. Horgan.

On the 14th March 1985, when the Trustees did something, in effect, settled on themselves as Trustees of the 1985 trust, that was assessed as on the basis that that triggered a capital gain; but if we go back a little bit in time, I think Mr. Bernard Dunne himself died I think in 1983. The 1984 Finance Act introduced this 3%, a tax on Discretionary Trusts

A. That's right.

Q. in the event of a death of a settlor. That's the tax I want to look at in the first instance, that one.

A. Oh, I see.

Q. And that tax also came into play on the death of Mrs. Norah Dunne?

A. Correct.

Q. And on that side of the taxation house, there also arose a question of a continuing 1% Discretionary Trust Tax from 1986 for every year thereafter?

A. That is so.

Q. And the Revenue, based on a valuation of the assets of the trust, namely the ordinary shares in the Dunnes Holding Company, raised an assessment, they raised an assessment based on a valuation as of January 1984, this was as of January 1984, they valued the company for this Discretionary Trust Tax at 100 million. That valuation, the Trustees accepted that there was tax due; the valuation was the issue in dispute. That was appealed to the Appeal

Commissioners, but or before the hearing before the Appeal Commissioners, negotiations took place between both sides, the Revenue and counsel for the Trustees; and a valuation for that particular purpose and that particular tax only was agreed, I think, at 82 million.

A. Yes.

Q. And then the tax was paid based on that?

A. Correct.

Q. Now, another type of tax, that was the Capital Gains Tax you were talking about, came into play when the Revenue took the view that what was done on the 14th March, 1985; in other words, the Trustees of the 1964 trust settled on themselves as Trustees for five beneficiaries, namely five children of Mr. Ben Dunne

A. And their descendants.

Q. and their descendants, all of the assets that were in the 1964 trust, namely the ordinary shares in the company?

A. That is correct.

Q. So what you must look at then, if the Revenue were deeming that to be

A. A disposal.

Q. a disposal, therefore giving rise to a capital gain, was the value of the property or the assets in the trust on the 14th March, 1985.

A. Correct.

Q. A different time to that which had been taken for the valuation for the purpose of the Discretionary Trust Tax,

namely 15 months or thereabout?

A. Mm-hmm.

Q. Now, of course we all know that when people negotiate, that both parties hope to achieve some benefit from a negotiation or a settlement of any issue. That's by its very nature; isn't that correct?

A. Correct.

Q. And I can't see any papers at the moment I'm not saying they are not there, but I don't see a particular assessment raised in respect of the death of Mrs. Norah Dunne. And I wonder, can you help me, is it that the assessment was raised in respect of the death of Mr. Ben Dunne, and that at the settlement, all matters were taken into consideration because the settlement didn't occur for a number of years afterwards, of course?

A. Correct.

Q. And that the value which was settled between the parties of 82 million relating to January of 1984 continued to be the value which the trust enjoyed, in fact, right up to 1990.

Now, there is a technical issue, and I just want to explain this.

When the matter was settled in 1986, the value was agreed as of January 1984 as 82 million. This was for Discretionary Trust Tax purposes. Mrs. Dunne died in 1986. The same value seemed to apply in the settlement, and the tax was paid on the basis of that valuation. It continued to be paid on the basis of that valuation up to 1990,

because it seems to be that the technical position was that once a value was set for this particular tax, it stayed in existence for three years. That seems to be so under the legislation?

A. That was the Revenue practice at the time.

Q. That was the Revenue practice, right.

Now, in 1990, when it was revalued, and it appears to have been revalued by way of agreement or maybe self-assessment had come in; I'm unsure on this particular issue but the revaluation placed a value on the company of $\frac{1}{2}$ 220 million, because the 1% tax that was being paid was 2,200,000; we have that evidence yesterday from Dr. Thornhill.

Now, of course, dealing with the question of Capital Gains Tax, which was the issue arising as of the 14th March 1985, nobody was bound by any valuations that had been agreed, or in fact been determined in respect of the Discretionary Trust Tax in strict terms; would you agree with that?

A. I would, yeah.

Q. Because the value of the company, or the value of the shares in the company may have fallen, or they may have appreciated between January of 1984 and March of 1985; isn't that so? It was open to both sides to argue the toss?

A. Well, I mean, the valuation of shares in a private company is a notoriously difficult problem, and the real valuation can only be determined when there is a sale on the open

market.

Q. I couldn't agree with you more.

A. This gives rise to the problem.

Q. Yes. And what both sides were trying to do, with the best will in the world, was trying to arrive at a valuation which perhaps both sides could live with, bearing in mind all of the difficulties?

A. Yes.

Q. Now, were you in practice during the 1980s up to 1990 yourself?

A. No.

Q. When did you cease?

A. I retired in 1988.

Q. Well, up to 1988, say from 1984 to 1988.

From the work we saw done by Dr. Thornhill in the Revenue at the time when he arrived at a valuation for his Discretionary Trust Tax purposes, there is no doubt about it that Dunnes Stores, as you say, it was a private company; but on the figures and analysis conducted by him, it would appear that a number of things stood out about it.

First of all, on his assessment, it had the largest share of the retail market in Ireland. It had, I think, 19% of the retail market in Ireland, and that was split between groceries and clothing.

A. I accept your figures on that. I mean, they must be there or thereabouts.

Q. Its pre-tax profits, on his analysis, and if we leave aside

the banks, I suppose, out of this, seemed to have been and he was relating them to public companies seemed to have been in general only outstripped by the likes of Cement Roadstone the Smurfit Group at the time?

A. This of course was all pre-Celtic Tiger.

Q. That's precisely the point yes, I agree with you. It was all pre-Celtic Tiger.

And you see, what the Tribunal is trying to come to an understanding of here, because we are conducting an inquiry, is this: that when Mr. Clayton, Inspector of Taxes, raised an assessment for Capital Gains, whether the valuation which he based that assessment on, and it was also before the time of the Charter, the Taxpayers Charter, was I think the term used yesterday was "in a reasonable range".

A. That is so.

Q. Because, and again I am just asking questions for the purpose of inquiry, but as I understood counsel for the Trustees yesterday, when Dr. Thornhill was being asked questions, was that if you had accepted a valuation of 82 million in negotiation for one tax purpose, that, in fairness, or being reasonable, one should have raised a fresh assessment in respect of the Capital Gains, because you had negotiated a valuation which dated back of course to January 1984.

Now, I don't know what Mr. Clayton is going to say in relation to many of these matters. But bearing in mind the

analysis conducted by Dr. Thornhill about the strength of the company prior to 1985, and bearing in mind the valuation which appears to have been agreed in 1990, that this company was worth 220 million as against 82 million, back in 1984, the Tribunal is effectively trying to conduct a kind of stress test, looking at the thing with foresight and with hindsight as to the reasonableness or otherwise of the valuation on which Mr. Clayton placed his assessment.

Do you understand the point?

A. I do, yes.

Q. Bearing in mind it was never sold, and you never went on the market and said, "Who is going to buy this, and what will you pay for it?" That's really the issue. Do you understand the point? And I'm asking you, do you have a view about that, about the reasonableness of the valuation, whether you agree with it or not, which Mr. Clayton placed on it?

A. I have a recollection of discussing this valuation in relation to 1984 to the Trustees, and I formed the opinion now, it's a layman's opinion, but I'm a tax man, not a financial man that my own view, for what it was worth, my own words were, as I recollect, that a reasonable value would be somewhere between 60 and 70 million at that point in time. And I think that's what the Trustees were ready to settle on, but in the interests of a quick settlement, they agreed to go the few miles extra to 82.

Q. That's in relation

A. One must remember that we are trying to judge a situation here in the year 2005 with the circumstances on the ground in 1984, and one must remember Ireland was in a bad state at that point in time.

Q. And continued to be right up to 1990, perhaps; would you agree?

A. That's right. But on the other hand, the Trustees and the Dunnes family reinvested every available pound in building up new shopping centres and that sort of thing, and there was an explosion, if you like, in the late eighties and the nineties, and I think that is possibly the reason why a valuation in the order of 200 million was taken later.

I must confess, this is my own

Q. Personal

A. Yeah.

You have the difficulty, all the time, that you have quot homines tot sententiae; that's really what it's all about.

Q. Now, the a number of issues arise, or arose subsequent to the settlement on the Discretionary Trust. First of all, there was an agreement that was reduced to writing, and there was a little bit of delay in actually receiving the payment?

A. That's right.

Q. And in fairness to Mr. Bowen, because we saw documentation opened where he had done a lot that was required of him, and some of the delay was attributable to Mr. Ben Dunne; this is Ben Dunne Jr. himself. But part of that settlement

was that if monies weren't paid within a certain period of time, which would be a normal term in a settlement, that it would attract interest at whatever the agreed rate was?

A. Yeah.

Q. And there was an accumulated interest based on the settlement of $\text{£}2.5$ thousand, a not inconsiderable sum of money at the time?

A. Correct.

Q. And I'd like to you bear that in mind, and not necessarily as might as could be put to you, it, as a proportion of the overall figure that was being paid. It was $\text{£}2.5$ thousand pounds, an awful lot of money in 1985/1986?

A. I agree.

Q. And there was forgiveness in relation to that. You are aware of that, or are you, that $\text{£}2.5$ thousand was forgiven?

A. It was.

Q. Do you know of any reason that was stated to you as to why it was forgiven?

A. None whatsoever. But may I say that it was Revenue practice to compromise in particular cases. Dunnes weren't the only case where interest was forgiven.

Q. And I understand the point, and I think what I would like to ask you about really is, and I try to draw the distinction. I perfectly understand bear with me if I try to be a little bit too precise about this, but there can be no doubt that you could say generally that it was a

practice of Revenue to forgive interest for the purpose of achieving settlement. We have a slightly different situation here, in that settlement had been achieved; it had been reduced to writing. Isn't that correct?

A. Yes.

Q. So it wasn't the situation of a forgiving of interest for the purpose of obtaining a settlement. Here was a situation where there was a forgiveness of interest which arose out of a settlement and was agreed to be paid; isn't that correct?

A. I agree, there is a difference.

Q. There is that difference.

I think you may have been shown a document this morning and I apologise, because it just didn't occur to me earlier you may have been shown a document this morning that I just want to ask you about, and it's at Tab 43.

Now, I think this is a note made by Mr. O'Cathain or Mr. O'Cathain in the Revenue Office, and I know, because information has come back to me, you don't actually remember this?

A. I don't.

Q. But if we just look at the note, if we could, for a moment.

"Call from R. Horgan", which presumably is you. "Had we decided on the valuation question. I said we would be agreeable to arguing the principle first. He asked me when the hearing would be probably in autumn. Who our counsel would be."

Now, what is being discussed here is the question of the Capital Gains Tax which had been raised consequent on what had happened on the 14th March 1985?

A. That is so.

Q. There were two issues about that, and weren't they these:

The first issue was, or one of the issues was, what valuation would there be on the company for the purpose of this assessment; in other words, the quantum. And the second issue was whether what had transpired amounted to a disposition; isn't that

A. Correct.

Q. Those were the two issues?

A. Yes.

Q. So if I could call the valuation, the quantum issue and the disposition the liability issues, in effect; isn't that correct?

A. That is so.

Q. And I think the note continues, and this is Mr. O'Cathain:

"I said I understood there were negotiations with client and SB." That is a reference to Mr. Seamus Pairceir, the Chairman?

A. It is, yes.

Q. "As agreed earlier. He said yes" that must be a reference to you saying yes in response to that "but that this was now over, as Seamus Pairceir took the view that the tax was payable."

Had it been indicated to you that there, around this

time that is, of the 4th June, 1987 or can you remember, can you remember whether it had been indicated to you, "Look, any discussions that had been taking place were over", because the Revenue were taking a view that

A. None whatsoever.

Q. You can't remember?

A. No, I can remember.

Q. You can remember; that was never said to you?

A. Absolutely not. The Trustees were doing a lot of things that they didn't tell me about on a commercial basis of course, that was wasn't my baby.

Q. You were an adviser?

A. Exactly.

Q. If your advice was sought

A. Yeah, I gave it, yeah.

Q. The note continues: "There had been talks, and a value of blank had been worked out for C.A.T., but neither side had been too pushed about it for CGT because the amount of tax that would have to be would be much more specific about a valuation. I said I felt there had been more recent talks.

He said he knew nothing about this, and it must be a BD who had done it on his own."

Did you ever know that Ben Dunne was involved in any negotiations?

A. Never, until the one of the Tribunal staff told me.

Q. I see. So you were unaware?

A. Totally unaware.

Q. Because Mr. Dunne was, at this time, merely a beneficiary; isn't that right?

A. Yes, yeah.

Q. Now, are you aware that when the matter, this CGT matter, went before the Appeal Commissioners, that what went before them in the first instance was what I would describe as the liability issue. The valuation was parked; it wasn't in issue at the hearing. Were you aware of that?

A. I was.

Q. And, again, just very briefly, if I may, what had happened on the 14th March 1985 was that the Trustees had made two appointments: First of all, they appointed 100 preference shares between the children, Margaret Heffernan, Elizabeth McMahan and Terese Dunne, and they appointed the 99,000 ordinary shares to the Trustees of a new Discretionary Trust of the 14th March 1985, to be divided into five equal parts and to be held on the future Discretionary Trust for the five of the six children of Bernard and Norah Dunne and their children, I think; isn't that correct?

A. Correct.

I would question your description of it, of what happened.

Q. Right. Okay.

A. The original trust deed provided that an appointment had to be made by March 1985. But it didn't particularise the type of appointment that should be made.

Q. I agree.

A. So it was quite open to the Trustees to make any kind of an

appointment, in effect, and this is what they did. They appointed it to themselves, in effect, into five packets.

Q. Into five packets.

A. Under the original trust deed provisions on that basis, no one beneficiary became entitled in possession to any asset of the Trust, and on that basis, we felt we had an unassailable case for CGT purposes.

Q. I don't think we are in much disagreement with what actually happened.

A. Okay.

Q. The 1964 trust was a Discretionary Trust?

A. It was.

Can I make a word there too? When we talk about, and particularly the media talk about Discretionary Trusts, tax evasion immediately circles. In fact, this was a real Discretionary Trust. It was done because the late Mr. Dunne had six young children who had to be tested, and he was absolutely insistent that the Dunnes Group should remain, as he said to me myself on one occasion, for 50 years after his death; and this was the kernel of the reasoning behind the Discretionary Trust.

Q. I'm not getting into the whys or wherefores of why a

A. I thought I'd make the comment because of comments in the media.

Q. But I want you to be clear about this: The Tribunal is not talking about tax evasion.

A. I appreciate that.

Q. But it was a Discretionary Trust, and under the '64 trust, the Trustees, at their discretion, could have made appointments to any one or all of the objects of the Discretionary Trust?

A. Correct.

Q. What they did in 1985 is they appointed, to themselves, as Trustees for five of the previous of the objects of the 1964 trust, they made an appointment to themselves for the benefit to hold in trust for the five of Mr. Bernard Dunne and Mr. Norah Dunne's children?

A. That's correct.

Q. When the matter of this issue came for hearing before the Appeal Commissioners and this is a very technical legal issue, but Revenue matters are construed that way; isn't that correct?

A. That is so.

Q. A key component of what happened in respect of the 1985 trust was that on the 14th March 1985, when this was done by the Trustees under the 1964 trust, it was stated that it could be revoked; isn't that correct?

A. That is correct.

Q. And that was for a period, the trust if that appointment hadn't been made on the 14th March 1985 declaring it to be revokable, the 1964 trust would have ended as of midnight, I think, on that night?

A. That is correct.

Q. And the property in the trust would have vested in the

Trustees, I think or in the beneficiaries, all of the beneficiaries, I think, as had been the case under the terms of the trust; and that would itself have given rise to a Capital Acquisitions Tax liability?

A. As well as Capital Gains Tax.

Q. One may have been written off against the other, of course, or set off against the other.

So that was the technical liability issue that went for hearing and was determined in favour of the trust before the Appeals Commissioner, isn't that right, on the issue of revocability, that it was revocable?

A. I am not a lawyer, obviously, but my view was that we won the case on the basis, the simple tax basis that there was no passing of an asset. No disposal.

Q. It's very

A. Now, that's what we worked on.

Q. I'm not getting involved in the ins and outs of it. That was the decision of the Appeal Commissioners, and it wasn't appealed. That's what happened; isn't that right? I'm just trying to explain to the public, in as simple terms as I can possibly do, what actually happened; that's all. But what was never in issue before the Appeal Commissioners was the question of valuations or quantum or anything of that nature, because that issue had been parked pending the determination of this particular issue?

A. That is so.

Q. Now, of course, as you said when you commenced your

evidence, that maybe with the benefit of hindsight, it might have been better not to set up the trust at all?

A. Oh, yes.

Q. Because at some stage there would have to be an appointment or a vesting; isn't that correct? Something had to happen at some stage

A. Indeed.

Q. that would give rise to a tax liability?

A. Correct.

Q. But up until that, you were able to accumulate the wealth within the Discretionary Trust; isn't that correct?

A. That is so.

Q. And that was not liable to tax in that period when it was being accumulated in the Discretionary Trust?

A. Correct.

Q. But wealth tax, when it came in in the 1970s, did have an effect on that, to some extent, I think; I stand to be corrected by the Revenue.

A. My recollection is it didn't apply to a trust, but I am not certain at this stage. I'm open to correction on that.

Q. But what did affect it was the 3% on the

A. Absolutely.

Q. the settlor. The continuing 1% was going to be a significant matter?

A. It's now 6%, I think, isn't it?

Q. The Revenue might be able to help us on that; I don't know the answer to that. But these came big issues, isn't that

right, for Discretionary Trusts?

A. Absolutely.

Q. For the Trustees, for their advisers?

A. Correct.

Q. So it would not be unreasonable, coming to the period of the life of a trust, or perhaps even at any time during the course of the life of a trust, that if one could negotiate a value for the purpose of making an appointment, or something of that nature, that one would have to look at these matters and consider was it advantageous to do it at this time, or should one continue with the Discretionary Trust and take the pain of the continued Discretionary Trust Tax, I suppose?

A. Yes, and that was a continuing problem

Q. These were debates?

A. for the trustees.

It was. But of course events overtook the Trustees, and indeed an appointment had to be made subsequently.

Q. That was in 1994?

A. Yes.

Q. This is when there was an appointment made to Mr. Bernard Dunne?

A. Correct.

Q. That was in settlement of, or appears in the settlement of proceedings he had taken against the Trustees?

A. Correct.

Q. And perhaps against other beneficiaries.

A. And they had to take the pain on that occasion.

Q. And of course that that was settled; the case never went for hearing. But the basis of that case was a claim by Mr. Dunne that there had in fact been no trust in existence at all, it was just the way matters had been operating?

A. That is so.

Q. Now, I think I just want you to deal now with the question and perhaps we should you can explain it to me and the Sole Member and the public. When the settlement took place for the purpose of paying Discretionary Trust Tax, the Trustees themselves had nothing; they had no money?

A. That is so.

Q. What they had, what they held in trust was 99,000 ordinary shares in a holding company; isn't that correct?

A. That's what they had. That's correct.

Q. And to get the money to pay the tax, the only place they could get it was from Dunnes Company; isn't that right?

A. Correct.

Q. And the only way that could be done was a dividend would be declared, isn't that correct, that money would be given to them?

A. That's right.

Q. To give to the Revenue?

A. That is so.

Q. That's the way it was done. Now, of course, when that money came to them for tax purposes, that would be deemed

to be income; isn't that right?

A. Income of the trust.

Q. Income of the trust. As Trustees, it would be income; isn't that right? And that in itself would be the subject matter of income tax; isn't that right?

A. It would trigger an income tax assessment.

Q. And the whole question that arose, as far as Mr. Fox and Mr. Bowen were concerned, was that when they negotiated the settlement of the value and the tax and interest payable in respect of Discretionary Trust Tax with the Revenue, that they were firmly of the belief that it was part of the settlement that this payment to them, seeing as they were getting no benefit or the trust was getting no benefit, would not trigger an income tax payment; isn't that right?

A. Yeah, they fervently believed that.

Q. You gave your professional advice on that, didn't you?

A. I did.

Q. And you have told us what it was, that the advice was the Revenue would never, in your view, agree to such a thing?

A. Correct.

Q. And I think you were aware that when sorry, let's take it step by step.

I think you are aware that in the periods when you were in practice, at least acting as an advisor anyway, that they didn't pay any income tax?

A. That's correct.

Q. And from information you would have received from them, you

would be aware that even subsequently, they didn't pay this income tax?

A. That is so.

Q. I think you'd also be aware that, as far as they were concerned, the Revenue never came to them and said, "Where is this?"

A. So I believe.

Q. Notwithstanding that the Revenue were receiving the Discretionary Trust Tax and knew the source of it?

A. Quite.

Q. I think you were also aware that in respect of what Dr. Thornhill described as the big amnesty yesterday, that Mr. Bowen and Mr. Fox were men who would have understood what was going on, and if they felt there was a liability, would properly take advantage of such an amnesty.

A. No doubt about it.

Q. This is what I'm trying to demonstrate here, matters which may point to support for the assertion to you and your belief that they firmly believed that certain steps that were and weren't taken.

Now, I think you were aware that they wrote to the Revenue?

Or you may not be aware

A. I am aware, yes.

Q. that they wrote to the Revenue in March of 1998. This matter became an issue after the McCracken Tribunal between the Revenue and themselves; I think you know that.

A. Yes.

Q. And it wasn't until then?

A. Correct.

Q. And I think you were aware that they wrote to the Revenue on the 4th March, 1998, at Tab 92. I'll just run through it very quickly. Really what this letter is saying is this, that look, we had a settlement. It was part of that settlement that the Trustees wouldn't have to pay this income tax. But the important thing is, if you go to the second paragraph of the letter we'll read the whole letter.

"The standard rate of income tax and the contribution credit attributable to the dividends from Irish companies began to diverge as from 6 April 1978. The standard rate of income tax at that time was 35%, and tax credit was 30/70, which is the equivalent of 30%. The Finance Act 1988 introduced a new rate of 32%.

"The appeal in 1987 was attended by three Trustees, Mr. Bernard Uniacke, Mr. Noel Fox, and Mr. Frank Bowen. Also in attendance was Mr. Liam Horgan, a tax partner, now retired, of the chartered accountants firm Touche Ross. It is the distinct recollection of all of the above that the settlement agreed" and then we have already seen the major aspects of the settlement.

"Valuation of 82,000 used for valuation 5th April 1987, 5 April 1988 and 5th April 1989. Provided the only receipt of the Trustees of the trust were dividends from the group used solely for the purpose of discharging Discretionary

Trust Tax no other tax would be imposed on the Trustees in relation to the dividends."

Now, I think it goes over to the next page: "The Trustees and Mr. Horgan are willing to testify this is their understanding of the settlement to the appeal."

I think they are incorrect; you weren't there?

A. No.

Q. And that wouldn't be your it wouldn't have been your view sorry, you can't give a view about what happened at the settlement meeting; but in relation to the operation of tax practice, that would not be your view?

A. Quite.

Q. But notwithstanding you expressing that view and giving that opinion, I think strongly, to Mr. Fox and Mr. Bowen, they were adamant that there had been such an agreement; isn't that correct?

A. That may be a question of timing, I'm not sure now. You know, these things happened years ago.

Q. I just want to point out to certain matters which may point to how strong their feeling was about this. I think are you aware, or have you become aware subsequently that this matter became an issue before the Appeal Commissioners, between the Trustees and the Revenue, as to whether this had been a settlement in respect of this? Are you aware of that?

A. No.

Q. I see. You are not then aware that the matter the

Appeal Commissioners felt that this was a matter that couldn't be determined by them; it was a question of a settlement, and it was really a legal matter, and the matter went to the Circuit Court?

A. No, I am not aware.

Q. And you are not aware that there was an unprecedented step taken by the Trustees, that they sought discovery against the Revenue in the Circuit Court?

A. I am generally aware that they did make some statement like that, yes.

Q. That they sought discovery?

A. Yes.

Q. And not only did they seek it; they got an order for discovery?

A. They did, yes.

Q. You are aware of that?

A. Yes thanks Mr. Horgan.

MR. O'NEILL: Sir, I do have some questions, but as this witness was an adviser to the Trustees, it may be appropriate if Mr. Nesbitt and Mr. Connolly go first; but I am subject to your ruling on the matter. Insofar as they may have questions, he is effectively an adviser well, he was an adviser to my client.

CHAIRMAN: Well, in practice, the Tribunal usually the approach is when somebody is dealing with one of their own witnesses, I follow the practice of previous Tribunals in leaving that person to the end. Equally, I am anxious to

avoid any perhaps unnecessary duplication between yourself and Mr. Nesbitt.

MR. O'NEILL: It was more, I suppose well, Mr. Nesbitt, Mr. Horgan was a client; he was an adviser to the Trustees and to the Dunnes Stores Group of Companies, not to the individual, as I understand, which Mr. Nesbitt was representing. But also I am more concerned, I suppose, with the Revenue's

CHAIRMAN: I had understood from Mr. Nesbitt's initial application that he only proposed to be here for one Revenue witness that he may have sought to examine.

But I think in the circumstances I'll hear you first, Mr. O'Neill.

MR. O'NEILL: May it please you, sir.

THE WITNESS WAS EXAMINED BY MR. O'NEILL AS FOLLOWS:

Q. MR. O'NEILL: My name is Hugh O'Neill; I appear on behalf of the Trustees of the 1964 settlement, the Dunnes Trustees. I have a few questions to ask you. I just want to correct a number of matters which were about which you were asked.

Mr. Coughlan suggested to you that the trust had to end within 21 years of 1964. That's not actually correct, I think. What happened or what had to happen within 21 years was that an appointment by the Trustees had to be made; isn't that correct?

A. That's correct, yes. It's only a question of words.

Q. It is, but I mean, the trust didn't automatically come to

an end at the end of 21 years?

A. I made that point in my direct evidence there.

Q. And if an appointment wasn't made, there were default provisions in the trust deed itself?

A. That is so.

Q. And the appointment that was made and again, to correct another issue, and this was a central issue in the CGT tax appeal an appointment was not made to Trustees of a new settlement; the issue was whether or not there had been a disposal by the 1964 Trustees to themselves in another capacity. Isn't that right? Was there a disposal, in other words, for CGT purposes?

A. There was no disposal, certainly, yes.

Q. And the two issues and Mr. Coughlan has rightly referred to one of the issues before the Appeal Commissioners, and that was the issue as to whether or the impact of the fact that the appointment was an irrevocable appointment?

A. Mm-hmm.

Q. And the second issue, of course, and coming back to the point that you have made, the exercise is to determine whether there was a disposal whereby someone became beneficially entitled in possession. The first thing to determine was whether there was a disposal; in other words, was the appointment by the Trustees an appointment to themselves in a different capacity? And if the answer to that was no, that was the end of any issue in relation to liability.

And the second point, the second string to the bow, so to speak, was that if there was an appointment to the Trustees in a different capacity, having regard to the fact that that appointment was revocable, was there a disposal by virtue of which someone became beneficially entitled?

A. Yes.

Q. So in other words, all the Trustees had to do was to win on either of these two points to succeed in defeating any claim for CGT?

A. That is correct. In fact we were prepared to go to the Supreme Court on it.

Q. And I think you've said you were firmly of the view that there was no liability to CGT?

A. Correct.

Q. Now, the effect of defeating the assessment to CGT doesn't, of course, mean that CGT is never payable in respect of this settlement; isn't that right?

A. Indeed.

Q. And ultimately when an appointment has to be made, and it has to be made within what's known as the perpetuity period it's a legal phrase; we needn't go into that but within a definable period, tax is going to have to be paid?

A. Inevitably.

Q. And in the meantime, what will happen in the regime that applied in 1985, in any event, that each year Discretionary Trust Tax at 1% will be payable?

A. Correct.

Q. And ultimately when an appointment is made, Capital Gains Tax will then be payable, having regard to the then value of the asset, effectively Dunnes Stores?

A. That is so.

Q. So if one takes it that and history seems to have shown that to be the case, that by 1990, the value of the trust, the ordinary shares, had increased to 220 million. If CGT was payable at that stage, one would be talking about a much larger bill than the potential bill that was payable in 1985?

A. Of course.

Q. Now, can I move to another issue, and that's in relation to the settlement of the Discretionary Trust Tax valuation. And Mr. Coughlan has referred you to the figure of 82 million which was arrived at between the parties, which I think you say was somewhat higher than the Trustees wanted to settle at?

A. That is so.

Q. That was a settlement not only of a valuation in 1984, but also in 1985, 1986 and 1987; isn't that right?

A. That is correct.

Q. And therefore, if it was to have an impact in respect of CGT, and the parties under the settlement said that has nothing to do with CGT, if it was to have an impact, it wouldn't lose that impact because it was dealing with a date in 1984; it was also dealing in '85, '86 and '87?

A. That is so.

Q. Now, can I turn to another point, and that's the issue in relation to the interest forgiven, and then the figure of 62-odd thousand that Mr. Coughlan has referred you to.

The Finance Act provisions in relation to the payment of interest are stringent but relatively clear, or very clear; isn't that right?

A. Mm-hmm.

Q. And if an amount of tax is payable and is not paid after a particular time, interest attaches to that tax?

A. Yes.

Q. And a situation where tax is payable will arise from one of three reasons. There will be an assessment made. That assessment will not be appealed and the tax for the assessment becomes final and conclusive; that's the first scenario.

The second scenario is that some negotiation take place between the taxpayer and the Revenue, and a deal is struck, and presumably a new assessment will be issued.

And the third scenario is that the assessment is appealed, and following the appeal, ^ process is determined in a particular amount.

A. Correct.

Q. And in each of those circumstances, and at the end of that process, the tax is due and payable?

A. Yes.

Q. And in those circumstances, you have had instances in which

your clients and I am not asking you to identify them, obviously, but clients other than anyone related to the Dunnes interests, as they are being called have negotiated reductions or write-offs of interest?

A. Yes.

Q. And in that regard there was no difference between whether or not the liability is arrived at as a result of negotiations between the parties or simply as a result of the assessment not being appealed or being appealed and determined; isn't that correct?

A. Yes.

Q. Now, can I turn, finally, to the issue in relation to income tax on distributions, on dividends payable for the purposes of or paid for the purpose of paying the Discretionary Trust Tax.

I have no doubt you'll be able to explain it much clearer and better than I can. My understanding, however, is that income tax or a shareholder, in this case the Trustees, receiving a dividend from a company, the Dunnes Stores Group, will receive that dividend or will be deemed to have received that dividend net of tax, is that correct, net of corporation tax?

A. Yes, it is, in effect.

Q. And the company itself, in paying the dividend, pays it out of taxed income?

A. Correct.

Q. And the Trustees in this case, in receipt of a dividend,

it's income in their hands and it's liable to income tax?

A. Yes.

Q. But at the same time, under the tax code, there is a setoff or a tax credit allowed in respect of essentially, not exactly the same, but essentially the tax that the company has paid?

A. Mm-hmm.

Q. So while the standard rate of tax may be 35%, the Trustees, or the shareholders, whoever they may be, will be entitled to a significant tax credit?

A. That is correct.

Q. And in 1985, '86, I think up to 1988, the tax credit was of the same amount as the income tax, the income tax charge?

A. That is correct.

Q. And therefore, in fact, one was set off against the other?

A. And there was no net liability in the hands of the Trustees.

Q. So there would be nothing extraordinary in relation to from the Revenue's point of view, in relation to them not pursuing an issue in respect of income tax on distributions where there was an automatic setoff of the same amount; it couldn't achieve any advantage for the Revenue?

A. Indeed. The way I looked at it was it was really a hidden liability, and in fact it may have passed beyond all the people involved in the settlement, that there could be a change in the rates of credit and the rates of income tax. People didn't think about it.

Q. And what you, as you have said, were of the view that the Trustees' interpretation of what the Revenue were telling them honestly believed was incorrect?

A. Oh, it was incorrect. That was my view.

Q. And

A. I couldn't see the Revenue doing a thing like that.

Q. And what the Revenue seemed to be talking about was a liability to surcharge tax; is that right?

A. No, no. The surcharge was a separate thing. This was a straightforward income tax liability on the dividend. The surcharge was a separate charge on the undistributed income of a trust. The trust received a dividend which they appropriated to the payment of tax. There was a big doubt in the minds of the Revenue, indeed, and in the minds of practitioners, as to whether, for the purposes of the surcharge, the payment of tax was an allowable deduction against the income.

Q. And was that the issue that you think the Revenue believed they were dealing with?

A. I don't think so. There was no the Revenue were in fact the subject of quite a number of recommendations and requests to do something about this problem, and eventually they issued a practice notice saying that the Revenue would accept that the payment of tax was an allowable deduction from the income of the trust for the purposes of the surcharge.

Q. And that scenario had also arisen in the context of wealth

tax?

A. Yes, that is so.

Q. I don't know if you have been furnished with a booklet of the material supplied to the parties, and perhaps you haven't.

A. I have some, yes.

Q. There is reference I simply ask you this question because there is reference in some of that documentation, internal documentation within the Revenue, in which they are raising this issue in the context of surcharge tax.

A. Mm-hmm.

Q. I am wondering how that arises. And I am just wondering whether you had seen that, and maybe that had assisted you.

A. It didn't impinge on me, I must say.

Q. Thank you Mr. Horgan.

THE WITNESS WAS EXAMINED BY MR. NESBITT AS FOLLOWS:

Q. MR. NESBITT: Now, Mr. Horgan, whatever the answer was to was there an arrangement with the Revenue or did the Revenue understand the arrangement, or did they think something else might have been mentioned, insofar as you were concerned, the people who said they had arranged something were quite open about that?

A. Yes.

Q. No secrecy?

A. None whatsoever.

Q. And when, so far as you're concerned, the Revenue had to deal with the matter, they were quite straightforward about

it as well?

A. They were. They were quite distinctly certain that there was a liability.

Q. And so far as you are concerned, there was a period of time when there was an issue, but it eventually came to nothing?

A. That's right.

Q. And nobody appeared to be trying to hide the fact; they thought there was something, or they didn't think there was something?

A. No, there was no question of hiding the fact. There was an argument about it what would happen, but no, not on the facts. No one hid anything. They were quite forthright in saying that they believed there was no liability.

Q. No sense of this isn't something we shouldn't be talking about; this is something that should be hidden. Just

A. Not at all.

Q. normal interaction between taxpayers

A. Absolutely.

Q. and the Revenue?

A. Yes, nothing out of the ordinary.

Q. Thank you.

THE WITNESS WAS EXAMINED BY MR. CONNOLLY AS FOLLOWS:

Q. MR. CONNOLLY: My name is James Connolly; I represent the Revenue Commissioners. There are just one or two matters I want to clarify with you.

As I understand, what you were saying is that you believe that this arrangement in relation to the setoff of income

tax arose in a particular context, and only in a particular context?

A. Mm-hmm. Oh, yes.

Q. And that context, just to be clear about it, was that at that time, when such a perceived arrangement was put in place between the Trustees and financial advisers on the one part and the Revenue on the other part, the Advance Corporation Tax, which allowed for a tax credit, from the payment of that, was it the same rate of the standard income tax rate?

A. At the time, yes.

Q. At that time?

A. Oh, yes.

Q. And

A. And had been from time immemorial.

Q. But once there was legislative changes that came in the Finance Act of the following years, there then emerged some slippage so that the arrangement didn't hold good that some persons perceived ought to have done?

A. That's right.

Q. I think you said it was something along the lines that it was inconceivable that the Revenue would agree to fetter their discretion?

A. Yes.

Q. Because if the perception was correct that there was such an arrangement to continue in perpetuity, effectively what we would be discussing would be a contractual arrangement

that would override statutory amendments?

A. That is correct.

Q. That could never happen?

A. Not at all.

Q. And in the original settlement

A. Perhaps I could expand a little bit on that last point.

Q. Yes.

A. There is a provision, as you probably know, in every Finance Act that the taxes imposed by the act are put in the care and management of the Revenue Commissioners, and the Revenue Commissioners have always interpreted that as giving them a certain amount of discretion in administering the Tax Acts, which would include reducing income tax, reducing interest, and that kind of thing.

Q. Perhaps I could just clarify that. That has been operated in a way that allows a certain amount of discretion on the part of the Revenue in relation to either forgiving or abating interest or tax liabilities

A. Correct.

Q. that have come up to a particular time, accumulated up to a particular time when that decision is being made?

A. Quite so.

Q. It doesn't allow for a blanket indemnity forgiveness in futuro?

A. Not at all. The Revenue Commissioners have always set their face against that type of thing.

Q. Were you involved in the wings in relation to the

settlement which was reached on the 16th March 1987 on the

DTT?

A. No.

Q. Were you aware of the details of it?

A. No, until later, much later. The Trustees ran with that themselves.

Q. All right. But when you did become aware of it, there was nothing in that agreement or in any follow-up document that appears to precisely set down, in terms, that there was a specific arrangement that come what may, there would be a forgiveness of income tax in order to allow the Trustees to pay the Discretionary Trust Tax?

A. As far as I am aware, I certainly saw nothing or heard nothing.

Q. You have seen no document with that

A. None whatsoever.

Q. specific arrangement having been put in place?

A. No.

Q. Thank you.

THE WITNESS WAS EXAMINED FURTHER BY MR. COUGHLAN AS FOLLOWS:

Q. MR. COUGHLAN: Just one small matter, and it's just a very technical, it's not been determined here at all; it's just something Mr. O'Neill said to correct me, and I am glad to be corrected in relation to matters.

But I just wonder, you responded "yes", and I just wonder whether that's what you really meant when he said that one

of the issues to be determined at the hearing in respect of liability for Capital Gains Tax arising out of what happened on the 14th March 1985 was whether the property was whether any beneficial interest had passed in the property.

A. Yes.

Q. The issue surely was, or do you know and perhaps we can get this correct, I just want to get the record straight, it's not an issue to be determined. That the issue was whether the question the question was whether there was technically a deemed disposal from the Trustees to themselves; wasn't that the issue?

A. That was the issue. However you put words on it, that was the issue.

Q. I appreciate it. It's just that that's fine.

CHAIRMAN: On that matter as to whether or not there had been a disposal, Mr. Horgan, which was determined in favour of the trust, you took the view that you had a good case, and you have mentioned that there were discussions that you might have gone all the way to the Supreme Court if it hadn't gone satisfactorily?

A. We were absolutely certain, from the advices we got from London, apart from other places, that we had an unassailable case.

CHAIRMAN: Is it a fair summary to say that over the last couple of decades, there has been quite a number of these cases as to whether or not there have been disposals before

the tax authorities, both here and across the water, and a number of them have gone to the Supreme Court here?

A. And the House of Lords.

CHAIRMAN: And more, evidently, to the House of Lords.

A. That's right. I have followed those with great interest, I can assure you.

CHAIRMAN: Some have gone one way, some have gone the other. At one stage, am I right in saying that there was a period when the House of Lords were somewhat sceptical of matters which they said might have related to form rather than substance, but there has been somewhat of a rowing back from that.

A. That is so.

CHAIRMAN: Just lastly, then, as regards the dealings that have been evidenced over recent days between the tax advisers and the Revenue authorities. In practice, has it been your experience and you have mentioned having had some degree of informal acquaintanceship with Mr. Pairceir, in any event that where you get to fairly high-level dealings between practitioners and Revenue authorities, you will get a somewhat more collegial or cordial atmosphere than you might get, perhaps, than where a shopkeeper is audited?

A. That is absolutely true, and particularly with Mr. Pairceir. He was I won't say welcoming, but he certainly was approachable.

CHAIRMAN: Yes, I am merely making that point. I shouldn't

hold it against anyone. There is a degree of mateyness in the correspondence at the meetings.

A. Yes.

CHAIRMAN: Thank you very much for your attendance and assistance today, Mr. Horgan.

I think we should probably make a start on Mr. O'Cathain, then.

MR. HEALY: Mr. O'Cathain, please.

MR. SEAN O'CATHAIN, HAVING BEEN SWORN, WAS EXAMINED

BY MR. HEALY AS FOLLOWS:

Q. MR. HEALY: Thank you, Mr. O'Cathain.

You are still a serving official of the Revenue Commissioners; isn't that right?

A. That's right.

Q. And what rank do you currently hold?

A. I am a Principal Officer.

Q. And in the years that we have been talking about here, '85, '86 and '87, what rank did you hold?

A. I was Assistant Principal level for a period. In 1986 I became a Principal Officer.

Q. Were those the titles by which the rank you then held were described at that time as well?

A. No.

Q. It might be of assistance if you were to tell us, because we are not as au fait, as I'm sure very few other people are, with the specific descriptions of the various ranks within the Revenue Commissioners.

A. Assistant Principal level was an Inspector Higher Grade.

An Inspector was the grade under that, so Inspector Higher Grade, and a Senior Inspector was the equivalent of a Principal Officer.

Q. So in 1985, '86, and '87, you were Inspector Higher Grade?

A. Up to '86 I was a Higher Grade Inspector, and in late '86, I became a Senior Inspector.

Q. And that's the rank you have today?

A. Yes.

Q. Now, what branch of the Revenue did you work in at that time?

A. I worked in the Office of the Chief Inspector of Taxes.

Q. And is that where you still work?

A. No. The Revenue has reorganised very fundamentally, and I am now in the Operations, Policy and Evaluation Division.

Q. Does that mean that at this time you are dealing with what I could broadly call sort of macro issues, whereas at that time you were dealing with more case work?

A. By and large, yes.

Q. You were working in I think what you called the Office of the Inspector of Taxes. Now, again, to most people that might seem to mean the Office of the Inspector of all taxes, but I don't think it means that, does it?

A. No. The Office of the Chief Inspector of Taxes was sort of a stand-alone office dealing with operational matters for direct taxes, corporation tax, income tax, and Value Added Tax later on, when it came along.

Q. Right. So the Inspector of Taxes dealt with corporation tax, i.e., if you like, income tax paid by companies?

A. Mm-hmm.

Q. "Income tax", that is income tax paid by individuals?

A. Yes.

Q. And then, although dealing with direct taxes, you subsequently acquired responsibility anomalously for Value Added Tax?

A. And Capital Gains Tax.

Q. And Capital Gains Tax. And when you were there, all of those taxes were within the remit of the Chief Inspector's Branch?

A. Yes.

Q. And had you any particular responsibility, and if not, was there a division of responsibilities as between the different taxes as I would see it, speaking as a layman, CGT, VAT, corporation tax and so on?

A. Yes, within the Office of the Chief Inspector of Taxes there were different areas. I worked in the area dealing with the Capital Gains Tax.

Q. And at that time, who was the superior to superior officer to whom you reported then?

A. Christopher Clayton was my Senior Inspector.

Q. And who was the head of that office, that branch, at that time?

A. I think at that time it was Seamus O'Connell.

Q. Seamus O'Cathain?

A. O'Connell.

Q. O'Connell; I beg your pardon.

Now, at that time Mr. Pairceir was one of the Revenue Commissioners, and as I understand it, the Revenue Commissioners, although forming as it were a form of a trinity, if you like, a three-in-one, they nevertheless had functionally individual not maybe responsibilities, because they presumably had sort of collegial responsibilities, but functional distinct areas of operation; would that be right?

A. Yes.

Q. And at that time who was the Revenue Commissioner, if you like, with a special interest, if I can put it that way, in your area of operations?

A. To be quite honest, I can't say for sure at this stage, but it appears from all the papers that it was Mr. Pairceir.

Q. Well in any case, we know from the papers you were dealing with him a lot, as was Mr. Clayton?

A. In this matter.

Q. So that's probably a reasonable conclusion.

A. Yes.

Q. Now, in the ordinary way, one assumes that the Revenue Commissioners do not, on a day-to-day basis, interest themselves in the affairs or the cases of individual taxpayers, whether companies or ordinary human persons; would that be right?

A. Yes.

Q. And in other words, they are not normally involved, except perhaps when a complaint comes in, or something like that, in case work?

A. Exactly. The board wouldn't.

Q. This, however, was not an ordinary case in the simple sense, firstly, that it involved huge sums of money; wouldn't that be right?

A. Yes.

Q. And is it your experience that one of the Revenue Commissioners would become involved in cases which were extraordinary by reason, say, of the amount of money involved or the complexity of the case?

A. I can't honestly say that.

Q. I see. Do you mean that they normally wouldn't become involved in big cases?

A. I didn't have any experience much of that happening.

Q. I see. So up to that time you hadn't become involved with Mr. Pairceir in relation to any big cases in the office?

A. I don't recall as such.

Q. In this case we'll come back to the details of it in a minute he seems to have been involved, in a very hands-on way, with a team of other people, of course; isn't that right?

A. Yes.

Q. Now, where all tax is concerned, presumably the Revenue Commissioners operate on the basis of the principle that they are not going to tax somebody simply speculatively to

see will he pay the tax; they are only going to tax

somebody where they believe that the tax is due?

A. Yes.

Q. Now, of course, the question of whether tax is due may give rise to issues of considerable complexity, but the Revenue, nevertheless, presumably would not seek to tax a person unless they felt that that person owed tax?

A. Yes.

Q. They could be wrong. We can all be wrong, and these questions can be extremely complex. But you wouldn't try to tax a person where you said, "Maybe we have a 10% chance of getting the tax out of them"?

A. I don't think so. That seems a strange way to look at it.

Q. Exactly. You'd have to be completely confident yourself.

A. Yes.

Q. And in relation to the amount of tax that you might be getting from somebody, where, as in this case, a question of differences over a valuation would arise, once again, presumably the Revenue wouldn't seek to collect tax on a valuation unless they were confident in it, whilst perhaps recognising that there could be other views?

A. Yes.

Q. Would that be fair?

A. Yes. You speak about collecting tax, which is a separate thing.

Q. Sorry; of course I do. I meant issuing assessments.

A. Yes. However, the assessment will be, it could be in the

higher echelon of what the person may expect to get ultimately in the reality.

Q. I see.

A. That's an important point to be borne in mind, I think.

But justifiable.

Q. But that's what I mean. You wouldn't put out an assessment in a case where you felt that you couldn't confidently justify the amount of money that you were seeking to charge to tax; in other words, where the assessment was based on a valuation, as in this case, of a company?

A. No.

Q. I think we heard we saw yesterday Dr. Thornhill's paper, I am sure you are broadly familiar with it, where I think in a number of different versions he and Mr. Reid tackled the question of how to value this very large and justifiably very successful company, and he was trying to put a value on this company, in hypothetical terms, on a particular date in 1984, I think, January of '84. You remember that paper that was being discussed?

A. I do. I am not very familiar with it, and I haven't gone back into it.

Q. I appreciate that. It perhaps illustrates the point I am trying to tease out with you.

He arrived at a number of different figures, and in arriving at his figures, he seems to have conducted a fairly exhaustive analysis of the way in which the company had performed over the previous few years, how related

companies in the same business and companies in other businesses but perhaps of an equal size had performed, and he tried to predict what somebody, maybe hypothetically offering to buy this company, would pay for it; isn't that what he was doing?

A. Yes.

Q. And he came up with various figures, and I think he ended up with something between I have forgotten now; was it 90-odd and 100-odd or something? In any case, he didn't pick his highest figure, because he presumed, look, you know, I could be knocked off this; my calculations, my assessments, my assumptions are not scientifically precise. And therefore he went for a sort of middle-ranging figure of 100 million; do you remember that?

A. Yes.

Q. So he didn't put in his lowest figure. He didn't put in his tip-top highest figure. Is that the sort of thing you are talking about, that you'd put in a good strong figure if you felt that you could stand over it?

A. Yes.

Q. And I think, while we are at that, I think you made a slight contribution to that I'll come back to your statement in a moment, but I think you did make a contribution to that debate; am I right?

A. Yes, that was the point at which I came into the case. But I have to say, I haven't gone back into that.

Q. I appreciate that. But I just it would be interesting

just to add in, I think, or mention your contribution at this stage. I think you'll find it at Leaf 11 of the book of documents.

Now, I think that you probably have a copy of that which doesn't contain, looking at the book, it doesn't contain all of the text because some of it has been taken out so as to limit it to the single issue. I am not quite sure what you have been I don't think the page you have been given is going to assist you. Perhaps I'll just read out a bit of it, the relevant part, and I'll make sure that you get a look at it at lunchtime so that if anything turns on it, you can come back to it. At this stage it's just perhaps paranthetically of interest.

This is a report of a meeting of the 12 March 1986.

Attended by the Chairman, then Mr. Pairceir.

Dr. Thornhill, Mr. Reid, Mr. Clayton, Mr. McDermott, and yourself. And when the question of control was being discussed in the context of C.A.T., you say that you said the following: "At this stage J. Keane said that he had reconsidered his attitude to the size of deduction to be made for lack of control. He now felt that if the holding in question came onto the market, the other preference shareholders would not allow it to be sold cheaply, that they would bid against any outsiders, and to that extent, the Revenue should present as optimistic a value as possible."

So, just in relation to your contribution to that, you were

saying, "We can stand over an optimistic valuation"; would that be a fair way of describing your contribution?

A. Yes.

Q. Now, this case was, if I can put this way, on the go from around 1985 onwards; isn't that right?

A. Yes.

Q. And senior management in the Revenue Commissioners seemed to have been focusing on it from around that time in terms of both the Chairman, Mr. Pairceir; yourself, Dr. Thornhill, Mr. Clayton, Mr. Reid and other people, but the main focus at the early stages, I think, was on the technical work being done down at the level of Mr. Reid and Dr. Thornhill. Was that right?

A. I'm not quite sure. Do you want to elaborate a bit more on that? I don't understand exactly.

Q. All right. The case was on the go for a number of years?

A. Yes.

Q. From the documentation that has been provided by the Revenue Commissioners, it would seem that it was being handled at a technical level in 1985 and in 1986. There were meetings between technical staff

A. About the valuation?

Q. Yes. And perhaps I think there may have been a meeting early on with representatives of the Trustees?

A. Yes.

Q. You probably saw that in the documents?

A. Yes, exactly.

Q. Now, what these individuals in the Revenue Commissioners were dealing with was, as we have heard, I think, from Dr. Thornhill, one of the largest capital cases that they had come across perhaps ever; I am not sure but in a long time, in any case?

A. Yes.

Q. Just because the taxpayer in this case was an extremely wealthy and extremely successful company or trust, in fact, which is what we were dealing with didn't mean that they weren't entitled to the same considerations as any other taxpayer?

A. Yes.

Q. Just because somebody is extremely wealthy, extremely well off, because some trust is very wealthy or some company is very wealthy doesn't mean you can adopt a casual or a cavalier attitude to tax?

A. On the part of Revenue, no, of course not.

Q. It's the same principle whether the taxpayer is big or small: You still have to try and work out what the true and correct tax is. You can't say, "Sure he can afford to pay it; we can charge him what we like"? You can't do that?

A. No.

Q. In this case the amounts of tax being claimed were in themselves extremely large. Not only was the company large, not only was the trust large, but the amounts of tax were large, weren't they?

A. Yes.

Q. I suppose the larger the amount of tax, the more issues there are around things like valuation, the more contact there is going to be between the Revenue and the taxpayer?

A. Yes, that seems reasonable.

Q. On the one hand looking for information, on the other hand, I suppose, trying to see could you do something about getting in the tax without going to the Appeal Commissioners?

A. Yes.

Q. Obviously the Revenue can't be going to the Appeal Commissioners in every case; every taxpayer can't be going to the Appeal Commissioners. The initial objective on all sides is to try and get in tax without going to the Appeal Commissioners?

A. Exactly.

Q. If the tax is a simple matter, if it's simply a question of collecting PAYE, well, then, it's just an arithmetical computation; isn't that right?

A. Yes.

Q. That's at one extreme. At the other extreme, if there are questions of valuation involved, not to mention complex questions of law, then you are going to have different views as to how much tax is due?

A. Yes.

Q. And of course, in those situations, it's only reasonable that you have or that you would approach it on the basis

there is an extra reason to try to settle it without going through the appeal process, because you'd get it in quicker; isn't that right?

A. I don't wish to disagree, but I don't fully understand that.

Q. In the ordinary way, as I said, the Revenue will always want to get tax in without having to go through the appeal process, and a taxpayer will also wish to dispose of his tax issues without going through the appeal process?

A. Exactly, yes.

Q. That is the case it doesn't arise, obviously, in presumably the vast majority of cases with PAYE taxpayers, but even with non-PAYE taxpayers, mostly the tax is a question of computation; you have arguments about expenses and that sort of thing here and there?

A. Yes.

Q. When you come to something like the valuation of a company, you are going to have lots of arguments about different points of view. We heard Mr. Horgan a moment ago put it very elegantly in Latin, in terms which I won't try to replicate. But I think he said you could sometimes have an opinions as men who could approach a question like that; isn't that right?

A. Indeed.

Q. I'll come back to that in a moment. I just want to ask you another thing about the way the Revenue conducts its operations.

In the ordinary way, in business, if you are dealing with a big customer, big customers are dealing with big money. They tend to get, they expect to get, and perhaps rightly get in business, good deals; isn't that right?

A. I think so.

Q. That's our experience. If you are going if you are on the telephone with some fellow and you are buying a tin of paint, you'll have to pay extra; but if you tell him "What will I have to pay if I'm buying a hundred tins of paint?" You'd expect to get a better deal.

A. Yes.

Q. If you are dealing with the same supplier over a lengthy period of time, and you want to keep him sorry, if he wants to keep you as a customer, well, you will expect a certain attitude from him in relation to payment, in relation to credit, in relation to what you pay for individual items and so forth; isn't that right?

A. Yes.

Q. That's business. I just want to know, is there any sense in which perhaps this is just human nature any sense in which that happens in the Revenue Commissioners?

A. Not in my experience of my dealing with customers.

Q. So that am I right in saying if you are dealing with very big numbers, the Revenue are still going to be looking for what's due; they are not going to be saying, "Look, it's a very big number, we'll do a deal with you on this, we'll do a deal with you on interest", whatever?

A. I beg your pardon? Repeat that, please.

Q. If the numbers that the Revenue are dealing with in the case of a particular taxpayer are very large, millions of pounds, is there maybe there shouldn't be, but as perhaps humanly, there might be a tendency to round up and to round down or to give somebody a good deal on something for quick payment or whatever, a good deal, for instance, on interest?

A. Well, I think we have already heard evidence about the interest, and yes, there was, there was flexibility about interest at that time.

Q. What I am just wondering, I am trying to put the interest that we have heard about in this case, 62,000, I am trying to put it in some kind of context. In the context of the total amount of tax at stake, or interest at stake, it wasn't a huge amount of money?

A. No.

Q. Is there a sense in the Revenue in which the Revenue may say, "Look it's not a huge amount of money; let's get the tax in, and to hell with the 62,000"?

A. I wouldn't think so.

Q. I see.

I am now going to go on to Mr. O'Cathain's memorandum.

CHAIRMAN: I think it's ten to, it's probably more satisfactory that we adjourn for lunch.

And if it suits you, Mr. O'Cathain, we'll take up the rest of your evidence at two o'clock.

THE TRIBUNAL ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF SEAN O'CATHAIN

BY MR. HEALY:

Q. MR. HEALY: Thank you, Mr. O'Cathain.

Now, what I'd like to do now is to go through your Memorandum of Intended Evidence 4. You provided the Tribunal with this, but also a number of very helpful memoranda dealing with many of the matters that are mentioned in your Memorandum of Intended Evidence. So I'm going to read it fairly quickly, if that suits you. And there probably won't be much I'll want to take up with you in it, because I'd prefer to go on and look at the other documents, because we'll probably get through it faster. But you stop me whenever you want.

A. Okay. What tab are we on?

Q. Of the white tabs now, we are at Tab 5 in the statement book, which is in my case it's a blue book. It's Book 64.

A. Yes. Thank you. Yes, I have that.

Q. You say, I'll read in the first person. You say: "My name is Sean O'Cathain. I am a Principal Officer in the Office of the Revenue Commissioners. I am asked to provide a detailed narrative of my knowledge of what went on and why in this case from January 1985 to 1988.

"The matters in question relate to the making of an assessment to Capital Gains Tax on the Trustees of the

Dunnes Settlement in respect of the deemed disposal by them on the 14th March 1985 of all the assets of the trust, the negotiations relating to the appeal by the Trustees against that assessment, the subsequent hearing of the appeal, and the outcome of the same.

"The first thing to be said is that I have very little recollection of any of the matters which occurred at that time, now almost 20 years ago, and therefore in compiling the narrative requested and the responses to the related queries I am totally reliant on what is contained in the documents on the file, copies of which I have recently seen for the first time since June 1988 which is the date I ceased to have any dealings with this case. As can be seen from the papers, my role in the case was that of providing advice and assistance within Revenue as and when required in relation to the issues involved. I was not involved in negotiations with the taxpayers or the representatives in relation to those matters, nor did I meet them at any time.

"The death of one of the settlors in 1984 and the other in 1986 resulted in liability to Capital Acquisitions Tax. In Revenue's view, the deed 14th March 1985 appointing the assets of the trust resulted in a deemed disposal for Capital Gains Tax purposes. The other side accepted that there was a Capital Acquisitions Tax liability arising from the deaths of the settlors but maintain that the deed of appointment of the 14th March 1985, the day before the expiry of the original trust, rather than creating a

liability to Capital Gains Tax, had resulted in the charge being avoided, for the time being at least."

Just so we can make sure that we are all ad idem on what we are referring to there. There are two matters being mentioned. One, I think, which I am calling for ease, because I am not a tax expert, is inheritance tax; the 3% inheritance tax that arose on the death of one of the settlors. Isn't that right?

A. Right.

Q. That was an issue where the question of liability was never, as far as I can see, in dispute. The only question was amount or quantum of tax.

Then the other issue is whether the deed of March 1985 constituted a disposal for the purposes of Capital Gains Tax, or whether it didn't so constitute a disposal and therefore avoided coming within the ambit of that Act.

A. That's right.

Q. "At that time all Capital Acquisitions Tax matters were dealt with by Capital Taxes Branch which was part of the Secretariat of the Revenue Commissioners in Dublin Castle. Capital Gains Tax was dealt with in the Capital Taxes Unit in the Office of the Chief Inspector of Taxes, which was located in the Setanta Centre Building in Nassau Street.

This unit was responsible for the administration of Capital Gains Tax, which was operated, as for direct taxes, in the tax districts spread around the country, which were part of the Office the Chief Inspector of taxes. The Capital Gains

Tax unit dealt with all complex cases and issues relating to Capital Gains Tax and was responsible for providing technical advice and instructions and valuations for that purpose. Share valuations in big or complex cases were provided by Capital Taxes Branch."

Just if I could stop there for a moment. When you say that share valuations in big or complex cases were provided by Capital Taxes Branch, does that mean share valuations in cases unrelated to capital taxes?

A. It wouldn't really arise. I mean, in relation to Capital Gains Tax here.

Q. I see. Only in relation to Capital Gains Tax. I just thought

A. Sorry; I mean, they would be the experts if anybody within Revenue needed a valuation.

Q. That's what I mean. If anyone within Revenue wanted a valuation of shares, because this expertise had built up, for obvious reasons, in that Department

A. Exactly.

Q. it would supply the service?

A. Exactly.

Q. So their experience was not related solely to the experience obtained within their own branch, but they had, perhaps, experience gained from being called upon to advise other branches of the Revenue as well?

A. Well, valuing shares for different purposes and specifically for Capital Gains Tax.

Q. "I worked in the Capital Gains Tax Unit, and my immediate superior there in 1985 was Christopher Clayton. Seamus Pairceir was the Chairman of the Revenue Commissioners at that time. It is clear from the papers in this case that in 1985, the main focus of attention was the liability arising for Capital Acquisitions Tax and the share valuations at the appropriate dates for that purpose. The share valuations for C.A.T. would be crucial also for Capital Gains Tax. The papers are best understood in that context.

"In March 1987, the Capital Acquisitions Tax issue was settled and the Capital Gains Tax issues then became the main focus of attention. I was involved in discussions which resulted in the making of the Capital Gains Tax assessment in an amount of $\text{€}38.8$ million in November of 1986, and thereafter in relation to attempts to settle the appeal against that assessment by negotiation."

A. Can I interject at that point?

Q. Yes, of course.

A. Despite writing that and looking back subsequently, I can't see in the papers discussions in relation to that assessment. I don't think, subject to something you'll open to me, but of course I was brought in for the brainstorming in relation to the original valuation paper.

Q. Yes, I was going to take that up with you, because, like you, I didn't see a direct involvement in relation to the $\text{€}38.8$ million; but as you say yourself, the original

brainstorming was carried out by Mr. Reid and well, I suppose led by Dr. Thornhill and Mr. Reid. And you were involved in that, I suppose?

A. Yes, I think it's in that context that I meant.

Q. That's fine. "In giving advice, it has been my practice to set out to the best of my knowledge the pros and cons of the issue in question i.e. what seems indicated by the requirements of the legislation from a Revenue perspective and the pros and cons of that interpretation: What alternatives are available, what would be the tax consequences now and in the future of particular approaches to the problem.

"Two things in particular are clear about this case. It involved the interpretation of the impact of actions taken under deeds of trusts and the conflicting outcomes of recently decided cases on the same points in the British Revenue Superior Courts.

"The other thing is that the amount of the liability, if an occasion of charge was established, was dependent on valuing a holding in an Irish company which was unique because of its size and because of it being unquoted. The experience in the valuation of shares in unquoted companies for tax purposes at that time, especially where a willing buyer and a willing seller had to be assumed, had shown that it was far from being an exact science, and that in most cases it ultimately depended on reaching agreement by negotiation with the taxpayer as to the valuation for the

purpose of the tax in question.

"In the current case, this was added to by the knowledge that whatever was conceded by Revenue in terms of reducing the deemed fact value of the share in 1985, and thus the amount of tax arising at that time would redound to Revenue's benefit in any subsequent disposal of those shares due to their reduced base cost forward which would be allowed in calculating the gain on later disposals."

Do I understand you to be saying where Revenue, in dealing with an ongoing relationship or situation, agreed to a certain valuation of a company for the purposes of a particular capital tax, that there is always the sort of added protection, or fallback, if you like, that when the matter would again come up for consideration at a later date, the earlier valuation, if it was, perhaps, for whatever reason, on the low-ish side, would nevertheless redound to Revenue's benefit, in that the new valuation, the gap between that and the new valuation would be that much higher; isn't that right?

A. Yes, for Capital Gains Tax purposes.

Q. Of course, obviously, if rates changed in the meantime, then the benefit might go the other way if the rates went down and up, if the rates went up.

"It is evident from the papers that there had been several meetings and discussions about the issues involved in this case dating from early 1985, but I was not party to these. According to the papers, I came into the case for the first

time when, together with Mr. Christopher Clayton of the Office of the Chief Inspector of Taxes, I attended a meeting on the 27th February 1986 with Mr. Seamus Pairceir, Chairman of the Revenue Commissioners and officials from the Capital Taxes Branch. The meeting was to discuss a draft of a share valuation paper relating to this case dated the 25th February, 1986."

Then you refer to your note of that meeting.

"I attended a further meeting with the same people on the same subject on the 12th March 1986."

John Reid's note of that meeting is the one that you refer to. And you refer to your own note of that meeting as well.

"The next meeting of this group which I attended was on the 5th June 1986, and shortly thereafter got a fuller picture of the case."

You refer to your note of the 5th June. Between the 5th June 1986 and November 1986, you do not appear to have been involved in the case.

"I became involved again in November of 1986 when Christopher Clayton advised me that the Chairman wanted the Capital Gains Tax assessment to issue and that he, Christopher Clayton, should keep the case. This resulted on the 24th November, 1986, in Christopher Clayton writing to Oliver Freaney & Co., who represented the Trustees, advising them that an assessment to Capital Gains Tax of $\text{£}1\frac{1}{2}$ 38.8 million was being made on the trust in respect of the

deemed disposal of shares in the year of assessment ending 5/4/1985 and explaining how this was calculated. The assessment was then issued in the name of the Inspector for Dublin No. 1 Tax District which was the tax district dealing with the trust. The accountants appealed against the assessment, asserting that no Capital Gains Tax arose.

"On the 16th March 1987, the day for the hearing of an appeal on the Capital Acquisitions Tax matters I'll call that the inheritance tax matters "agreement was reached on the market value of the shares held by the trust in 1984 and 1986 for that purpose. Following this I drafted a statement of agreed facts in relation to matters at issue for Capital Gains Tax, and this was sent to the Appeal Commissioners, with a copy to the agents, seeking a date for hearing appeal against the Capital Gains Tax assessment. The Appeal Commissioner subsequently allocated the 9th and 10th June 1988 for the hearing of this appeal. This was later put back, at the request of the other side, to the 22nd and 23rd September 1988.

"For Capital Gains Tax in this case, unlike Capital Acquisitions Tax, there were two issues involved. A) the question of whether there was any disposal within the meaning of the 1975 Act, and B) what was the market value of the shares in the trust on the 14th March 1985 and on the 6th April 1974, the latter being the base date for Capital Gains Tax.

"In May and June of 1987 I was involved in meetings and

briefings with the Chairman, who was negotiating with the other side in an attempt to reach agreement for settling the appeal against the Capital Gains Tax assessment. These negotiations broke down in July of 1987 and were finally ended in September of 1987 without agreement.

"In March of 1988, apparently on receipt of notification that the appeal was set down for hearing on the 9 and 10 June, the other side sought further meetings, and I provided briefing materials on the issues for the then Chairman, Chairman Curran. No agreement resulted.

"On the 29th April, 1988, Declan Sherlock of the Revenue Commissioners and John Reid for Capital Taxes Branch and myself met our counsel to prepare for the forthcoming appeal. In May the accountants sought from the Appeal Commissioners a six-month deferral from the date of the appeal hearing, and a deferral was agreed.

"My last dealing with this case was on 5th June 1988, when I wrote to the Appeal Commissioners confirming the agreement of both sides to the 22nd and 23rd September 1988 as the dates for hearing of the appeal against the Capital Gains Tax assessment. About the same time I was assigned to take up duty as District Inspector in a busy tax district, and I did so on my return from summer leave. I do not recollect having any other dealings with or knowledge of the case after that, but I assume I would have become aware of its outcome.

"In relation to the any of the events about which I had

knowledge and which I am asked to provide details in this case, I should add that in my experience, there was nothing untoward in the handling of the case, given its unprecedented size and complexity, the way the occasion of the charge came about and the need to protect the confidentiality of the client, the client's affairs and their identity. I think that all on the Revenue side were of the one mind in regard to the desirability of reaching a compromise on the valuation figures which would deliver a settlement then current Capital Gains Tax issue acceptable to both sides.

"I am setting out here, under my response to the 15 queries which I have been asked to deal with, if I can give further assistance in relation to the any of matters raised in these queries, I will be glad to do so."

Firstly, you were asked for an outline of dealings between the Revenue Commissioners and the Trustees from January '85 to December 1988.

You say that you were taking that to refer to the period of your knowledge from February '86 to June '88. You refer to the assessment of Capital Gains Tax of 38.8 million made on the Trustees on the 27 November, 1986, settled by the Capital Acquisitions Tax assessments were settled by agreement on the 16 March 1987. From March 1987 onwards, Capital Gains Tax was the main issue. I did not have any dealings with the Trustees or any one from the other side at any time, apart from two contacts by phone from Liam

Horgan of Touche Ross, one on the 21 May about arrangements for the forthcoming appeal hearing, and the other on the 4 June '87 inquiring about progress in the case, and one from Noel Fox on the 22 March '88 about the whereabouts of a letter which his firm had recently sent to the Revenue Commissioners about a different aspect of their client's affairs. Therefore I am not in a position to say what contacts there were between the Revenue and the Trustees. "However, there is reference to a number of contacts contained in my notes in these papers of the information which I received about the progress of the case at meetings and consultations with Revenue."

You describe those, and we'll come to them in a moment.

You were asked for details of the involvement of the Chairman of the Revenue Commissioners and the approach adopted to the raising of the assessment and so forth. You say: "From the papers, it appears that the approach to and filing of the Capital Gains Tax assessment was influenced by the Chairman and consultation with his officials, including myself. Valuation of the assets upon which the assessment to Capital Gains Tax was computed was done by Capital Taxes Branch and was based on objective criteria as discussed with the Chairman and his officials. During the period which I was involved with the case, the interaction between the Revenue Commissioners and the Trustees and persons on their behalf was handled by the Chairman, initially Mr. Pairceir, and eventually Mr. Curran. The

appeal hearing against CGT was in September 1988." And you say that you had no dealings with that.

I think there is a lot of repetition in your responses to 3 and 4. I am not criticising you in any way, because you have already to some extent covered many the points you have mentioned.

A. I felt there was a lot of repetition on the questions. I was being asked to cover so much. I felt I was afraid I wouldn't even be giving enough.

Q. You were afraid sorry?

A. That I wouldn't give enough. Everything was there was so much asked for.

Q. Not at all. I'm not suggesting I am not criticising you in any way, Mr. O'Cathain. In fact, it's more than complete, just so as to avoid going over it all more than once on this occasion.

You were asked, in Query Number 5, for your knowledge of the officials, direct or indirect, of the meeting between the Chairman of the Revenue Commissioners and Mr. Bernard Dunne dating from May '87 to September '87, including your understanding of the purpose of the meetings and the outcome of the meetings.

I think this sort of questionnaire was sent to a whole number of Revenue officials, and obviously some of them would have more and others less involvement with the matters to which the questions were addressed.

And you refer to your notes and the contacts you had with

the various persons. And most of the contacts you had were with individuals within Revenue who had themselves been in contact with the Trustees or representatives of the Trustees or with Mr. Bernard Dunne himself, or you had contact with people who were themselves told about contacts between the Trustees or Mr. Bernard Dunne and other officials.

A. That is so, yes.

Q. Would that be a fair summary of it?

A. It is.

Q. You were asked for your knowledge of the officials, direct or indirect you were asked for your knowledge, direct or indirect, in relation to the outcome of the proposed settlement of the CGT assessment at $i_{\frac{1}{2}}16,000,000$; that appears to be discussed between the Chairman and Mr. Bernard Dunne at a meeting on or about the 4th June.

You refer to your memorandum again for your information on that. And we'll come to those memoranda at a later point.

Your response to Roman numeral number 7 again refers to your various memoranda.

You say that you were asked for your "knowledge, direct or indirect, of all matters, factors, or considerations which prompted the then Chairman's determination to" I think that should read "compromise the assessment at 16 million. From my notes of the meeting with and briefings of the Chairman leading up to his meeting with Bernard Dunne referred to in my note of the 4 June 1987, it seems

clear that a compromise figure to settle the Capital Gains Tax appeal was under discussion prior to that meeting. My briefing note, which was provided to the Chairman on the 26th May 1987 at his request, indicates a range of possible settlement figures based on different discounting factors of the value of the shares. Part 3 of that memo shows that applying a discounting factor of 20% for nonmarketability to the 82 million value of the holding at the 14/3/85, as agreed for C.A.T., would throw up a Capital Gains Tax liability of 15.64 million."

I just want to clarify one point in that sentence; it may simply be a typographical or syntactical error. You say: "The applying of a discount factor of 20% to a nonmarketability to the 82 million valuation of the holding at 14 March '85 as agreed for C.A.T."

A. That's a typographical error.

Q. I think C.A.T. was the 1st January, '84, isn't that right, that was the valuation date for C.A.T., I think for inheritance tax?

A. It was also used for '85.

Q. I appreciate that, yes.

A. But it derives yes, it is the '84 debt, or the value at '84, yes.

Q. I presume that one figure was chosen for C.A.T. as at January 1984, and presumably to avoid the complexity of having new valuations, I think in 1986 you'd have had to have split valuations?

A. Reference was made to the three years. I am not sure if that's statute at this juncture, or whether it was referred to this morning as being practice.

Q. I think you'll correct me, or if you don't, I think there is somebody here will correct us in a moment if you agree a figure for inheritance tax or Discretionary Trust Tax at a specific date, that figure, certainly as far as the 1% rate is concerned, applies for the following three years; isn't that right?

A. It appears to have been the case here, anyway, yes.

Q. That seems to be the law. So that if you obviously, if you had to do the valuation exercise every year, the Revenue would be doing nothing but valuation exercises; so what you agreed for one year, you keep for the next three years. And again, as with all valuation exercises, if the company is in fact increasing in value, that's to the advantage of the company, and it's a permanent advantage because they never again have to pay that tax; and if the company goes down in value during those three years, it's a permanent advantage to the Revenue. Isn't that right?

A. On the face of it. I don't know the details of the

Q. It swings and roundabouts?

A. Yes, but maybe there is some I don't know is it as inflexible as you make it in terms if the value goes down, I don't know.

Q. You mean if the value went down, you might get a chance to come in again and argue?

A. I am saying I don't know whether you would or not. With respect, I don't have information on it.

Q. Yes, I appreciate that.

CHAIRMAN: Is two years? Is it current year plus two, or current year plus three?

A. Apparently, current plus two. Three years, that's what appears from the papers.

Q. MR. HEALY: That's what I gathered from the documents, in any case.

And you mention that it threw up a Capital Gains Tax liability of 15.64 million. This figure would leave a value forward of 65.6 million would be very favourable, from Revenue's point of view, as a base cost for calculating Capital Gains Tax on future disposals by the trust.

In other words, if the trust is valued at 65.6 at the valuation date of March 1985, and subsequently there is a disposal, then you'd be arguing from a base cost of 65.6; and if there was a huge gain in value, that would accrue to the benefit of the Revenue?

A. Yes.

Q. And of course the converse also applies?

A. Yes, that's the base cost forward.

Q. "The proposed settlement for 16 million was therefore in keeping with these discussions. It is clear from these discussions that it was felt that there was every possibility that if the Revenue were not prepared to settle

for a compromise figure and insisted on going to appeal hearing, Revenue could lose all."

I think Query Roman numeral number 8 again refers to meetings, and I think you deal with it by reference to your memoranda. And I won't go into the details of it here.

And I think the same goes for Queries Numbers 9 and 10 to 15.

Now, I think we can I am not going to go through all of the papers that you provided to the Tribunal or that the Revenue provided. I think we may take it that all of the documents that contain your handwriting we have referred to your handwriting already; it's very distinctive are identified as your documents in the book. Isn't that right?

A. Indeed, yes.

Q. And I have made available, to some of the other affected individuals, copies of your other working papers that I think I have also showed to you at lunchtime, they are also in your handwriting, and they are clearly yours; isn't that right?

A. Yes.

Q. I am not for a moment suggesting that anyone should be held to the chapter and verse of what he puts down in his working papers. They may consist of musings, serious thoughts, peripheral thoughts on issues that were exercising your mind at the various points where you applied yourself to the issues with which you were dealing

in these two cases, mainly in one of them; isn't that right?

A. Right.

Q. And again, just to describe them sort of compendiously, what they involve is some thoughts on valuation, a lot of quite detailed and, if I may say so, quite insightful views on the legal principles applicable to the question of whether there was a deemed disposal or not, and then some thoughts on perhaps how you might structure a settlement or approach a settlement. Would that be a fair way of describing them?

A. Yes.

Q. In relation to C.A.T., I think your role simply seems to have been making contributions from the sidelines to the more core work that was being done by Dr. Thornhill and Mr. Reid; would that be a fair way of putting it?

A. That's true.

Q. Now, if we just deal firstly and try to get out of the way the involvement you had, such as it was, in the inheritance tax that was disposed of by a compromise on the 16th March, 1987. You were not present at the Appeal Commissioners hearing in relation to that; isn't that right?

A. I think I may have been.

Q. I am sorry, I beg your pardon, you were not involved in the you were not involved except to the extent I described beforehand, but you were present, I beg your pardon, you were present at the Appeal Commissioners hearing?

A. Yes.

Q. Can you remember where the Appeal Commissioners heard that appeal?

A. It would have been Stephen's Green, the top of Dawson Street.

Q. And do you remember who else was present from the Revenue, or the main people present from the Revenue?

A. I have a note in the papers, and from recollection, for Revenue it was Don Thornhill, in particular, I think a Mr. Fitzpatrick from the Capital Taxes Branch. John Reid probably I'd have to look at it now again.

Q. Dr. Thornhill, obviously?

A. Sorry, yes, very definitely.

Q. Now, you became involved in that appeal hearing, according to Dr. Thornhill, as a result of something that arose in the course of settlement discussions, is that right, or after them, maybe?

A. Perhaps it's like this, that I was there on the day it didn't actually go to hearing, as you know; that there were negotiations, as Dr. Thornhill describes, between counsel. So I was on the sidelines. And as the note indicates, afterwards Dr. Thornhill asked me that this matter of the dividend, the surcharge had been drawn down by the other side, would they get some concession that had been given for wealth tax. And we agreed that we didn't know and could make no undertaking on it.

Q. Can I just, for a moment, just park that for one moment and

just ask you about one or two other questions about the hearing.

Was that the only involvement you had in the hearing at that point? Did you discuss the settlement proposal at all at 82 million, or anything like that?

A. No, I don't recall anything like that.

Q. So what do you think you were there for, in any case? What was your role to be in the appeal hearing if it went ahead?

A. To observe.

Q. To observe?

A. Yes.

Q. I see. So then your only really substantive role was in relation to this question that Dr. Thornhill brought to you?

A. Exactly, yeah. There wasn't any hearing. But don't forget, sorry, why I would have been there, of course, is because the valuation was going to be centrally important for the Capital Gains Tax.

Q. Of course. Yes, and it was worth you might get information or learn something from the process if it had gone ahead?

A. It goes without saying. I mean, the figure arrived at and how it would be arrived at would be crucially important for Capital Gains Tax.

Q. Of course. I just want to get this clear about that. I presume that you are referring to the situation that would have obtained if the appeal had gone ahead; is that right?

A. Yes.

Q. You know that it was settled without prejudice to the valuation for Capital Gains Tax?

A. I do, yes.

Q. You were aware of that?

A. Yes.

Q. Meaning that it would be new ballpark; start all over again?

A. Yes.

Q. Is that how you would have understood that?

A. Yes.

Q. And of course, from the Dunnes point of view, they could have set a new ballpark as well. 1% is one thing, or 3% Discretionary Trust Tax, but whatever, it was a massive percent of CGT we might want to argue or take a much tougher line in relation to valuation?

A. Indeed.

Q. If I could just refer to you Dr. Thornhill's note; I think it's at 28 of the book of documents.

A. Yes, I have that.

Q. He gives an account, which is obviously an account from approximately a week later, of dealings he had over the previous week concerning this matter. Do you see that?

A. I do, yes.

Q. He says: "During the negotiations on the 16 March, Mr. Bowen inquired as to the likely Income Tax treatment of any income passed up to the trust in order to pay

Discretionary Trust Tax liabilities. Initially he sought an assurance that any such income would not be subject to income tax (payable by the Trustees). He also mentioned that, when similar circumstances had arisen in respect of payment of wealth tax, the trust income had not been subjected to income tax.

"Following consultation with my colleagues, including Mr. Sean O'Cathain (Senior Inspector of Taxes), I told Mr. Bowen that I was unable to give him my assurances on this issue it related to another area of Revenue. I did say that the Revenue would be reasonable and that we had noted what he had said in respect of the wealth tax.

"Later (20 March), Mr. O'Cathain telephoned me to say that no income tax returns had been made in respect of the trust. He also confirmed what Mr. Bowen had said about the income tax treatment during the wealth tax era. He also thought that an instruction had been issued that a similar concession should not be made in respect of the 3% Discretionary Trust Tax."

Now, I think if I could refer you to one of your memoranda, a memorandum of the 16 March of 1987 dealing with the same matters with similar queries. It's at Document Number 26, or Leaf Number 26, rather, of the document book. Yours is headed "Mearain" you say I'm going from the typed version. You may prefer to read from your own handwriting, and please feel free to correct me.

"On the 16/3/87, Bowen had inquiry for D. Thornhill

A. "Had inquired".

Q. "Had inquired from Don Thornhill if the wealth tax concession which was allowed to the trust would also be allowed when they got money from the company to pay the approximately 5 million VAT/trust tax.

"I said I did not know of concession referred to and that I did not understand how the problem would arise. DT did not know how the trust would get the money but it would presumably be by way of dividend. A trust is only charged at 35%, and in the case of directors which have already suffered"

A. Sorry, "in the case of dividends".

Q. "In the case of dividends which have already suffered tax at that rate."

A. That's probably at the standard rate.

Q. Yes.

"The recipients or distributions are treated as receiving"

A. "The income under deduction of tax and given credit"

Q. "...at the standard rate."

A. It's not in my copy.

Q. "He then told them that the people dealing with trusts were not present, and that while no undertakings could be given, Revenue would act reasonably."

Then you say rang Sean O'Siochain. "Section 13, Finance Act 1976, introduced a 20% surcharge on undistributed income of trusts.

In calculating the uncontributed income, it was concessionally agreed to allow the payment of wealth tax as a charge against the income of that year." And you gave the file reference number.

Then I think you go on to say: "Assuming that dividends are paid, there should be no surcharge on the trust if all are paid out in capital taxes. A CT would have to be paid by the company". That's a corporation tax would have to be paid by the company "paying to the trust, but" you say "it has no other income. Maybe they fear a surcharge on the dividend income of the capital tax is not allowed as a charge against it."

Then there is a gap which I haven't been able to decipher.

"Something of the trust has other income for the year."

A. My photocopy isn't good either.

Q. Then it goes on. Now, do you have a next page on yours?

A. No.

Q. The first intimation that Chief Inspector Income Tax had of the trust was when we advised them of it. Returns for all years would be required in due course."

A. That's the district headed by Sean O'Siochain, which was dealing with the income tax of the trust.

Q. Then you go on to say: "Sean O'Siochain thinks this is a memo that 3% Discretionary Trust Tax of 1984 should not be allowed in surcharge computation". Is that right?

A. Yes.

Q. "Note preference shares now held by individuals, so trust

has no power of paying itself dividends.

"Rang Don Thornhill and advised him of the above."

Your memorandum seems to more or less tally with Dr. Thornhill's memorandum, at least in most respects; isn't that right?

A. I think so. He refers to income tax there.

Q. That's what I was going to comment on.

A. Which I think that's a misunderstanding, perhaps.

Q. Right. Well, can I put this way should we look at that again?

A. Yes.

Q. In light of what we now know was subsequently contended by the tax advisers of the trust, I think it's only fair to point out that Mr. Thornhill, in the first paragraph of his note, was referring to the likely income tax treatment of income passed up to the trust in order to pay Discretionary Trust Tax liabilities, and when that issue was put to him, according to his note, a reference was also made to the treatment of a similar situation in a wealth tax context; but when it came to you, perhaps because of your experience and what you had been told by maybe Mr. O'Siochain, it had become focused on the surcharge issue. Would that be a fair way of putting it?

A. Yes, I think my note on the day, or that note we yes, sorry, this one we are looking at, yes, is fairly clear that it was a surcharge was the issue.

Q. I appreciate that. Am I right in thinking they are two

separate issues?

A. Oh, yes.

Q. They are two separate taxes?

A. No, no. Well, they are both income tax.

Q. Yes, I appreciate that.

A. Except that the surcharge is, as it says, it's a surcharge on undistributed income, and it's a question of what's deemed to be uncontributed income.

Q. But both could hit the same trust; isn't that right?

A. Yes.

Q. The query as described by Dr. Thornhill in the first paragraph of his note, certainly in terms in the words used, refers to income tax, and there is no reference to surcharge; isn't that right?

A. I think so. Should we look at that note again? What number is it?

Q. Yes, it's Number 28.

A. Well, he was writing this on the 24th March, which is eight days later. But where he says initially he sought an assurance any such income would not be subject to income tax payable by the Trustees, that doesn't seem to be about the surcharge; I can't explain that. But also however, he goes on then to mention that similar circumstances had arisen in respect of wealth tax, and that's about the surcharge. So it does seem as if the two issues are mixed up.

Q. It may be that the two issues are being transposed or mixed

up in some way

A. I think so.

Q. he not being a technical tax expert himself. But

A. Yes.

Q. But I suppose, putting it this way, in each case whether you were talking about the surcharge or ordinary income tax, what the Trustees wanted to know was whether they would be allowed or given an allowance for the payment or for the use of income to pay tax; isn't that right?

A. Sorry, I beg your pardon; repeat that.

Q. The Trustees query whether you described it, no matter how you describe it or no matter what taxes you were referring to, the query coming from the Trustees in each case were the same; they wanted to know whether an allowance would be made for income that came to the trust and that was used to pay tax. Isn't that right?

A. It seems to be, but as far as I was concerned, it was about the surcharge matter.

Q. I can see that. It's as plain as day. As far as you were concerned, it was the surcharge?

A. Yes.

Q. Mr. Thornhill, not being a tax expert, might not have made those distinctions, is my point.

A. It seems, from that sentence there, anyway, that's a reasonable or maybe I should say a possible interpretation of it.

Q. If you could go on for a moment to Leaf Number 30A. This

refers to two days, firstly the 13th April and secondly the 14th April 1987. We'll come back to the first note later, but the second note refers to a call from John Reid:

"D. Thornhill wants note on the dividend to Trustees position." Do you see that?

A. Yes.

Q. So presumably he hadn't had the note from you at that point.

A. Indeed.

Q. Now I want to refer you to another working paper of yours which wasn't initially in the book of documents, but which appears to refer to this issue. It's dated the 15 April, 1987, and it's in the black book of documents that I think was handed to you today, and it's Document Number 1. If you go it's a two-page document in your handwriting, and the second page is stamped at the bottom right-hand side, "15/4/1987".

A. Yes, I have that.

Q. Now, I am not quite sure what the top left-hand corner on the first page says. I can see "An Brancha Caineacha Capituila" but above that

A. That's John Reid, I take it.

Q. John Reid; I see.

It says: "In response to your request for a note on the implications of a trust paying the 3% Discretionary Trust Tax and the 1% annual tax out of the dividend received, the following appears to be the position."

So you seem to be doing what he had asked you to do in the memorandum I referred to a moment ago: preparing a note for him that ultimately he could give to Don Thornhill?

A. Exactly. Don Thornhill had obviously wanted a more I had advised him on the phone, from our earlier note there, and he had obviously wanted it in writing.

Q. Yes.

A. So I was passing on what I had established in relation to it.

Q. You say: "Section 13 of the Finance Act 1976 provides for a surcharge of 20% on the undistributed income of a Discretionary Trust.

"Such a trust is otherwise only charged to income tax at the standard rate of 35%.

"On receiving the dividends, the trust is treated as being in receipt of income already taxed at the standard rate.

That's because the dividend comes with a tax credit in a sense; isn't that right?

A. Yes.

Q. The tax is retained out it was at the standard rate?

A. Yes.

Q. "The question arises as to whether the payment of 3% Discretionary Trust Tax and the 1% annual tax reduces the income of the trust for the purpose of ascertaining the amount of the undistributed income.

"Apparently it has been decided and querists have been advised that the 3% Discretionary Trust Tax provided for in

Section 109 of the Finance Act 1984 may not be regarded as an expense for the purposes of Section 13(1)(D) of the Finance Act, presumably on the basis that it is a tax on the capital and an expense of the same".

Is that right?

A. My photocopy isn't good. "Is a tax on the capital", yes.

Q. "And an expense of same."

A. Yes, I think that's what it is, yes.

Q. "There is a file on this under the reference number. The same question arose in relation to wealth tax in 1977, and it was finally allowed as a proper charge on the income of a trust for the purpose of Section 13, Finance Act 1986."

And again you refer to a file on that?

A. Yes.

Q. "There is an additional element in the BND trust. It holds no voting shares in the holding company since the 14/3/85, and the holding company apparently holds only shares in the trading companies or in a further company which holds shares in the trading companies.

"If a dividend were to be paid to the trust, advance corporation tax would have to be paid by the payer (or the company from which it got the dividend) to cover the tax credit at the standard rate available to the trust.

"I am sending this note across to you by hand now as requested."

Now, again, your note was dealing solely with the question of the surcharge, the 30% or the 20% surcharge in

undistributed income, not the question of whether any and all income to the trust would be taxed for income tax; is that right?

A. No, it's the question of the surcharge, but just putting it in context.

Q. Exactly; I appreciate that.

One of the points you make here is that you say the querists apparently, you say, the querists have been already advised of this. Does that suggest that the Trustees or their representatives had already been told that, according to what you had been told, presumably, by the people dealing with this kind of tax?

A. I don't know, to be quite honest, whether I don't know quite what that means at this juncture. Whether I was aware that they had been told or otherwise, I just don't know.

Q. Can we just canvass the possibilities. I suppose either you were aware yourself, in which case you probably would have said, "They have been told", or you were aware from what somebody had told you

A. It would have been what somebody had told me.

Q. And maybe that accounts for you using the word "apparently"?

A. Indeed, yes, maybe. Yes, looking at that yes, I would then, I hadn't adverted to that. It does seem that in writing that, I felt that they had been already told that, which I suppose is a reasonable interpretation.

Q. If I could ask you now to go to Folder or Leaf, rather, Number 36 of the book of documents. And just before I go to that document, can I just clarify the sequence again.

Dr. Thornhill spoke to you at the hearing. You appear, to judge from your own note, to have spoken to Mr. O'Siochain, and then subsequently you spoke to Dr. Thornhill; isn't that right?

A. Yes.

Q. But at the same time, you or rather sometime later, in April, you formally sent a more considered view to Mr. Reid for onward transmission, presumably to Dr. Thornhill; is that right?

A. Yes. Well, I wouldn't call it a more considered view. I was providing the written account of what I had given on the phone. I don't appear to have gone back to Sean O'Siochain.

Q. It's just on your first, if you like, noted response, you said you had spoken to Mr. O'Siochain, and you thought or he thought that there was a memorandum dealing with this; but when you spoke to Mr. or when you wrote to Mr. Reid and you say conveyed your note to him there and then, it was more definitive. That's all I am saying.

A. True.

Q. If you now go to, as I said, Leaf Number 36. This is a memorandum of a meeting on the 25/5/87 with An Cathaoirleach, Mr. Christopher Clayton, and Mr. John Reid. And if you look at the third paragraph on the first page,

it says: "He has had the file on surcharges looked at, and a decision has been made to allow both the 3% charge and the 1% charge as a deduction in calculating the undistributed income, if any." Do you see that?

A. Yes.

Q. That would seem to suggest that this issue had now been concluded, at least on the question of the surcharge, by a decision from the Chairman; isn't that right?

A. That's right. Well, I don't know about a decision had been made by somebody.

Q. Well, I suppose so. But it had the imprimatur of the Chairman in some way, to judge from your note, anyway.

A. Oh, I'm sure it had.

Q. So whatever views had been canvassed before, whatever memoranda had been issued before, it was now clear that the new position was definitely going to be these two charges were going to be allowed in calculating or in reducing the amount of income coming within the definition of undistributed income ; isn't that right?

A. That is true.

Perhaps I should say, hopefully, helpfully, that there is a letter, or a note, a memorandum from Commissioner Casells, Lord have mercy on him, later on, where he says that having looked at it, he felt compelled, had to allow such a treatment as it referred to here in this.

Q. Yes. Do you know if this was ever actually followed up, or if you see, in your note you say that the Trustees or

the querists had been apparently informed there'd be no allowance. And now the Chairman has looked at it and it looks like this is, as it were, a new decision

A. No, this is a surcharge.

Q. Yes, this is the surcharge.

A. Oh, sorry, I take your point.

Q. So, to judge from your note, there had apparently been a communication to the effect that there would be an allowance, and now a decision has been made, clearly a new decision, that it would be allowed. Do you know if that was communicated to

A. I have no idea.

Q. How would the Revenue communicate a decision like that? That would presumably apply to all trusts, wouldn't it?

A. Indeed.

Q. Would it be possible to find out whether the Revenue had issued a general communication to, you know, a directive to tax advisers to that effect?

A. It would be impossible to look for it. The gentlemen this morning referred to as a practice note. I don't know.

This isn't my area, and

Q. I appreciate that. But how would the Revenue communicate some question, or the resolution of some question like this to practitioners? Do you know? Has that ever arisen in your experience, that it's been necessary to clarify some issue like this that isn't wholly dealt with in legislation?

A. There are statements of practice, but

Q. Is that how it's done?

A. Yes. It might be done like that, but I don't recall any such, for this.

Q. Right, maybe in due course I won't press you on it, Mr. O'Cathain; maybe Mr. Sherlock will in due course look for it and see.

A. But of course, sorry, I mean, in case you are concerned of that treatment being given, it would mean it would be communicated to the district dealing with trusts and that, then that treatment would be applied universally.

Q. That's what I mean. It would presumably be applied to all trusts. I am sure Mr. Sherlock will find the relevant document or whatever memorandum or directive there is to explain that.

But in any case, assuming that that was communicated to the representatives of this particular trust, the Dunnes Trust, well, they would have known, presumably, well, we are happy enough now on surcharges at least, but it wouldn't have answered their question on ordinary income tax on the income of the trust, sure it wouldn't have?

A. No, not on the issue being discussed.

Q. Now, when you first, I think, took that matter up, you mentioned that the first intimation that the Income Tax Branch had had of the trust was when you advised them of it remember, we discussed that a minute ago your memorandum that referred to the fact that the first

intimation that, I think you have "CI Coin Income had of the trust was when we advised them of it."

A. Yes.

Q. "Returns for all years will be required in due course."

Does that mean that that section would now be alerted to the fact that there was a trust out there, and that income tax returns in relation to that trust should be monitored for income tax?

A. Yes.

Q. I now want to turn for a moment to look at the Capital Gains Tax issue. And before going to look at your documents, because I'm not going to read them all out, I just want you to understand what it is I am trying to tease out.

The Capital Gains Tax assessment that was issued in November of 1986 in this case was for $\frac{1}{2}$ 38.8 million, and we'll come back to discuss it in a moment in more detail, but this morning we canvassed in a general way the care that would go into issuing an assessment like that, and we know the care that had gone into the valuation exercise that led up to it.

That assessment ultimately was appealed, and the Revenue were unsuccessful; the taxpayer was successful. But I want to come back from that appeal now, for the moment, to the period during which the question of a settlement was being discussed. And bearing in mind that you are starting out with the figure of 38.8, ultimately the settlement

negotiations on the question of the amount of tax that would have to be paid if the liability was accepted by the taxpayer was 16 million, which is a massive reduction; isn't that right?

A. Yes.

Q. Now, I am not saying that in itself is the end of the matter. What I want to try and understand is what accounted for the shift from 38.8 to 16, and what conclusions ought to be drawn from the fact or can be drawn, if we can get enough information about the entire matter from the fact that an initial assessment of 38.8 is eventually reduced by agreement for the purposes of settlement, I hasten to add to 16 million; that's what I'm trying to find out. What accounts for the what does it come to, nearly 23 million drop; I think 60% or something like that. Now, and that's what I'm going to be pursuing in asking you about it.

Now, we had some discussion about trusts this morning, and presumably from your experience in Capital Gains Tax, and I can see, from the papers you were working on, you had some knowledge of the legal nature of trusts; and presumably, from your time in the Revenue, you have some understanding of the fiscal and of the financial aspects of trusts?

A. Yes.

Q. And apart from the fact that putting money into a Discretionary Trust keeps it out of the hands of the potential beneficiaries, it also allows the funds to

accumulate unaffected by for a long time, anyway in

Ireland almost any tax; isn't that right?

A. It was tax efficient. I am no expert on tax, by the way.

Q. Oh, yes, for a long time it was tax efficient. I am not suggesting, and I want to take up Mr. Horgan's remark this morning, that putting money in a Discretionary Trust was tax evasion. It was simply what was involved here was putting money into a Discretionary Trust; eventually it would have to be taxed, when it came out of the trust.

Isn't that right?

A. Yes.

Q. But it could accumulate unaffected by a lot of taxes while it was in the trust, and eventually the State began to erode that, or those advantages; isn't that right?

A. Yes.

Q. And they were eroded significantly by inheritance taxes, the 3% Discretionary Trust Tax and the 1% annual Discretionary Trust Tax. And I think we heard from Mr. Horgan, I'm sure you may be able to confirm it, those taxes have now been increased in terms of the chunk they take.

Can I ask you now to look at Leaf Number 13, please.

A. Yes, I have that.

Q. Meeting with the Chairman, the first figure of the day seems to have been eroded, maybe it hasn't been, I don't know, but it's June of '86, in any case?

A. June '86. Some day in June '86.

Q. "Meeting with Chairman. Christopher Clayton, self, John Reid, Don Thornhill." It says "Thornton"; that's probably a mistake?

A. It is.

Q. Then "Norah" that's a reference to the late Mrs. Dunne "died 8/3/86 further charge to C.A.T."

"Discretionary Trust Tax each year.

"They deemed control provisions of C.A.T. are applied also for DTT."

Then you have 100 and 120 generally agreed". Do you see that?

A. Yes.

Q. "What deductions to apply to 120 for lack of control.

Opinion of counsel awaited on this. Chairman will talk to" is that "bank", is it, or

A. "Bowen", I'd say.

Q. "Bowen". I beg your pardon.

"Question whether new trust made in '85 a question of fact law. Facts to be established in evidence by cross-examination of the Bowen family."

Now, that's a code word at that stage; it's the Dunne family. Is that right?

A. Yes.

Q. That's perfectly understandable. "This will keep Ramsey approach open also."

Correct me if I am wrong: Is that a reference to the English decision at that stage which I think, as the Sole

Member mentioned this morning, permitted the courts to look at the substance rather than the form of transactions to see what their tax implications were?

A. It is. And it's perhaps, if I can say it, we had a similar case ourselves going through the courts at that time. That was the McGrath case.

Q. The McGrath case. And the McGrath case in Ireland was decided in favour of the form, the approach to the formal implications of documents as opposed to their substantive reality; is that right?

A. It was. I checked it. It was actually in I think in '87, in the summer of '87. At that time High Court ruled against it, and the Supreme Court ruled against it sorry, followed the High Court line in the summer of '88.

Q. In the summer of '88?

A. Yes.

Q. So that was an aspect of the litigation that was in your mind at the time, and that you were bound, I suppose, of course you were bound, in fact, to keep in your mind as long as it was still the law?

A. Yes.

Q. And of course the question was in Ireland was up for grabs, if you like; but if the Irish courts decided the McGrath case in the same way as the House of Lords had decided the Ramsey case, that could affect your approach to this particular litigation; isn't that right?

A. Yes.

Q. "Chairman will take advice on latter, and if this approach to be adopted, he could mention it to Bowen."

He may be referring to either Mr. Frank Bowen or

Mr. Bernard Dunne; it's not clear.

A. Exactly.

Q. "It may get them negotiating. Why the original share setup and why the change in '85. Too artificiality to consider this again. He would like us to examine critically.

Opinions of counsel. Philosophy of CGT tax on gain on change of ownership. If no change of ownership no tax.

Question here was there a change of ownership. If not, Revenue were seen as being unjustifiably trying to create a charge.

Tax Capital Gains likely to be 40 million. Extraordinary considering they could have wiped this out due to tapering by arranging a disposal in 1981. Lack of balance, equity, all they would get is new base cost. Question of getting a foreign expert on the general theory to be deferred to see who they intend bringing. Their legal side will probably resist having the Bowens" meaning the Dunnes "called.

They will argue

1 to"

A. "No disposal".

Q. "No disposal except of the preference shares.

"2. Disposal of" is that "ordinary shares", is it?

A. Yes.

Q. "On their own.

"3. Therefore very large discounting to be applied."

"To get full file and examine the details before next meeting."

Now, that meeting, there were two things being discussed.

Firstly, you were discussing the C.A.T. and the valuation that would apply for that, and you were also discussing then the ongoing CGT situation which had been brought to the Revenue's attention, I think, by the Dunnes themselves about a year or so before; isn't that right?

A. Yes.

Q. Now, in November of that year, the assessment was issued, I think, based on a valuation of 120 million; and the tax required was 38.8 million.

A. Yes.

Q. In the interval, you had had the benefit of all of the work, the various reports and revised reports produced by Dr. Thornhill and Mr. Reid; isn't that right?

A. Yes, but if you mean I was actively working on it, I don't know.

Q. Oh, no, no, I am not saying that.

A. Sorry, can I just explain. It's a very big case, but it was but one case, and we were a very busy office with very small resources, and even these notes would often be just jotted; you wouldn't have the file even I'm not talking about notes of meetings now but other notes and that. So we were administering the CGT in the meantime.

Q. I see. In terms of the scale, I suppose, though, I mean,

how much CGT did you get in that year or for that year eventually?

A. I don't know. It would have been it was very small in those years, relatively small.

Q. Was it about 10 or 12 million? I haven't got the finger on it.

A. That would be it, I'd say, between 10 and 20 million.

Q. So that this assessment was either twice or even four times the total amount of CGT that was got in for that year, so it was obviously a very important

A. A very important case, yes. But I am just saying to you, we also had to administer the committees of the Capital Gains Tax. We weren't just sitting around dealing with this particular case.

Q. Of course.

You have to excuse me, I was trying to find a document.

Who would have been who would have had the primary technical responsibility for issuing that assessment to CGT in November of 1996 in the amount of 38.8 million?

A. Well, if you mean under the Act, the assessment is issued in the name of the District Inspector, Mr. O'Siochain.

Q. Yes, but who would have put it together?

A. As you see, Christopher Clayton wrote to the agents telling them the amount of the Capital Gains Tax, and the Inspector, Sean O'Siochain, would have been brought into the discussions in relation to it.

Q. What I'm trying to see is where I can see who was

involved in I can see who was involved in the C.A.T.

Looking at the documents that I think may have been mentioned already, it seems that Mr. Christopher Clayton and the Chairman were in liaison with one another as to whether this assessment would be issued, whether I think what was called yesterday in evidence, or maybe in the course of the Opening Statement, the big bang CGT charge would issue. So there seemed to have been a degree of discussion about it for some time prior to the actual formal issuance of the assessment; isn't that right?

A. You could take that from it, yes. I don't know is that borne out by the papers, but yeah.

Q. That's my impression from the papers.

A. There is such a note that you referred to all right, yeah.

Sorry, with respect, Mr. Clayton will be able to say what went on between himself

Q. I'm just trying to see what you can remember of it, whether anything that has come up here has provoked or stimulated your memory.

If you look at Document Number 10, and look to the third of the pages provided the second of the pages provided from that document. It's actually page number 29 of a very long document.

A. Tab 10, page?

Q. Tab 10. The second page in Tab 10.

A. Page 30?

Q. It says "page 29" on the bottom right-hand side. Does it

say that on yours?

A. Page 29, sorry, I have that, yes.

Q. I think these were mentioned in the course of Dr. Thornhill's evidence. Do you see the reference to Discretionary Trust Tax and then Capital Gains Tax underneath it?

A. Right.

Q. And you see the two figures given for Capital Gains Tax?

A. Yes.

Q. Valuations as at, presumably, March of 1985. The figures on the different on the same P/E and on the different maintainable earnings are 150 million, approximately, and 165 million for the valuation of the company. Do you see that?

A. Yes.

Q. Now, there would of course have to be some discounting for control in the context of C.G.T., which obviously wouldn't apply in the case of C.A.T.; isn't that right?

A. Yes.

Q. We had some discussion about that yesterday. Now, do you remember, one of the documents I referred you to this morning was a memorandum of yours of the 12 March of 1986; it's at Leaf Number 11.

A. Yes, sorry, I have Leaf Number 11. Is that my memorandum, is it?

Q. Yes. Do you see it says "Report of meeting held in Chairman's office". Maybe it's not your memorandum.

A. No, it isn't mine.

Q. It's Mr. Reid's formal report, I think, of that meeting.

A. Okay. And sorry, are you referring me to a part of it?

Q. Just I am referring you to the same part that I referred you to this morning. I think I arranged for you to get a copy of the full document at lunchtime. And on the overhead projector, as well, I had put the part that I am referring to well, I hope I can. It's on the second page of the document. It's just so as to identify the document again.

A. What paragraph? I have a paragraph (b) here under my hand; is that the paragraph you are referring to?

Q. On the second page of the document, the paragraph on the top left-hand corner is

A. I got a document after lunch; I am going to have to refer to that, I think.

Yes, I have the full document. The second page, right, what paragraph there?

Q. I just want you to sort of, if you like, I want to help you to form an impression of the meeting by referring you

A. I haven't read this document. I just got this after lunch. As I said to you I haven't gone into the valuations.

Q. I appreciate that. Do you remember the portion I read out, it begins half-way down that page: "At this stage,

J. Keane said that he had reconsidered his attitude to the size of deduction to be made for lack of control. He now felt that if the holding in question came onto the market,

the other preference shareholders would not allow it to be sold cheaply, that they would bid against any outsiders, and to at that extent the Revenue should present as optimistic a value as possible." Do you see that?

A. I do, yes.

Q. So you were involved in the discussion, and that discussion seems to have been related, I suggest to you, to the document that I mentioned, one of the documents I mentioned a moment ago, the report from Dr. Thornhill, which I think was dated the same day as that.

A. That's right.

Q. So you were probably discussing that document?

A. A draft.

Q. A draft, yes, of course.

A. Yes, that was my that was my introduction to the case, I think.

Q. Was it? I see.

A. I was brought into the discussion.

Q. That was in early '86. You seem to have had some further involvement, as we mentioned a moment ago, in June of '86, and I am not sure to what extent you were actually aware of, but presumably at some stage you became aware that in November of '86, the assessment had issued?

A. I would have been very aware of its being issued and the preparations for its issue.

Q. Right. And the figure, the valuation figure of 120 was I think lower than any of the two figures that we mentioned a

moment ago; isn't that right?

A. Yes.

Q. Now, Mr. Clayton will tell us more about this, but it's way below the 150, the lowest figure we mentioned, and way below the 165, the higher of the two figures we mentioned.

A. Yes.

Q. And I presume Mr. Clayton will be able to enlighten us on what sort of exercise goes into arriving at 120; it's probably a combination of science and feel, or whatever.

A. There may be another paper explaining it.

Q. I see. The issue of that assessment presumably means that the Revenue Commissioners were confident, A), that the tax was due, or confident in their own view that the tax was due, and confident that it was due in the order of that sum, 38.8 million?

A. Yes.

Q. They couldn't predict they would get 38.8, 38, 37.8 or 36.8 or 30.8, but it would be something, obviously, reasonably close to that figure; is that right?

A. Yes, having arrived at a figure for valuation, then the tax followed it.

Q. Yes. Now, if I could refer you now to Document Number 30A, once again, in the book of documents?

A. I have that, yes.

Q. If I go through the whole note with you now on this occasion.

"Call from John Reid, 711303. Their tax has not yet been

paid. BD has arranged a meeting with the Chairman for the 27th." That means, presumably, Ben Dunne has arranged a meeting with the Chairman for the 27th.

A. Yes.

Q. "John Reid wants to know what liability will be thrown up by the 82 million value of the" presumably "the company".

A. Presumably.

Q. Then underneath that, "Call from John Reid, Don Thornhill wants a note on the dividend to Trustees position". We have dealt with that.

"Based on the 82 million value in 1984, our claim for C.G.T. would now be 23.6 million as over" I don't know what that means; it may refer to some tot or something.

A. No, there would be a computation, there is a computation under this note showing how the 23.6 is arrived at.

Q. Is there? Well, it's not on my copy, which I presume is a full copy. Maybe it's on a separate sheet.

A. I beg your pardon, on a separate sheet.

Q. I beg your pardon. Yes.

A. But we don't have it here, but I mean it's in the original, I'm saying.

Q. I assume that that tot is correct. I'm not questioning it.

A. Yes.

Q. So I take it that John Reid got on to you and asked you if you applied a value of 82 million for C.G.T., what would the tax be, and you said the amount would be 23.6 million?

A. That's right.

Q. Now, at that stage you had heard nothing to suggest, presumably, that the valuation in the assessment had been changed?

A. I don't think so.

Q. The Chairman was due to meet Ben Dunne on the 27th April.

I'm saying the 27th April, but I think from one of your

other notes I can say it probably is the 27th April.

Because it's in one of your next notes, which is well

before the 27th May, you say that the Chairman had already

met Ben Dunne.

A. Right.

Q. If you could now go to Leaf Number 32, please.

A. I have that.

Q. Memorandum 5th May 1987. "Meeting with An Cathaoirleach,

arranged for 10.30am on Monday next. Christopher Clayton

and myself to attend. Per CC An Cathaoirleach met BD and

had a full and frank discussion. He does not accept that

there is a disposal, but would rather not gamble on the

outcome, especially in view of the fact that it might take

some years to resolve. An Cathaoirleach pointed out that

Revenue believed there was a disposal and have to pursue

it. Apparently BD would like to settle. No indication of

what figure might bring a settlement. Only figure was that

mentioned of 23.6 million as being our revised claim based

on the 82 million market value at 1985.

"Case discussed earlier with Christopher Clayton along the

lines of my memo attached of this date."

What I want to ask you about here is your use of the expression "our revised claim based on the 82 million valuation at 1985." Does that suggest that the team involved in this or that people unknown to you had decided to revise the claim downwards?

A. It does suggest that within Revenue, we seemed to be talking more realistically of basing a settlement on the 82 million which had been hired out for the Capital Acquisitions Tax.

Q. Had you been involved in any discussion about that up to that point?

A. I have no recollection of it, and I don't see it in the papers.

Q. It would be a fairly significant revision, wouldn't it, obviously very welcome to a taxpayer, but fairly significant revision, coming from a valuation of 120 million down to 82?

A. But the 82 was a reality. It had been a figure that had been hammered out between both sides for Capital Acquisitions Tax. That was an inescapable reality.

Q. Was it? Do you mean that that would have overtaken any further negotiations about value?

A. Oh, no, no, no, but it had to be very compelling. I mean, don't forget these notes were written weren't written for this Tribunal or for the other side, either, for the Trustees. This was just talking about what we and it

does seem to indicate realistically now we were talking about something based on this figure.

Q. But presumably you thought the original figure was realistic as well, did you?

A. That was a different matter; that was a valuation quite some time earlier. I think that was February '86 it was being done. Here

Q. No, no, it was November '86, was the assessment.

A. The assessment, sorry. Sorry, I am talking about the paper on which it was based. No, I take your point. So, no, this was a new reality, the fact that you had you know, don't forget this was it was a question of coming to an agreement with somebody. We have gone into this, about share valuation being such an inexact science and that sort of thing.

Q. But

A. So I am agreeing with you, then, that it does very much, can be taken from this that within Revenue, we were now looking realistically as something a settlement based on a figure of 82.

Q. Right. And does that mean that, if you recall the settlement that was achieved in March of 1987, which was achieved on a without-prejudice basis do you remember that?

A. Yes.

Q. That in fact it became a with-prejudice settlement?

A. No, no, that would be being very restrictive. This is an

internal confidential memo.

Q. Right. But at the same time, in fairness to the taxpayer, if you were now saying that 120 million was unrealistic and that 82 is realistic

A. No, what I'm saying is that this new figure presented a new reality, the fact that this valuation had been hammered out.

Q. But it hadn't been hammered out; it was a negotiation, wasn't it, for the purposes of settling C.G.T.?

A. Sorry, that's what I mean, it was negotiated we use the expression "hammered out", hammered out between the two sides after negotiation.

Q. Yes. But it was horse traded, wasn't it?

A. Yes.

Q. You didn't have any paper from the other side setting out the technique they had used to arrive at their valuation?

A. No, and but, just listening to the I was reminded that apparently the only valuation we had put in by the other side was one for about 32 million, and I don't recall seeing that, so you can see where they were coming from.

Q. I don't think a valuation paper was put in. There was a meeting in which the figure of 32 million was put forward.

A. Oh.

Q. I think if there had been a valuation paper, you'd have seen it, surely, wouldn't you, at that stage? That figure was put forward in 1985. If there had been a valuation paper, you presumably would have seen it at that stage?

A. I don't know.

Q. Well, isn't it obvious? You wouldn't have been going to a meeting in 1986 with Mr. Reid and Mr. Thornhill, who had done Trojan work, without seeing a paper from the other side?

A. I take your point. But I thought there was reference to a paper, so that's all I'm

Q. You are quite right, there was reference, but I think in fact it was only just a note made in Revenue.

A. Okay.

Q. If you go on to Leaf 33. This is another memorandum, this time based on the meeting that you had with the Chairman that was prefigured in the earlier memorandum. And again it refers to meeting with Mr. Dunne. It says: "He" meaning the Chairman "had met BD and Mr. Fox recently at the request of An Taoiseach. It was C.G.T. they wished to talk about. The C.A.T. tax" presumably

A. No, "the C.A.T., 4 million," roughly.

Q. "Would be paid.

"They had had a frank discussion. BD did not believe on his advice that there was any C.G.T. due, but he did not want a long drawn-out appeal and he recognised that at best the full tax would only be deferred. 23 million was too much for him to pay now. He would like to come to some agreement if possible. The Chairman pointed out that Revenue claim was for the full amount, and he was only nominee for the Dail and the Board in this matter, but he

would seek further advice on the matter.

"BD intimated that with the grandchildren coming up, he was giving consideration to hiving off the properties into an unlimited company and passing the shares in it out to them. It would charge rental to the trading companies. He wanted this appointment to be done through the trust. This is also part of his desire to reduce the exposure to public scrutiny of the trading empire when disclosure requirements are".

I am not sure what comes after that.

A. "When they come in", I suppose.

Q. "We discussed generally the latter point and agreed to examine the implications of it. With a multiplier of almost 5 since 1974, we might not receive much C.G.T. on such disposals. The Chairman was interested in the idea of treating the disposal as being to five separate trusts and discounting the 20% holdings for nonmarketability with the consequential reduction in the deemed acquisition cost of those holdings of the new trust.

"He was fairly sure there would be no C.A.T. on such an acquisition by the trust, and on checking, it seemed that for trust tax purposes, such holdings would continue to be valued as a proportion of 100% of the company with no discounting. He was not as enthusiastic about having the value for 1974 at 8 million, but he would like to hear more about it.

"We looked at the trust deed setting up the five funds and

saw that where on the one hand the Trustees were given power to appoint as they wished, each of the five children could nominate what grandchildren of the original settlors should benefit from each named fund consequent on the nominator's death. We discussed the possible levels of discount be for the 20% holding for nonmarketability and tax values forward appropriate to these.

"The Chairman asked us to study the five separate trust aspect and to meet him again at 10.30am on Friday next.

"I mentioned the surcharge, and it might be indefensible, but it could be used as a bargaining counter. John Reid had passed him my note on this. It was agreed that the deed of 14/3/85, having been accepted for trust tax, would not now be challenged, but to ascertain whether it involved a disposal might call for evidence from the principals as to what precisely went on at March 1985 and what understandings or other documents were entered into to copper fasten the five children's individual interests.

This could be put to BD in negotiating."

Could I just ask you to look at the second-last paragraph for a moment, where you say, "I mentioned the surcharge."

What surcharge were you referring to there, do you think?

A. I take it it's the same surcharge we have been talking about here.

Q. And you said "It might be indefensible, but it could be used as a bargaining counter". What do you think you meant by that?

A. What I think I mean is exactly it. I take it that the a decision in principle, I am referring to the decision in principle I don't recall the date of the earlier had been taken to allow the search to allow the capital taxes in calculating a surcharge.

Q. Right

A. And that could be used as a bargaining counter.

Q. Perhaps you'd explain that to me. Sorry, I'm not sure I am following that.

A. We spoke earlier about a paragraph in of a meeting with the Chairman where he had said he had the matter of surcharges looked at.

Q. Yes.

A. And that they were disposed to allowing the capital taxes payments in calculating a surcharge. I take it that I am referring to that there. I don't know.

Q. Well, I think what you are saying there is that the surcharge could be used as a bargaining counter.

A. The thing I have just referred to.

Q. Yes. In other words, that you'd be saying to Dunnes, "Well, look, we'll drop the surcharge"; is that what you mean?

A. Yes, that the capital, that this treatment whereby which had been refused earlier, that this treatment could now be allowed.

Q. But you are saying it could be used as a bargaining counter. Do you mean a bargaining counter in negotiating

on C.G.T.?

A. Yes, sorry, the whole thrust of all of these is really to convince the other side that they should negotiate and reach an agreement. They were negotiating, but to reach an agreement, so...

Q. But I'm trying to understand what use you'd make of the surcharge as a bargaining counter. I just want to understand. It's a bargaining counter to be used in negotiations on the C.G.T.; that in other words, if they paid C.G.T. at a valuation that was acceptable to you, you might drop or allow payments used to pay Discretionary Trust Tax against the undistributed income of the trust; is that right?

A. I am not sure are we talking at cross-purposes.

Q. Maybe we are.

A. We have already mentioned that a decision in principle had been made.

Q. No, the decision hadn't been made at that stage.

A. Sorry, I get confused back and forth between the papers.

Q. The decision you refer to is recorded in your note of the 25th May. This is the 11th May.

A. Okay, so I am anticipating it.

Q. Well, you are saying "I mentioned the surcharge and that it might be indefensible but could be used as a bargaining counter." Now

A. I take it and maybe infer from that that I thought it was fairly harsh treatment not to allow the capital taxes in

calculating a surcharge.

Q. Yes. You were saying "It's indefensible, but perhaps we could use it as a bargaining counter". Is that what you mean?

A. That's what it says, yes.

Q. But a bargaining counter to settle another tax; in other words, we'll give you a deal on this tax if you'll do a deal with us on another tax?

A. Yeah. I wouldn't call it a deal, but yes, oh, yes, it's about Capital Gains Tax, yeah.

Q. "If you'll settle the C.G.T. tax with us, we might be able to see our way to giving an allowance on undistributed income, or in respect of undistributed income, for income the trust received to pay tax"?

A. Yeah.

Q. You say that Mr. Dunne, at this stage who seems to have been running the show, judging from the note; is that right?

A. He seems to be the predominant person all right, yes.

Q. I mean, it seems that the Revenue treated Mr. Dunne as the trust, even though he was obviously just a beneficiary, but potential beneficiary, maybe?

A. I don't know; you are putting words on it. I mean, Mr. Pairceir was negotiating with Mr. Dunne, if that's what you mean.

Q. But Mr. Dunne thought "23 million was too much to pay now." Do you see that note?

A. Yes.

Q. And from that, would it be reasonable to conclude that any discussions with Mr. Dunne had started at 23 million, or thereabouts?

A. It seems reasonable, yeah.

Q. So the 100 million, the 120 million on the assessment was off the agenda at this stage?

A. I don't know what went on between them, to be quite honest.

Q. I see. But I suppose, to be fair to Mr. Dunne and his advisers, if he was being asked to pay 23 million there and then, it seems reasonable, it would only be reasonable for him to assume, well, it's 23 million, or whatever the figure was, 23.6 million was the starting point; there couldn't be an assessment raised for any larger amount?

A. Yes, if that was the way it was being put to him. But don't forget, this was, as I said before, "Duir bean liom go duirt bean lei". This is secondhand. I don't know just what went on. And all I'm doing, this is I just know when I pick up the case just where it's at.

Q. Of course. Could you go to Leaf 34, please.

A. Sorry, I have that, yes.

Q. This is a note of the meeting of the 15 May. "Meeting with the Chairman, Chris Clayton and myself, from 10.30 to 12.15. Gave him the three documents which I prepared as a basis for discussion. He will read these.

"He is concerned about the charge to C.G.T. on record in this case, and he will have to prepare an explanation for

the 30/5 for the C.& A.G. on it.

"Agreed Section 34 is not a problem." Something I can't decipher. "Series of disposals.

"Wide-ranging discussion on all issues.

"Maybe he says the assets would be transferred to a new company held by the trust to think about this. It would mean high C.G.T. as nominal base cost only and C.A.T. also but relief for C.G.T. against the latter.

"However, they might do this gradually, e.g. one property in one property company now, 4 million etc., and so on, as the grandchildren came of age."

A. Yes.

Q. "I read out the statement of practice of 8/84 where in particular following, Bond V Rickford (sic)"

A. Pickford.

Q. "Pickford," sorry, "They say the board considers that a deemed disposal will not arise when such a power to remove assets from original trust is exercised and trusts are declared in circumstances such that A) the appointment is revocable or...

"Further, when such a power is exercised, the board considers it unlikely that a deemed disposal will arise when such trusts are declared if duties in regard to the appointed assets still fall to the Trustees of the original settlement in their capacity as Trustees of that settlement, bearing in mind the provisions in Capital Gains Tax Act 1979, Section 52(1), that Trustees of a settlement

form a single and continuing body distinct from the persons who may from time to time be the Trustees.'

"The deal of the 14/3/85 is stated to be revocable (clause 2), and the original settlement is stated to continue to have effect. (See my analysis of this deal).

I expressed some of the views which are in my memos from him of this date. Deed drawn for tax cases, need to question validity of deed if going to appeal."

"He is now beginning to have doubts about discounting as a method of settlement. The only other variable is to increase the 6/4/74 value to 8 million.

"I said my gut reaction, assuming there was a valid appointment, was one disposal one settlement. The rest was in an effort to achieve a settlement.

"He would like to be sure that any value dropped would ultimately be got again for C.G.T., (see my previous note on this).

"He wants to meet the other side next week. Meeting with Christopher Clayton and myself at 3 o'clock on Thursday.

He wants to do a study of the four tax cases as I suggested to compare them with the deal of the 14/3/85."

Can you let me know what you make of the second sort of paragraph, if you like, where you refer to the charge to C.G.T. on record, and you say: "He is concerned about the charge to C.G.T. on record" and so on? What does that appear to refer to?

A. I take it that's the Comptroller & Auditor General, and I

take it it would be drawing attention to the case. I take

it it's a security aspect.

Q. Well, would a name be mentioned to the C & AG? Would he not surely be expected to respect the security aspect?

A. I can't answer that. Of course he would, but I mean, I don't know. You are asking me what I think it means.

That's what I think it means.

Q. It says "The Chairman is concerned about the charge to C.G.T. on record." And he wants to be able to prepare an explanation. Does that seem to suggest that he is concerned about the fact that there is a charge for 38.8 million on record? It's probably gone into the estimates, or whatever else the Government use to ascertain how much money they are going to get in, and the C & AG is presumably going to be looking at it. He is going to be presumably asking the same question as is asked here: If you have 38.8 million as a charge, if you are going to settle it for 28 million, what's the explanation? Is that what it means?

A. No, perhaps there may be an implication and acknowledgment that the 38.8 at this stage is not, you know, it looks like, realistically, whenever a settlement does come, will be much reduced. I think that's a more likely

Q. Sorry, I didn't quite get the last part of what you said there, Mr. O'Cathain.

A. That it is more likely, I think, to reflect that the realistically, when and if the case is settled, the

ultimate charge will be much lower than the 38.8.

Q. But I think what he says is

A. That's not what he says. That's what I say is which again is not verbatim. It's just my jotting it down.

Q. I appreciate that, but I presume it must have made some sense at the time when you said he was concerned about it.

"He would have to prepare an explanation before the 30/5."

What's the significance of that date? Is it to do with

A. I don't know.

Q. Is that the date when the estimate goes in or something?

A. I won't be he'll be able to tell you about that, perhaps.

CHAIRMAN: Mr. Healy, I am conscious that not only have you not finished, but other counsel may have questions to arise. And equally, whilst I am, as yesterday, I would have been prepared to sit late; but I am conscious that there are other Tribunal meetings of importance that are connected with today's sittings, so I think inevitably we are going to have to go into tomorrow, which I hope doesn't present undue problems for you Mr. O'Cathain.

A. That's okay.

CHAIRMAN: And, well, for the moment, because of those other commitments, I'll say 11 o'clock.

Just one thing while it's in my mind, on the second-last topic that Mr. Healy questioned you about, you remember we were discussing the question of the settlement of what Mr. Healy called the inheritance tax issue, and the fact that

the valuation that was used as the benchmark for that was stated as part of the settlement terms to be without prejudice to the oncoming Capital Gains Tax matter.

A. That's right.

CHAIRMAN: I suppose one meaning that logically arises from that would be that if the Capital Gains Tax appeal, matter before the Revenue Commissioners had proceeded on the issue of valuation or quantum and I think you will recall it was parked, and it was contested only on the question of liability then neither side would have been at liberty to mention to the Appeal Commissioners that there had been this previous valuation.

A. Precisely.

CHAIRMAN: But I suppose it is another question that is at least arguable is that if much the same two teams were involved in the two matters, there'd been preparation on both sides and not less than an hour's horse-trading to devise the somewhat discounted figure, I suppose it is reasonable to suggest that some weight at least must attach to the context of future negotiations.

A. Indeed.

CHAIRMAN: Very good. We'll take up matters at eleven o'clock in the morning. Thank you.

THE TRIBUNAL ADJOURNED UNTIL THE FOLLOWING DAY, FRIDAY,
17TH JUNE, 2005 AT 11AM.