THE TRIBUNAL RESUMED ON FRIDAY, 17TH JUNE, 2005 AS FOLLOWS:

CONTINUATION OF EXAMINATION OF SEAN O'CATHAIN BY MR. HEALY:

A. Before you begin, Mr. Healy, I wonder, last evening I felt I hadn't been able to give as full answers to some of your questions as you might have liked, so I had a look over the papers, and if I might be permitted to perhaps help to clarify.

Q. MR. HEALY: Yes, please do. You tell me what paper you want me to refer me to.

A. I am referring to papers that aren't included.

Q. I follow.

A. But you were the reference to Comptroller Auditor General, you were having a difficulty with it, and I was trying to explain what I thought it didn't seem satisfactory to you.

Q. Just before you start on that

CHAIRMAN: It occurred to me, from the point of view of the public, it might be no harm if Mr. Healy just indicated the general position of the C & AG and its possible connections with the Revenue Commissioners.

Q. MR. HEALY: You and I were talking about the C & AG yesterday, I suppose, without explaining precisely that's a shorthand for the title of the Office of Comptroller and Auditor General; is that right?

A. Yes.

Q. It's his job, if you like, to keep an eye on he is a constitutional officer whose job it is to keep an eye on

spending by Government departments and to ensure they are run properly from what I'll call a financial or treasury point of view. Would that be right?

A. Yes.

Q. To make sure that they are not spending money they shouldn't be spending, make sure that all the money they got was spent properly and accounted for? In simple terms, if the Department buy water for, you know, for a tribunal or any anything else, there has to be a receipt to show that the man who supplied the water got the money that the Department were provided with for buying the water, in simple terms; is that right?

A. That's right.

Q. And if the Department in any one year say, "Well, for next year we estimate we are going to need blank amount to conduct our affairs, and we estimate we are going to get money in" it's not every department gets money in; the Revenue is obviously the main department getting money in. And if the Revenue say they are going to get in millions of pounds on this, that or the other front, and they don't get it in, the C & AG might say, "Well, look, you said you were going to get this much from this particular area; why didn't you get it?" Is that the type of query?

A. Yes.

Q. Right, okay. In any case, you go and take me through what it is you wanted to clarify.

A. I think the C & AG's role actually has been expanded since;

they look for value for money.

Q. I understand. I see. How good is the water you are getting, in other words.

A. You gave me a note of a meeting by Capital Taxes in relation to another matter, but there is a reference there to this business of the Comptroller and Auditor General, and I see my own note of the meeting, which I don't think is exhibited at the bottom of it. It says

Q. Can you take me firstly to my note, so I know what it was I was asking you to help me with it?

A. I am afraid I'm not going to be able to help you do that, because I wasn't keeping tabs on the notes you were referring to.

Q. That's fine. I'll find it if you bear with me for a minute.

A. Is it sometime in 1987 the reference to the Comptroller & Auditor General?

Q. Yes. I think that the document I was asking you about was contained at Leaf 34 at the book of documents, and I was drawing your attention to your note with reference to the Chairman: "He is concerned about the charge to C.G.T. on record in this case, and he will have to prepare an explanation before the 30th May for C & AG on it." Right, okay.

A. Yes. And then that document, as I said, that you gave me, which was a note by Capital Taxes Branch of the, probably I think the first meeting I attended in relation to this

matter in '86, or the second, maybe. My note is dated 13th March, recording a meeting either on the 13th or the 12th; I am not quite sure now.

At the end of that, it says: "Chairman agreed with CC" that's Christopher Clayton "that no hurry to put in assessment until post 31 May. Any assessment before that will appear huge in appropriation account in November." The appropriation account is drawn up for the purpose of C & AG showing money in and money out. "And would give rise to questions."

Here is the important thing: "Security and confidentiality to be maintained." So that was the first response I gave to you, and I thought you didn't seem to be happy.

Q. No, I fully understood that; but I presume that what that means is security and confidentiality to be maintained, although you were not going to issue the assessment, it was not going to appear in the C & AG's, or in the documentation provided that the C & AG can look at. It was still going to be proceeded with, and you had to maintain confidentiality and security; is that right?

A. I don't follow you.

Q. What does the C & AG have to do with confidentiality and security?

A. What I am giving you is what here, at this time, in February '86 and as to who was saying what. There was, I'm not saying I fully understood it, I wasn't dealing with the C & AG, that for security and confidentiality reasons,

there should be no great rush to put in a huge charge.
Perhaps also it was anticipated

Q. Perhaps we'll go over that. Would you read it out again, then, and we'll go through it more slowly, because I didn't get that meaning from it.

A. Well, this is the thing in relation to any of the documents exhibited, when we look at just one part of them, to be fair to the people involved, one has to go through all the documents and see; because each is a step in the evolution of the case, and I'm I know the Tribunal couldn't go through all the documents here.

Q. It's important if you can go through them and give your interpretation.

A. I am not saying I have, but at least in this particular instance, it says: "The Chairman agreed with CC that no hurry to put in assessment until post 31 May. Any assessment before that will appear huge in appropriation account in November and will give rise to questions. Security and confidentiality to be maintained."
I take that to mean that that whole matter was about the security and confidentiality.

Q. I see. Could I just take it's three sentences, the way you read them out there?

A. No, the sorry, one sentence and two sentences.

Q. Could you just read the first part of it again, please?

A. "Chairman agreed with CC that no hurry to put in assessment until post 31 May."

Q. Right. So 31 May is the date that's mentioned here as well. That obviously is a critical date in terms of estimates of what it is the Department, or this particular section of the Government service, is going to get in; is that right?

A. Yes.

Q. So that's a critical date in terms of what it is the Department or the Revenue were committing themselves to?

A. Yes. I can't speak very much beyond that except that that appears, I agree with you, it appears to be a crucial date.

Q. Okay. And then

A. I don't have any more on that one.

Q. Christopher Clayton said there is no hurry to get it in, Chairman said no hurry to get it in?

A. There was agreement on that. I just thought that I'd bring that, because, as I say, when one is dealing a sentence out of the exhibited document, you know, and there are other material in the papers which might throw light on it.

Q. Okay. All right.

The document I am looking at here says: "He is concerned about the charge to C.G.T. on record, and he will have to prepare an explanation before the 30th May for the C & AG on it."

Now, are you saying that that explanation had to do with security and confidentiality?

A. No, I don't know. It relates to it relates to the size of the assessment, I take it. But as I said already, I'm

not in a position to speak about it, and perhaps Mr. Pairceir will he will be more familiar with the whole C & AG procedures.

Q. I just want to make sure that I understand you correctly. Judging from the passage you have just read out to me from your notes there, as I understand it, firstly there was a concern that there shouldn't be any hurry and we don't need to get this done before the 31st May. Then the next remark referred to the size of the tax that was involved; is that right?

A. Yes.

Q. Could you just read it out again.

A. "Assessment before then will appear huge in appropriation account in November and would give rise to questions."

Q. "And would give rise to questions"; right.

A. Then the sentence is unbroken, there is a dash: "Security and confidentiality to be maintained."

Q. If we look at the note, you are noting that the Chairman said he is concerned about the charge to C.G.T. on record in this case, and he will have to prepare an explanation before the 30th May for the C & AG on it.
Just to get back to that note, what do you think that explanation?

A. I am afraid, at this juncture, I don't know.

Q. Was the size of the charge a factor?

A. I think so, yeah.

Q. Right. Was there an impression that it was too high?

A. I don't know.

Q. I think

A. Well, sorry, if I bring myself back, I think I said to you yesterday, when you pushed me, that you didn't seem to be happy with the first explanation, which is the one contained in the earlier document. I vouched, I think, or guessed that it might relate to a knowledge now that we weren't going to be able to get that amount of tax.

Q. I see.

A. So to that extent.

Q. Do you remember, in the documents that were discussed I think the day before yesterday, there was another reference to no need to hurry getting this assessment out; it was important to get it right. Do you remember that?

A. I don't.

Q. We heard evidence to that effect, that it was important in approaching this matter to get it right. As you and I agreed yesterday, you have to get everything right. You do your best to get everything right, but there was enormous amount of tax, both in terms of C.G.T. and C.A.T., and it was important to get it right, wasn't it, and take your time about getting it right, not be rushed into it?

A. Yes.

Q. And we know that eventually an assessment for inheritance tax and DTT was issued in the sum of on the basis of a valuation of 100 million; isn't that right?

A. Yes.

Q. And we know that at the same time, in the sense of while that assessment was still going through the system, and in advance of it being ultimately settled, the assessment for C.G.T. was issued based on a valuation of 120 million?

A. Yes.

Q. So, at that time, as far as the Revenue was concerned, there was nothing wrong with those two figures or the fact that one was higher than the other; isn't that right?

A. Yes.

Q. And one of those figures of course had to be discounted for C.G.T. purposes, the 120 million, isn't that right, because there is a question of control to be taken into account in ultimately valuing a company for the purposes of C.G.T.; isn't that right?

A. I am not sure is there discounting at that 120 figure, at this juncture.

Q. There is.

A. Okay.

Q. Well, we were told there was.

A. Okay.

Q. You were one of the people, if you recall, who contributed to the discussion.

A. I know the discounting is a feature very much later on in my dealings. Whether in the capital taxes valuation there, at this juncture

Q. I mean, isn't it surely it's incredible that Revenue wouldn't have ensured that they had properly discounted the

value of the company when they were issuing a tax assessment to somebody for 38.8 million, possibly four times the total amount of tax that the Department were going to get in that year?

A. If discounting was due. It depends on the whole year. I am sure it was applied; I agree with you on that.

Q. We can see that people devoted enormous amount of effort to this. Mr. Reid and Dr. Thornhill in fact, it seems to be one area that Dr. Thornhill got deeply and intensively involved in; isn't that right?

A. Yes.

Q. So there doesn't seem to have been any problem in Revenue in living with having a ï¿½100 million valuation for C.A.T. and a ï¿½120 million valuation for a much later date, one year and three months, fifteen months for CTT; they were well able to live with that. Isn't that right?

A. They seemed to be, yes.

Q. And you were in that branch. You hadn't, presumably, expressed any reservations about that?

A. No.

Q. And then sometime in May of 1987 and from then onwards, a lot of effort seems to have been put into getting that figure of 120 down?

A. Yes.

Q. If I could just refer you to a note that I think you'll find it in the extra book I gave you; it's as far as I can judge, it's dated the 5th May 1987, and it's I'll

tell you where it is in the book now. It's the second tab. They are not numbered.

A. Yeah, I think I have that. It's headed "Bowen settlement."

Q. Yes. And it seems to be from in or around this date onwards, which was the date you first learned about a meeting between that there had been a meeting between Mr. Dunne and the Chairman; from this date onwards, there seems to have been a lot of work put into getting this valuation down.

If you look at your note, the top left-hand corner, some of it is obliterated, but we can get the original, and I am sure we can examine it later on. It seems to have the last four letters of 'Meaurain'. Then underneath that, "CC", which, judging from your earlier note, seems to be a reference to Mr. Christopher Clayton, probably "per CC", because on that date you had had a telephone call from him, you recall, and he told you about the Chairman's dealings with Ben Dunne.

"BD wants to settle C.G.T. What can the offer" seems is what's written underneath that; do you see that?

A. Yes.

Q. So it seems that at this stage what and I hasten to add, and this shouldn't be forgotten, this is a working paper. These are your thoughts. These are not final positions the Revenue was committing itself to. These were your thoughts to enable to you address this matter

A. Yes.

Q. or to contribute. You weren't the only one doing it, to contribute to, maybe yourself and Mr. Clayton and Mr. Pairceir's addressing it. And you have "Bowen" meaning Dunnes "Settlement."

Then you have "Market value 84". Then you have "82", probably "100 million" written underneath that originally, because that was the assessment, and then crossed out. Maybe 120: It was 100 million was the assessment I am sorry; I am confusing you.

And underneath you have that crossed out, and "82", which is presumably a reference to the figure that had been achieved in settlement.

A. Right.

Q. And then I don't know what's crossed out in the next thing. Then you have a note: "Could not be less." So you were saying, as a starting point, you couldn't you didn't feel you could approach it from a lower figure than that. Now, you were already valuing a March '85 company by reference to an '84 date with a view to seeing what you could do, and you seem to be saying we couldn't go below 82. Then if you go down underneath that, you have "Market value 6/4/74 5.5 million." Do you see that?

A. Yes.

Q. You say "Checking figures may become" I don't know what's written underneath that. Maybe if we could have it enlarged?

A. Sorry, perhaps

Q. You try it, yes.

A. My copy isn't good either. "Checking figures" I don't know what that next is "May be a case for increasing this."

Q. I follow. If you look at the monitor, you'll see it's enlarged. "May be a case for increasing this."

A. Yes, I still don't know what

Q. What you would be doing then is you would be starting with the 82 figure, which was lower than originally envisaged, and then you would be increasing the base figure of 5.5; do you see that?

A. Yes.

Q. You were trying to see is there a case for increasing this. Now, do you remember yesterday we were discussing the value to the Revenue of having low base figures. There was always a fallback position for Revenue, if they were compelled by settlement, or even because of the way a case ran, to be satisfied with a low base figure. On the next bite of the cherry, the Revenue would get a little payback. But here it seems, and to judge from work that was done in the months after this, a lot of effort seems to have been put in to eroding the value of the low base cost by pushing it up; isn't that right?

A. Yes.

Q. And without going into all the detail of it, aren't I right that eventually it was pushed up to nearly 8 million?

A. That's right.

Q. Which is a 2.5, or 40-odd percent, 45% increase. Now, 2.5 doesn't sound like a lot but you had to multiply it by the multiplier, isn't that right, which was 4.14?

A. Yes.

Q. That would increase that sum by another 10-point-odd million, which was a huge benefit to anyone; isn't that right?

A. Yes.

Q. And of course would decrease the amount of tax they'd have to pay by something in the order of 4 million.

Now, this paper is interesting from a number of points of view, because it gives a couple of starting points to your thinking, and it may help throw some light on the overall view the Revenue had. And I think, before I start it, I should say, as I think you pointed out as well yesterday, Furnis -v- Dawson, or if you like, Ramsey, the question of whether you could look at the substance rather than the form of a transaction was still alive, and in particular, the question whether the Revenue could look at a transaction to see was it entered into for the purpose of avoiding tax. And I hasten to I say the purpose of avoiding, not evading, tax.

In other words, the question in the House of Lords case and in the McGrath case in Ireland had been, should the courts look at these transactions and say were they designed to get around the tax system using technicalities; isn't that it?

A. Yes

Q. And we know that eventually the Irish courts said they weren't going to go the way of the English courts?

A. That's right.

Q. But it was a live issue then, and it was obviously, for quite proper reasons, part of your thinking. I am going to try to read it, but in fact it might be better if you read it, because I'll be too slow.

A. I'll try it on the monitor.

Q. It might be easier on the monitor, yes. Or if you want to read it, and we'll get the large troublesome bits enlarged on the monitor.

"Where will the trust get the money to pay". That's the part, if we could start there.

A. I'll try it on the bad photocopy, I think.

"Where will the trust get the money to pay? Some problem re surcharge on trust same problem as with C.A.T. payment, see earlier memo."

Q. That's a reference, obviously, to this whole question we discussed yesterday about the surcharge and undistributed income?

A. Probably.

Q. And that allowance was ultimately made, and we discussed it?

A. Yes.

"It must be remembered that a tax charge to C.G.T. was imminent, and four senior counsel were hired to avoid

method of avoiding it.

"B. It would be necessary to call the principals to establish what exactly was done. When and why especially if the scheme to be attacked both on technical grounds and on grounds of artificial scheme whose main purpose is to avoid tax a long Furniss v. Dawson lines.

"Even if Revenue lost, the tax charge is only deferred until there is a disposal."

Q. I think there is no hope of doing the next line.

A. No, I am afraid I can't make anything much of the next line.

Then overleaf is much clearer. "In that sense there is an actual Capital Gains Tax accrued up to 1984.

"The regime for C.G.T. is likely to get stricter so that the chargeable gain might even be charged as income, thus getting much more tax out of the gain accrued to '84 as well as the gain subsequent to '84.

"3. The chargeable gain now due on the basis of the 80 million"

Q. Well, 80, 82?

A. Yes.

"Is about 24 million. It should be remembered that this, in reality" "this is in reality spread over 5 people, making it less than 5 million per person.

"As against that, our case on technical grounds along the lines of the precedent trust cases may not be great as there" something

Q. Yes, maybe "vagueness"?

A. "Their execution may be vagueness", perhaps. And "contradictions in those cases with the result being left to "it all depends on the facts."

Q. In other words, being left to be decided along the principle of it all depends on the facts?

A. Exactly. So you must hear all the facts surrounding the behind the

Q. Well

A. the legal deeds.

Q. Yes. I think, in fairness to you, you are making two points. Firstly, you are dealing with the technical grounds. Even on the technical ground, and if you can remember the cases, you had to look at all the facts, because from a technical point of view, you still had to see what the import of the documents were, whatever reason there may have been for going about them.

And then I think you go on: "On the Furniss v. Dawson lines". In other words, the other side of the argument, the nontechnical aspect of it.

A. Yes. "Unless there were revelations in direct evidence, that could be an uphill battle."

Q. It could be uphill, in other words, to establish that the document was entered into for purely for the purpose of avoiding tax?

A. Yes.

Q. "However, on that point it would stretch credulity to

accept that there were no arrangements and instructions which were made before the agreement to continue the trust to copperfasten the rights of each of the 5 individuals and to ensure that if the death of one of them occurred, their share would be secured for their children.

"Another reason for settling if possible would be to avoid tying up resources in this case which would go ultimately to the Supreme Court and take a lot of time which might be put to better use.

"If it is not settled now with the present Chairman, the family would face that long delay and uncertainty and publicity.

"5. There could be made a case for increasing the market value at 6/4/74 to 8 million see note of 14 November '86 on the main papers. This would reduce the tax from 23.69 million to 19.55 million.

"6. If we won on the grounds of artificiality, then we would be saying that there was in effect a disposal to the children (and Trustees hold only as bare Trustees.) If such were the case, the agents might then claim that there were five separate disposals and that in valuing each 20% holding, a discount factor of up to 40% should be applied. They might argue that Section 34 Capital Gains Tax Act 1975 does not cover such a transaction, especially in the light of the replacement of the corresponding section in the British Revenue legislation.

"If we were to go down this road without prejudice and for

the purpose of making a settlement, it could only be done by a corresponding reduction in the base cost of the holding received by each, and this also to involve no increase for their holding of preference shares beyond par.

"See example attached the market value at 6/4/74 would also have to be decreased. On the basis of a 25% discount, the tax charge would be reduced to under 15 million.

"They might claim then a repayment of the C.A.T. in relation to the trust for 9/3/86, 5/4/86, and 5/4/87. This might be of the order of 3 million.

"This would reduce the tax suffered by the trust to about 12 million."

Q. Could I just ask you I'm not saying I can follow all of this, but I find that passage very difficult to follow. How would that reclaim arise? I couldn't quite follow that.

A. Perhaps "reclaim" isn't the proper expression there, but I think what is involved is, if you are recasting the whole thing and saying there wasn't any trust going forward, then there wasn't any C.A.T. That would be unreasonable to be looking for you can't have both.

Q. You can't have it both ways. Neither could the taxpayers either. There would be other implications, wouldn't there?

A. The thing is rife with implications.

Q. You'd have much more implications for the taxpayer, because they'd have to if there was no trust?

A. Yes. But as appears from the papers, the Capital Gains Tax

would be allowed as a relief against Capital Acquisitions Tax.

Q. Yes, I follow.

A. And that's something that

Q. I follow. So I think what you are canvassing there is, in other words

A. Sorry, I wouldn't say I am canvassing; with respect, I am exploring different

Q. I think we are using the word in the same way. By "canvassing", I mean exploring. You are exploring what the implications might be if the deed of 1985 were not deemed to be a valid deed at all and you had effectively an appointment to each of the main siblings at that point; is that right?

A. Yes. Will I continue?

Q. Yes, do, please.

A. "7. In a way, we have been saying not that the scheme does not work, giving rise to scenario as above, but rather that it does and catches them for trust tax on a continuing basis. Trust capital gains tax on a 100% deemed disposal. I.e., that the deed of resettlement worked, but only gave rise to more taxes (the seeking and getting of trust tax in a way precludes a claim by us that the children acquire the assets in reality.)

"8." There is an asterisk

Q. To the 12 million?

A. Yes. "There might also be a claim to C.A.T. on the five

children on receipt of the distribution, and Section 63 Finance Act 85 (C.G.T. allowed against C.A.T.) would have application. The C.A.T. could/would be huge, possibly of the order of 35 million."

Q. I suppose that's the downside for the family if they went that route?

A. Yes.

Q. The numbering doesn't go on, but I think it goes onto the next page, I could be wrong, or else this is these are some of the papers that went with it showing some of your calculations?

A. Right. I am not sure either, but there is another page marked "Continued". It's the same date.

Q. It's the same date, yes.

A. It's headed "Continued", I think.

Q. Well, it seems to be a number of calculations which are reflected in what you have read out, and which could result, ultimately, if you reduced the valuation for the company in the assessment and you increased the valuation at the base of 1974, that you might end up with something as low even as 15 million, or perhaps even lower?

A. Yes.

Q. What did you mean by your note at Number 4, where you say: "If it's not settled now with the present Chairman, the family will face the long delay and uncertainty and publicity." You put "with the present Chairman" in a circle. What special attribute of the present Chairman

would make it easier to settle now, or at least more difficult to settle later?

A. I think it was just reflecting that the negotiations were going on with the present Chairman, and who was very familiar with the case at this stage.

Q. Right.

A. And indeed, as was borne out, when the new Chairman, when I did a note for him, he knew nothing of the case.

Q. I think this was its first time, am I right, that you were asked to canvass approaching the matter on the basis of a lower figure, in or around this time; is that right?

A. A lower figure than the original assessment?

Q. Than the original assessment, yes.

A. If you say so. But I mean, there are as I said, there were over 100 documents in my hand; some of them are multiple. And it's all recorded there. There may be phone calls from Capital Taxes I think there is a phone call from Capital Taxes asking me what would the

Q. What would the tax be at 82 million.

A. Yes. I don't know, is that before this?

Q. It's around the same time.

A. Okay.

Q. It seems that from that time onwards, a lot of effort was put in by you and by other people in trying to see could that figure of 38.8 million be brought down.

A. Yes.

Q. Looking at your analysis of it, you were looking at what

might happen, in your note there; thinking aloud, I suppose, would be a fair way of putting it. And you were saying, well, you didn't think that your case was great in relation to the liability side of it, can I put it that way, as opposed to the amount; isn't that right?

A. I beg your pardon; I don't fully understand.

Q. In your notes there, thinking aloud, you seem to be suggesting that there might be grounds for thinking that the Revenue didn't have a great case?

A. Yes.

Q. In other words, that your chances of winning at all, forget about the amount, were something you weren't totally confident about?

A. Yes.

Q. And there are two aspects to it: The Revenue have to win on liability to tax, and they have to win on the amount of tax that is due; in other words, to get the result close to the assessment in any case. Isn't that right?

A. Yes, yes.

Q. Up to that time, had you expressed any doubts about the Revenue's prospects of succeeding? I couldn't see it. I mean, but it may be if we look at other documents

A. I think in the note of the first meeting, that one I referred to, there is some reference there that I wasn't sure I was only getting I didn't have the full details done that the way things were going with decisions on Capital Gains Tax in relation to trusts was very

helpful.

Q. Was very?

A. Helpful to Revenue's position.

So yes, but I mean, in the position that I was in in my work, one was looking at both sides all the time, evaluating both sides of a case.

Q. Yes, but what I'm trying to get at, were you saying at this point, were you looking at some way that a settlement could be justified, or were you looking at some way of settling it so as to avoid having to retreat or lose altogether?

A. Sorry, I don't follow you. Sorry, just give me a minute with it. There is a lot in that. The second part no, just would you maybe two questions.

Q. Yes, I'll go through it again.

The note you have is that "What can be offered", I think would be the heading of your note; would that be a fair way of putting it?

A. Yes.

Q. And you are trying to work out what can be offered.

A. I think what that means is, like, what can we settle on? What can we justify ultimately? Like, we are not going to go lower than the lowest we could justify.

Q. Right. Well, there is two approaches to it. Firstly, there is the amount, and then there is the question of the liability.

A. Yes.

Q. Let's deal with the liability first.

A. You may take it we believed that there was a liability. We had a counsel opinion saying that there was a liability.

Q. But you were looking at it here from two points of view. One we can definitely rule out now, and that is the Furniss v. Dawson, because that was completely overtaken by the McGrath case; isn't that right?

A. You mean now, looking back?

Q. No, no, we know that what you were thinking of at that stage, in relation to Furnis -v- Dawson, was completely overtaken by the McGrath case, that approach

A. Sorry, we know now that it was, is it?

Q. We know that yes.

A. Sorry, yeah.

Q. In 1987, you were taking Furnis -v- Dawson?

A. Are you still talking about this memo?

Q. Yes.

A. What was the date of it in May? I don't think there was a decision in the McGrath case

Q. Correct.

A. until after that.

Q. Correct. But we know now that there was a decision in the McGrath case?

A. Sorry, yeah.

Q. And we know that therefore, the thoughts that you were having at that point, we can forget them completely; we can put that out of our minds. There was a High Court Supreme Court decision which says that the McGrath decision

is the law in Ireland. So the Furniss v. Dawson route was never going to be open to you, even though at that time you of course thought that it was?

A. I'm not sure they were I think the facts, the facts behind the deed would be important to bring out. Because again, do you remember the expression there that it all depended on the facts?

Q. Yes.

A. That hadn't to do with Furniss v. Dawson. That had to do with interpreting the trust, whether or not what was done with the trust created a deemed disposal, so it was

Q. The fact was very vital?

A. Yes.

Q. But in Furnis -v- Dawson, the facts you'd be looking at would be slightly different facts. You'd be looking at the purpose of the deed to ascertain whether the dominant purpose of the deed was to avoid tax legislation; isn't that right?

A. Perhaps; I'm not very familiar with Furniss V Dawson, now, at this stage. Can I say, this case wouldn't be on all fours with the type of artificial tax avoidance, but it was just the principle that

Q. I think you were forming the view that it might be capable of being attacked on the ground of artificiality?

A. Yes.

Q. We'll pass away from it.

On the other question, the question of the interpretation

of the deeds, was there in fact a new settlement, or was there a continuation of the old settlement? You were canvassing the proposition that maybe the Revenue case might not be great?

A. Yes. I think the way the Chairman worked, with respect, was he wanted to hear both sides all the time. I was presenting both sides. And then he ultimately would evaluate, I suppose.

Q. But I presume he must have heard both sides up to this, did he?

A. Sorry, I don't understand.

Q. Surely this wasn't this seems to be the Chairman must have

A. Sorry, I beg your pardon, if I understand, from the time I was involved, yeah, we were presenting both sides to him. From the time I was involved, I would have tried to present both sides to him, because we were evaluating our chances of success.

Q. It's just I find it somewhat odd that you have already decided to ask a taxpayer for ï¿½38.8 million, which is a lot of money, and you were beginning to wonder at this stage whether it's the right thing to do. Is that not a bit odd?

A. I don't fully appreciate the question you are asking.

Q. Well, you have asked the taxpayer for ï¿½38.8 million, and here you are saying that the Revenue, on technical grounds, mightn't have a great case. Shouldn't you have made up your mind about that before issuing a tax demand for

ï¿½38.8 million, a tax assessment?

A. I'm not sure I it depends on the timing. I mean, I can't go with you on it.

CHAIRMAN: I suppose the liability was all duck and no dinner. There is no Civil Liability Act in tax law.

MR. HEALY: Yes.

A. But may I say, I mean, if we are talking about something that happened 20 years ago, but I don't think it would be fair to take any inference that that we were acting improperly. I think we have always acted reasonably, at the best of our judgement.

Q. I am just wondering, is it possible that the assessment for 38.8 million was issued, and that afterwards you began to have doubts about the amount of tax that you were looking for, and you began to have doubts about whether you'd collect any tax at all, whether it was appropriate to issue any assessment, and you were trying to find a way of settling it; is that possible?

A. I wouldn't put it like that. We had a figure had been agreed of 82 million for Capital Acquisitions Tax. As I said, that was a reality.

Q. It wasn't; it was without prejudice to the reality.

A. Sorry, it was a reality in terms of negotiating. If it went to a hearing, we would start again from the from where we had been.

Q. Fair point, yes.

A. But

Q. That was for a different tax, wasn't it, a different tax date?

A. But it was the same shares.

Q. For a different date. Is the date relevant?

A. Well, it was a year before, this was spread over that was taken to apply to three years.

Q. But it was fixed by reference to a particular date, wasn't it. Well, what date was it fixed by reference to; do you know?

A. It seems to have been fixed by reference to '84.

Q. So are you telling me that when Dr. Thornhill and Mr. Reid did their paper, and they arrived at two figures, one of 100 million and the other up to 165 million, that they didn't advert to the fact that they were talking about the same period of time for the same company?

A. I think I know what you are saying, but I don't follow the same period of time. What do you mean?

Q. You are telling me that this ï¿½82 million figure was a figure that covered the period that applied to Capital Gains Tax. You are saying it was a reality, a figure that you were now bound with; and I said to you, but sure, that's for a different date to the date that applies to Capital Gains Tax. And you said no, it's not, it covers a period of several years and that one of those years is the same.

I assume what you are saying is one of those years is the Capital Gains Tax year. Sure how did they start off with

two totally different figures?

A. The dates are different. I acknowledge that. There is no difficulty about that. And the figure of 82 was agreed for '84. All I was saying, it was applied for Capital Acquisitions Tax for three years.

Q. Yes. That's by agreement, isn't it?

A. But the whole thing was by agreement. And yesterday

Q. No, no, no, can we just stop there for a minute. It was applied, by agreement, for Capital Acquisitions Tax for one year. Now, is there a provision in the tax statutes that says wherever you agree for four years

MR. O'NEILL: I am sorry, Mr. Chairman, I am sorry to interrupt, but one has to look at the terms of the settlement. There is 82 million valuation was applied for four years. The practice that was previously discussed in relation to leaving that valuation in situ applied for the following three years after that. The 82 million was a figure covering the years 1984, 1985, 1986 and 1987.

Q. MR. HEALY: So does that mean that, to get back to my question, that where the Revenue agree, for the purposes of compromising a tax assessment without prejudice to Capital Gains Tax, a figure of 82 million, that they are stuck with that figure of 82 million in relation to that precise Capital Gains Tax liability? Is that what you're telling me?

A. No. We weren't stuck with it. We were talking here about trying to come to an agreement, and we had to take

cognisance that an agreement had already been hammered out and I think you took you had difficulty with that expression yesterday. I looked up my note of the date of that, those negotiations, and that's what I said. And you may take it that it was hammered out; it wasn't easily agreed. So and it was, as you say, it to be without prejudice, that meant that it left the C.G.T. to be discussed.

However, it was a new reality. They were saying that while there had been a valuation made, a paper valuation, here now, 82 million had been agreed as the value of the shares held by the trust for just a year before the date that we were looking at.

Q. Could we just take up Mr. O'Neill's point for a moment. You remember, he pointed out that the Revenue in fact relied on that valuation right up to 1988, 1989, in fact, I think. It's obviously a huge benefit to the taxpayer. But are you telling me that if you were looking at C.G.T. in 1989, you would have been stuck with the valuation of 82 million?

A. No, no, you keep saying "stuck". I am saying we weren't stuck. It's just a decision was taken for negotiating purposes to

Q. To start at 82?

A. Yes.

Q. Okay. All right.

A. Not to start at 82. My note says that you couldn't go less

than 82.

Q. You couldn't go less than 82?

A. Yes.

Q. In your notes, I think I am right in saying, there is no reference anywhere to any figure coming from the Dunnes side.

A. That's true.

Q. So the Revenue seems to have been sort of arguing or bidding against itself all the time.

A. It was one of the difficulties with the case that the other side never presented their arguments.

Q. Could I ask you to look at Leaf Number 35, please. We read a lot of this yesterday. I only want to mention one or two parts of it.

A. I have that.

Q. If you look I think we read it yesterday. It refers to a meeting of the 22nd May 1987.

A. Right.

Q. Between the Chairman, Mr. Christopher Clayton, Mr. John Reid and yourself. You refer to some of the legal issues, and you mention some of the important cases. And you said: "In light of my review of the cases, I said they seemed to have good grounds for arguing for a continuing settlement." So I suppose that was not dissimilar to the point you were canvassing in your own memo, that you felt that you mightn't have a great case. Maybe you are not putting it quite as strongly here. You are saying they certainly seem

to have a case; is that right?

A. It's all words. I'm saying that I'm pointing out what they have both sides of the argument. What's in favour of their side.

Q. Okay. If you then go on to the third page of the printed pages if there is any difficulty with it, we can come back to the manuscript.

A. No, this is clear. Sorry, Point 3, is it?

Q. The third page of the printed pages.

A. Yes, I think I have that.

Q. Second paragraph: "The Chairman moved the discussion to valuation of old shares for C.G.T. What about discounting from the 82 million for not having the preference shares."

A. Right.

Q. At this stage he was asking, was there some way that we could discount from the 82 million for not having the preference shares.

A. Right.

Q. That suggests to me what was being explored was some way of getting the 82 million down?

A. That's right.

Q. Then if you go on, perhaps this is related to the point you were making. "Discussion re valuation of 82 for 1985, because if 8 million"

A. Sorry, I beg your pardon; I can help you there. The typed version is bad.

"Discussion re valuation of 82 million for '85 because of

'84 and '86 figure accepted. Chairman feels, apart from a bargaining point, we are constrained by it."

Q. Now, does that suggest that apart from the fact that the other side might use it as a bargaining point, or you might have to take account of it, that the Chairman was saying, "I feel we are constrained by it. We are restricted by it"?

A. Yes, but I mean, it's my word, "constrain."

Q. I don't think anyone ever consulted counsel on this, or even got back to Dr. Thornhill on it; isn't that right?

A. When you say "anyone", I certainly wasn't aware of it. But sorry, in case there is a misunderstanding again, or an inference being taken: The question of discounting of that 82 million was taken up with Dr. Thornhill's section, and this was they gave the figures for what could be applied.

Q. Yes. To discount it more?

A. To discount you are taking into account, yeah?

Q. Yes. And there are working papers showing it being discounted well down, I think producing figures for tax to 13 or even 12 million, I think.

A. Right.

Q. Provided you bring the 5.5 million base cost of 1974 up to 8?

A. Right.

Q. If you go to the second-last paragraph, and you have a note: "If we should negotiate, on what basis can he reach

a settlement?" And you said: "If discounting were to apply, especially with 74 value up to 8 million, it would give us the outcome I was first aiming at when I heard of negotiation, i.e. a reduced charge with one trust in reduced value forward within".

And I don't know, the the manuscript seems to peter out at that stage.

Is this perhaps a reference back to your own working papers and your own thoughts that we looked at a moment ago, and you are saying if you discount the 82, get that figure down, and you bring the '74 figure up to 8, you are going to get a more palatable figure for tax; isn't that right?

A. No, I think it may be along the lines of what you are saying, but I think what I take from that is that it was just one we'll go with one disposal, get our chargeable gain on it, and then have a reduced I was concerned about what the future might bring, that that was just one asset going forward, and any disposals out of that would have this, which would be likely to be valuable in the future, would have this reduced base cost.

Q. Yes, although I wonder about the value of this reduced base cost when you are eroding it almost completely here in the context of a settlement, aren't you?

A. No, no.

Q. It seems to me that you were really just perhaps for perfectly valid reasons because you had doubts about this whole project, you were trying to get a palatable

settlement figure, and you were prepared to use, you know, the figures at your disposal to try to achieve that so you could produce a justifiable but still palatable settlement figure. Maybe I am wrong in that.

A. Well, again it's words. It was a valuation, and the people who produced the valuation, I think they subsequently, looking at it again, reworking it, they came they could justify a higher valuation.

Q. No, no. That's not correct.

A. Sorry. I beg your pardon.

Q. The subsequent working of it was all based on trying to find a figure for settlement, which is a different thing altogether. The initial valuation was trying to find the figure that the taxpayer should be asked to pay. These workings and these discussions were based on finding a figure that you could offer to Mr. Dunne in settlement; isn't that right?

A. Yes.

Q. Which is a different exercise. You were looking at the figures to see what way can we justifiably move them around to come up with a palatable or acceptable figure; isn't that right?

A. Yes, but there are two different things. I mean, it is, at that time you would put in an optimistic assessment, which you felt you could justify. If you put in lower, then that would be the starting point by the appellant. These cases, not just this case is different, but generally tax

assessments would be on the higher of what the Inspector could justify, because the whole basis was of the appeal an appeal would be made, and there would be negotiation, and it was only in the event of those negotiations failing; and in that negotiation, depending on the type of case involved, if the income was quite clear what it was, then obviously that couldn't be reduced. But where there was scope for negotiation, that was done. So if you started with the lowest reasonable figure.

Q. You were arguing with one hand tied behind your back. Of course.

A. Yes.

Q. But the drop here from the initial figure down to the figures we are now talking about is radical. If you look at the negotiations about C.A.T., you went into C.A.T. knowing that liability was not the issue. The issue was amount; isn't that right?

A. Yes.

Q. And Mr. Thornhill had his tip-top figure, but he didn't put that in. He put in, sort of applying a gut reaction, I suppose, he reduced that figure, and he went in with 100 million, and he was happy to get 82% of that.

A. Right.

Q. A feeling he could justify the 100. In fact, that he could justify a higher figure, but that he would be happy to run with the 100.

Now, I have to assume that when the figure of 120 was put

in, and 38.8 million, that was Revenue felt this was a justifiable figure. We may have to take a deduction, of course.

A. Indeed.

Q. But not down to 16, 15, 12. It seems to me that

A. Sorry, you are talking about tax now?

Q. Yes, I am talking about both tax and valuation.

A. It's valuation we are talking about.

Q. Yes. But it seems to me that the Revenue here were pushing the figure down all the time, and I'm asking you, is that because you were being brought you were being asked to push the figure down to get the lowest figure that could be justified to the C & AG or anyone else, or is it because you and there seems to be some evidence of this began to have doubts about the figures and doubts about the liability?

A. Well

Q. Real doubts.

A. It's how you put it. All the time we were aware that if you go to appeal hearing, this is the nature of it, that you might well lose.

Q. Yes.

A. All.

Q. Everything.

A. Exactly.

Q. And you have made that point. I haven't gone to it, but you have made it.

A. That's the nature of the whole exercise. And it must be said there that it did seem that an agreement was imminent, which would move this whole thing on.

Q. It would. It would be very attractive from your point of view to get it completely out of the way. All I'm trying to work out is why it was that the settlement was at such a low figure compared to the initial assessment. I can well understand you having to say

A. I am trying to be of assistance by saying that that 82 million which was hammered out was crucial.

Q. Right. Okay.

A. And certainly that was the view taken by the Chairman there as well.

Q. And the 5.5 million, that seems to have been jettisoned, though, doesn't it, and 8 million put in instead?

A. No, I think that I don't remember the exact details, but there is reference there to an earlier memo which would indicate that you know, it wasn't an absolute if you were valuing it ab initio.

Q. It wasn't a it wasn't written in stone?

A. Exactly.

Q. Increasing it to 8 million was

A. We are going back it's not an exact science. What we had was, the nearest thing we had was an agreement between the two sides on a value at one date.

Q. I suppose you'd wonder, though, whether when you look at I am just reminded that the agreement was on there was

the '74 figure was the subject of either an agreement or

the it was an agreement, the '74 figure was an

agreement, wasn't it?

A. Sorry?

Q. The '74 figure was an agreed figure for wealth tax, wasn't

it?

A. I don't recall. There is reference to wealth tax. And

Q. It was an agreed figure?

A. I don't know that.

Q. How come when it's an agreed figure that you don't like,

the Revenue seemed to be prepared to push it up?

A. Sorry, with respect, I don't know, I'd like to see

Q. Let's say it wasn't an agreed figure, then; let's assume

that it was

A. I take it that this was used for wealth tax, if you say

that's in the papers.

Q. Yes. There is little doubt it's stated in the papers to

have been the wealth tax figure; I am sure someone will

correct me if I'm wrong. But whether it was agreed or not,

a huge increase in it, isn't there, up to 8 million?

A. Yes.

Q. And when you apply the multiplier, and you are going to

wipe 10 million 4 million off the tax bill straight

away, aren't you?

A. It reduces it, yes, substantially.

Q. If I could just ask you briefly to look at Number 42.

A. 42, I have that.

Q. Call from the Chairman. He met BD. They settled on 16 million. The word you use is "Shochraigh siad ar ï¿½16m." So you are saying they didn't settle the case. We know that what they settled on was only the amount, and it's subject to Mr. Dunne, according to the note, in any case. We don't know exactly what happened, but according to your note, it depended on Ben Dunne being able to come back to the Chairman, presumably having spoken to other people on the taxpayer's side; isn't that right?

A. Yes.

Q. I suppose at that stage, looking at it from the taxpayer's point of view, the taxpayer was in a good position that he was now fighting a case where, if push came to shove, the most he might be exposed to was 16 million, or thereabouts?

A. That certainly seemed to be on offer to him, yeah.

Q. It was very attractive from his point of view, in the sense that he if lost, he might very well say, "The most they'll get out of me might be around 16 million"?

A. No, that wasn't the view that we were taking. This was negotiating negotiating it without prejudice as well. That if it went to appeal hearing, you'd start from the top.

Q. But weren't you that's what I want to get at. Was your figure of 16 or 15 million a genuine assessment of the value of this company's shares and of the amount of tax due, or was it simply an attempt to put get together an explanation which would enable you to justify a settlement?

Do you see what I'm getting at? Either the figure of 16 million was a genuine figure, or it was a figure that you felt, "Look, we can provide and explanation for why we settled for 16 million. Let's go ahead and settle for 16 million. It's a good thing to get it in. It's a good thing for the Revenue to get that money in, and we can justify it, we can bump up the '74 figure. We can drag down the '85 figure. We can squeeze both ends of the envelope, and we'll end up with a smaller figure, and we can present that to the C & AG, and everybody else as an acceptable settlement"?

Or were you genuinely saying, "This company is really only worth whatever figure generates 16 or 12 million"?

Do you see what I'm getting at?

A. I see. But what I am saying to you is a situation where we had 82 million had been agreed for a value in 1984, and it was now, for the purpose of coming to settling this case and completing the negotiation, it was now down to the tax thrown up by the computation, based on there is a computation underlying that that threw up 16 million, and that's as far as Revenue were prepared to go.

Q. I am not criticising you for arriving at this figure. I am trying to work out what prompted it, or the timing: When did it happen? And was it as a result of the events that occurred in or around the time of the meeting between Mr. Dunne and Mr. Pairceir?

Now, you have carried out a lot of calculations. I want to

you tell me, did you believe at that time that the tax actually due was in or about 16 million, and of course it could be up or down, depending on how you did some of your calculations, up or down a million or two. Did you genuinely believe it was 15 or 16 million, or were you simply producing a rationalisation or a explanation that would justify a settlement of 16 million, whatever prompted the settlement?

A. It's an amalgamation of those things.

Q. Right, so you felt maybe we are not going to get 38.8 million. We are not going to get 30. We are not going to get 20.

A. Indeed.

Q. There was no realisation, then, in any of those figures, as far as you were concerned?

A. They were different times. I mean, when the assessment sorry, I wouldn't put it like that. I mean, the way assessments and appeals and settlements of appeals was dealt with, there was nothing extraordinary about this.

Q. I see.

CHAIRMAN: Was there any element in it of appraising it as this being perhaps a very hazardous 50/50 case, and 16 million wouldn't be light years away from half of the 40% of what you say was the previous agreed valuation?

A. Half of the I beg your pardon, Your Honour?

CHAIRMAN: Well, perhaps if you look at 40% of the 80-odd million, you are looking at something like 32 million, and

perhaps one bystander might say, looking at this, well maybe the people thought that this was a case of 50/50 whether it could be won or lost, and perhaps a figure out of the air might be half that, in the vicinity of 16 million.

I am only putting that as a possible scenario. Is it something that featured in the deliberations at that time?

A. With respect, Your Honour, I don't know. I couldn't agree with that, if it isn't anything beyond what's in the papers, what is shown by the papers.

CHAIRMAN: All right.

MR. HEALY: Just before we leave this issue, can I ask you to look at Number 45 for a moment, Mr. O'Cathain. It's a memorandum, it starts off as gaelige, then goes into English. "A memorandum on coming back from my holidays". "Per JS" that is, I think, Mr. Savage; is that right?

A. That's right.

Q. And CC, Mr. Clayton. "The negotiations with BD have foundered. Apparently BD wanted to deal with C.A.T. also now as if the beneficiaries had or were taking the shares. The C.A.T. would be of the order of 30 million, and 5 years would have been allowed to pay it, the CG would be allowed as a credit against the C.A.T."

It's interesting that discussions were taking place along some of lines that you had canvassed in your very first thoughts, isn't that right?

A. Yes.

Q. But at this point, of course, the figure of 16 million had, as it were, been mentioned as the figure for allowable tax, and therefore the value of the company had been brought away down; isn't that right?

A. Yes.

Q. So it would have been attractive with a low value for the company to put an end to the trust, basically; is that right?

A. Yes.

CHAIRMAN: And it's the case, I think, as Ms. O'Brien mentioned in her opening, that unfortunately Mr. Savage is in extremely poor health.

MR. HEALY: No, My Lord, I think that's the he is out of the country. He has corresponded with the Tribunal it's well, I don't want to mention them; there are other members of the Revenue Commissioners staff and of the Revenue Commissioners at the time who are poorly, and I don't think there is any need for me to identify them at this point in any case.

Q. Just two final matters. One of them is one I think you may not be able to help me on, but I just want to clarify it. You know the surcharge issue and the income tax issue we discussed yesterday?

A. Yes.

Q. I think apparently there was no general direction at the time that Mr. Pairceir agreed to allow DIT payments in the calculation of undistributed income for the purpose of

applying a surcharge?

A. I wonder about that, because there is a letter in the papers from, as I said, I think I may have said Commissioner Casells, frank Casells, Assistant Secretary, and that's directed to myself it's directed principally to a Mr. Brown, Lord have mercy on him as well, who's now dead, and was the head of the income tax technical area. So

Q. There are papers, and Mr. Sherlock has very helpfully brought files to the attention of the Tribunal, obviously concerning other taxpayers, whose names I won't mention, but in which there was correspondence directly with those taxpayers informing them, because they had raised the matter, of the fact that the tax would be allowed in calculating the undistributed income; but we have not been able to find, as yet, any letter to Mr. Noel Fox or Mr. Bowen or any general statement, although I gather that at the time, information like this would have been expected to trickle out through the tax grapevine or the taxation community. There wasn't a system such as there is today of making announcements of these things. Is that possibly the explanation?

A. Possibly, but I would have expected that the people dealing with the trust would have been advised that this was the treatment, and that they would have applied it to any cases where a surcharge might have been likely.

Q. Well, we haven't been able to find it.

And the other thing we haven't been able to find is any letter dealing with the income tax, either. But that's perhaps understandable, because you felt that the question was to do with the surcharge and not with ordinary income tax.

And the question I want to come to, and it's not one that you necessarily may be able to answer: You recall yesterday I drew your attention to one of your notes in which you had mentioned this to somebody in income tax, and they had said to you it was the first they had heard of this trust?

A. Yes.

Q. And we agreed, I think, that one would have expected that it would have been monitored from then on?

A. Yes.

Q. But are you aware, either from your own dealings or from subsequent dealings the Revenue had with the Dunnes Trust, that no income tax was ever paid on this until recently?

A. No.

Q. You don't?

A. No.

Q. Now, I suppose you'd be surprised to learn that no tax was in fact collected during all those years, when the tax rate diverged from I think '88, '89, '90, onwards? I think it may have been paid subsequently, but we don't know yet.

A. I don't know.

Q. I mean, if you drew it to somebody's attention, if it

wasn't checked, would it have been just an omission?

A. Well, it depends on what I don't know, were they making returns? I don't know. I can't comment. I don't know what the income of the trust would have been.

Q. They weren't making returns. They claimed you may be aware that Dunnes asserted that they had an agreement, Mr. Bowen contended that he had an agreement, reached at the time that you were at the C.A.T. hearing, that there wouldn't be any income tax charged; and quite understandably, he insisted that because of that agreement, there was no need for him to put in returns, and there were no returns put in.

A. Well, that's just in relation to one issue about dividends, but

Q. No, no, no, about income. You think it was about dividends, and I am not criticising.

A. Sorry, I think or I thought until now that what you were talking about was tax in relation to dividends, and that that was the issue.

Q. Let's get it clear: I am not talking about that now. I am talking about the additional income tax issue. Whether any income tax at all should be paid on money passed up to the trust to enable it to pay yes, it is in dividend form, but

A. All I wanted to get across, I don't know what the income of the trust was. I mean, we are talking about a lot of it could have any I had never saw the

Q. Let's make it easy, then. We know the trust paid Discretionary Trust Tax right up until it was eventually I think brought to an end sometime in '94 or whatever.

A. Right.

Q. In any case, we know that the trust continued to pay Discretionary Trust Tax in the years after you were involved in that settlement; isn't that right?

A. I have no idea.

Q. Well, you may take it we knew, because the Revenue have told us and Dunnes have told us.

A. Certainly, yes.

Q. And in order to pay that Discretionary Trust Tax, it appears that dividends were used, dividends were paid out from the Dunnes companies to the Trustees, and they used those dividends for the purpose of paying tax, and as far as we understand, only for that purpose.

A. Right.

Q. Two things would have arisen from that, as I understand it. Firstly, the question of income tax on that dividend income; and secondly, as we discussed yesterday, the further or related issue of surcharge on undistributed income of the trust.

The query that was raised with Mr. Thornhill was relayed to you, as you understood it, as a query relating solely to the surcharge?

A. Yes.

Q. According to the advisers to the Dunnes Trust, the query

related to the pure straightforward income tax issue; do you understand?

A. Right.

Q. You went about your work, and you pursued the question of the surcharge, and ultimately you recorded the Chairman of the Revenue Commissioners indicated that they had had the matter looked at and that an allowance was going to be made; isn't that right?

A. Yes.

Q. We have seen no indication of where that was communicated to anybody, but be that as it may, that was your understanding of what was involved ?

A. But sorry, can I interject: In fairness, the note from the Assistant Secretary, Frank Casells says that he has examined it in depth and that he has come to the conclusion that it would not be you could look at the memo, but that it was he was looking at it, he had examined it, it was he came to the conclusion that the surcharge

Q. That the allowance should be made?

A. Exactly.

Q. Yes. That was in relation to the surcharge.

A. Yes.

Q. Not the other issue of income tax?

A. No.

Q. Right. Because as far as you were concerned, no query had been directed to you concerning income tax?

A. Indeed.

Q. Right. According to the Dunnes tax advisers, and they have asserted this in correspondence and in litigation, they say that the query they raised was a query relating to income tax, and they say that they were told that no income tax would be charged, no further income tax would be charged on any of the funds transferred to the Trustees by the company in the form of dividend to enable them to pay tax. Do you understand that?

A. I do, yes.

Q. That, as far as we can see, that's what I was asking you about. You did draw the existence of this trust, and you drew the question or you drew the issue of payment of Discretionary Trust Tax to the attention of the income tax branch; isn't that right?

A. Yes.

Q. In the context of your inquiries concerning your query?

A. Yes.

Q. But that same branch would be responsible for all aspects of income tax, wouldn't they, concerning the trust?

A. Sorry, just a clarification. It was the district dealing with trusts, yes.

Q. CI Coin Income?

A. Dublin Income Tax District No. 1, I think.

Q. And would you have expected that branch to follow up, that district to follow up on the question of income tax affecting the trust in the following years? You spoke to them in '87; it would have been '87, '88, and so on?

A. I think so. I mean, it was a trust over very valuable assets which we had drawn to their attention.

Q. Now, do you remember you left the or you ceased to have any involvement with the team dealing with this C.G.T. sometime in 1988; is that right?

A. That's right.

Q. But prior to your departure from the team, because you went on to more onerous duties elsewhere, I think you were promoted at that time, were you, or certainly your duties were changed, anyway?

A. Yes, substantially. I had been promoted earlier.

Q. Before that happened, I think you were contacted in 1988 arising from a direction, I think, from the Taoiseach, that the Chairman would meet Mr. Ben Dunne, isn't that right, or that he would meet him, sorry, about Mr. Ben Dunne, I beg your pardon.

A. In early '88?

Q. Yes.

A. Yes.

Q. If you go to Number 48 for a moment.

A. I have that.

Q. You see you have a note on a number of matters that occurred over a number of days, and you have related each one of them with reference to the day on which, according to your note, anyway, it occurred; do you see that?

A. Yes.

Q. And I presume that from the fact that your note, the final

entry is the 3/3/88, that it was on that day that you made the note referring to the other three days that were relevant?

A. I don't know at this distance.

Q. Well, you didn't make it any earlier than that, anyway, one assumes?

A. Is it important? I may well have the 29/2, I may well have put that on the 29/2, probably. Just give me a minute.

Q. We'll read them first, and you can tell me later.

A. Right.

Q. You may have made each entry as it went along; I don't know. But maybe you keep a journal type notes of your day-to-day dealings, and maybe

A. These events were happening fairly quickly, and they were fairly important, in that the Chairman was inquiring about the case.

Q. Right. On the 29/2 /88: "Received notification of days for appeal, 9 and 10 June '88". That I think is a reference to the initial date fixed for the C.G.T. appeal in this?

A. That's right.

Q. That was on the 29th February, 1988. And on the 1/3/88 I beg your pardon, I should say "Advised John Reid Capital Taxes Branch and Declan Sherlock, Revenue Solicitors, he will advise."

A. I think that he would contact counsel and see would he be

available, would the days suit.

Q. Fine. The 1st March, which is presumably the next day:

"Call from Mr. Howard of Chairman's office."

Would that be the Chairman's Private Secretary, is it?

A. Probably.

Q. "Chairman out till next week. Taoiseach directed today that Chairman meet him at 5.30 re BND", which was the code for the Dunnes Trust; isn't that right?

A. That's Ben and Norah Dunne, yeah.

Q. "Later agreed to wait till next week."

2/3/88: "Mr. Howard rang requesting brief explanatory note for L. Reason" that's Mr. Reason "and for Chairman. I suggested he contact Cathal MacDomhnaill also".

3/3/88: "Briefing note sent, copy to John Reid and"

something else

A. "P McG".

Q. Who would that be?

A. He was an officer in the Chief Inspector's office

McGiolla?

Q. I am just wondering what would his

A. I am not quite sure at this juncture.

Q. It's not the identity of the individual I'm interested in, but what section of Revenue was he in that would have had an interest in that?

A. I am not quite sure, to be quite honest. He may well have been some sort of a supervisory role.

Q. I think Mr. Sherlock has helped us on it. He was a member

of the Appeals Committee. I think that is a grouping that deals with appeals, their management and decisions about them.

A. I am not sure there was an Appeals Committee in existence at that time. Perhaps there was.

Q. We can find out, anyway. I suppose, if there was an Appeals Committee in existence, that would have been an obvious man to have sent it to?

A. Yeah, that would make sense. Maybe that's it. Sorry.

Q. "Maybe he, BD, is looking for a change in regulation of Section 82 Finance Act 1982 which would defer the charge on the disposal by the Trustees by reducing the cost forward by the amount of the chargeable gain.

"This could only apply from a current date". Is that right?

A. Yes.

Q. Next line: "Seeking the amnesty relief.

Interest at 15% for the 1/1/87 or even 100 million would be 17.5%, equal to 1.75 million."

Sorry, it's 15% on even 100 million would be that much."

A. Yes.

Q. And I assume here you said "Seeking the amnesty relief".

A. Yes.

Q. Had you been told about these three items, or were you speculating about them?

A. I was speculating. Trying to anticipate what I might be asked.

Q. Right. In any case, it seems that there was a lot of activity over a short period of time with a view to responding to this direction; isn't that right?

A. Yes.

Q. And I notice that you that Mr. Howard wanted an explanatory note from Mr. Reason, and you suggested that he contact Mr. Cathal MacDomhnaill also, that all three members be contacted.

A. Right.

Q. And they were the Revenue Commissioners, all three of them together: Mr. Reason, Mr. MacDomhnaill and Mr. Pairceir?

A. I take it that Mr. MacDomhnaill was I am not quite sure at this juncture

Q. Sorry, Mr. Curran was the Chairman at that stage, not Mr. Pairceir, of course. So it was Mr. Curran, Mr. Reason and Mr. MacDomhnaill, was it?

A. Yes. I am not quite sure why I included Mr. MacDomhnaill's name there at this juncture now.

Q. I think, in any case, you did quite a lot of work I mean, I'm not going to go into it all, but on those days, I think the next document in fact is a paper you prepared on the 3rd March.

The first document says: "Note for An Cathaoirleach". And that is on the second page, signed by you, but not dated.

The next document is "Trustees of BND settlement of the 16/3/64 appeal against Capital Gains Tax assessment, statement of facts and comment." And that is dated the 3rd

March. Do you see that?

A. Yes.

Q. And in it, a lot of things we have been canvassing here are discussed. Did you have any contact with Mr. Curran when he came back from having spoken to the Taoiseach?

A. I don't think so. Almost certainly not.

Q. Right. Well, I hasten to add, I am not trying to trap you, but

A. No, no

Q. If you go on to the next document, there is some mention of it. It's Leaf 51.

"Rang Liam Reason"; do you see that?

A. Yes.

Q. "11/3/88". Presumably you were wondering what had happened

A. Yes, indeed.

Q. in the meeting between the Chairman and the Taoiseach. And you say: "Rang Liam Reason. Chairman saw An Taoiseach. Ben Dunne confused and under tremendous pressure. The Taoiseach will have him briefed of Revenue position, and he, BD, will probably be advised to contact Revenue he may do so by contacting the Chairman.
"I suggested that we should allow payment of C.A.T. and C.G.T. by installments in gift situations" "in fifth situations", sorry

A. No, no, that must be "gift".

Q. Is it? I see. I think you are right; it must be gifts,

yes. "In gift situations say over 5 years with interest running at 8% from Day 1 along the lines in Britain. I pointed out our 55% C.A.T. versus 30% in Britain and our 30%-60% C.G.T. versus 30% in Britain. Also that the allowing of the C.G.T. as a credit against C.A.T. with cost"

A. No, "was" I beg your pardon, at market value, "at MV," sorry, "Also that the allowing of the C.G.T. as a credit against C.A.T. with cost forward at market value was a very valuable relief here".

Q. "Better than the English holdover relief.

"He suggested I do some figures of liability on different assumptions."

A. I think those references there, that's more sort of policy for the future; it's suggesting that things that might be looked at by the legislation branch.

Q. Right. You were suggesting, in the second paragraph, I think, another possible type of settlement; is that right?

A. I don't know at this remove. It looks fairly general. You know, something going forward that to be thought it for legislation.

Q. What do you think prompted you to make that note in that form? Was it something that Mr. Reason had asked you about earlier, or was it your own thinking in relation to how you might approach this case?

A. It was my own thinking. But as I say, the it's fairly general.

Q. I think if you look at it again. "I suggested that we allow payment of C.A.T. and C.G.T. by installments". I think that in fact is "fifth situations", is it?

A. No, "in gift situations".

Q. The two letters look the same to me, the first and the third.

A. That's how I would have made a "G".

Q. Maybe it's been suggested to me that maybe your note on the next page, Leaf 52, might offer some assistance. Do you see that?

"Both sides agree that there will be appointment in next three months of all the share held by the trust."

A. Yes.

Q. "Revenue accept without prejudice that the deed of settlement did not give rise to C.G.T.

"The disposal consideration is the full market value of shares as for C.A.T. trust at the 4/4/88. No market value of each holding to be" I don't know what it says after that. Do you?

A. I can't make out from the is it "separate income"? I can't make it out from this. The copy is unclear.

Q. Let's pass on for a moment.

"Base cost is market value at the 6/4/64.

Trust tax already paid stands.

CG tax on the disposal to be allowed against C.A.T.

Both C.G.T. and C.A.T. to be allowed to be paid over 5 years with 10" something "interest on installments.

Legislation to be brought in for this. This results in discharge of C.G.T. assessment with interest arising thereon.

C.A.T. (including C.G.T.) will be at least 34.4 million (figure basis of market value of 82 million.)" Do you see that?

A. Yes.

Q. Can you tell me, or can you confirm to me that my impression is correct that this seems to relate to some settlement discussions being discussed at that point?

A. No, I think it's again preparation in anticipation, if I was to be asked how can we settle this case.

Q. But wasn't that what the is that what you thought the phone call of the previous day was about, or the previous week was about? Why do you think that Mr. Curran was being directed by the Taoiseach to meet Mr. Ben Dunne? Wasn't it presumably with a view to talking about settlement?

A. It was yes, if you look, again, you have to look at all the papers. I think there is a note about the advice I gave to Mr. Reason on the phone, that it wouldn't be talking about a settlement, but the best he could do would be to refer the Dunnes representatives to negotiate with us.

Q. Sorry, to?

A. Negotiate with Revenue.

Q. What did you say before that? I didn't quite get you. The best he could do would be to tell Dunnes to negotiate with

you, is it?

A. Exactly, yes.

Q. Right.

A. Because I would have been aware that the Chairman at that time would have known, I assumed, nothing about the case, or about the probably about the issues. I don't think that he had come from this sort of a taxes background.

Q. Of course. But at that stage, because of the doubts you were having, wouldn't you have been, on the Revenue side, hugely interested in settling, wouldn't you?

A. I would have been continuing on what was, yes, what had been yes.

Q. You would have been interested in a settlement as low as 16 or 15 million, without a doubt, wouldn't you?

A. Yes.

Q. If maybe not even lower. Was this an attempt to think about another approach to settlement?

A. Yes, that is yes, that

Q. Could we just go through it.

A. Sorry, it isn't my settlement. If I was asked what could we settle on, I'd point out these various it's for somebody else to make the decision.

Q. You are looking at something, and you are saying maybe you are thinking aloud again "Both sides agree that there had be an appointment in the next three months of all the shares held in the trust. Revenue accept without prejudice that the deed of resettlement did not give rise

to C.G.T."

So that what you would do is you'd say we won't quibble about the 1985 deed, we won't say that it gave rise to C.G.T., but we'll agree now that there will be an appointment in three months' time.

In other words, instead of do I understand that what you were thinking about here was that Revenue would acknowledge that there had been a continuing settlement, but you wanted something back in return for that acknowledgment?

A. Yes.

Q. Isn't that it?

A. Yeah.

Q. So you were it was a new piece of thinking, if you like. It had advantages for Revenue; you could avoid having an argument about a case that which you mightn't have felt was that strong. It would have an advantage for the Dunnes in that they would win, effectively win that point. The other advantage is that then they would make an appointment out of the trust. That would be an advantage to them if it could be done by agreement. The advantage to you was that you'd get tax arising out of that appointment; isn't that right?

A. Sorry, I beg your pardon, could you take it one question at a time. I'm not trying to be difficult, and I have to try there is 9 points here which I haven't, you know, which I need to try and assimilate myself.

Q. Let's take the first point. "Both sides agree that there

be an appointment within the next three months."

A. Yes.

Q. Point Number 2 is related to that point, obviously.

A. Yes.

Q. Okay. Now, just take those two points for a moment.

A. Right.

Q. That means that, as you say, without prejudice, the Revenue accept that there is a continuing settlement. The C.G.T. on the deemed disposal issue is parked or put aside; isn't that right?

A. Yes.

Q. So Revenue would lose any tax that might have come from that?

A. Yes, or deferred.

Q. Yes, but if there is going to be an appointment in three months, well, then, Revenue would expect to get some Revenue out of that, tax out of that?

A. Yes.

Q. So there'd be something coming back to Revenue for the concession?

A. Yes.

Q. "The disposal consideration was the full market value for the shares as for C.A.T., Capital Acquisitions Trust Tax as at April 1988". This is putting some value on the shares as at that date; isn't that right?

A. Yes.

Q. Which is around the current date?

A. Yes.

Q. It seems, if you look at Point Number 9, that the market value figure you were looking at was 82 million?

A. Yes.

Q. Which would be an advantage to Dunnes, I suppose, wouldn't it? And if you were going to agree that figure in 1988, that would be an advantage to them, one would assume. Are you agreeing with me on that, or do you think I'm wrong?

A. 82 million, I assume they would have accepted, yes.

Q. And then you are considering what the implications of that will be, what the what's in it for Revenue, in other words; what's in it for the Exchequer?

A. What would be in it, yeah.

Q. What would be in it, yes, of course. What I am trying to find out is, where do you think the idea of an appointment in three months came from?

A. At this distance, I am afraid I don't know.

Q. I suppose it must have come from some discussions you were having around that time with people involved in the case?

A. I can't say that it must have, to be quite honest.

Q. Well...

A. I am just looking at this document which handwritten document which appears on its own.

Q. I will try and find if there are any related documents. It's dated the 13th March.

A. Yes.

Q. And it seems to be just two days after it may be the

next document, I'll check that, in your file, after your phone conversation with Mr. Liam Reason on the 11th March. Did you see the last line, if you go back to that note of your conversation with Mr. Reason: "He suggested I do some figures of liability on different assumptions." Do you see that?

A. Right, I do, yes.

Q. Mr. Reason was intimately involved in the case at that time, wasn't he? Unfortunately, he is poorly, so we are not in a position to

A. To be quite honest, I doubt it.

Q. I see. But he, in any case, seems to have suggested to you that you do some figures on it?

A. Yes.

Q. And those figures seem to be based on the notion that A) you would concede, for the sake of argument in any case, at any rate, that the settlement was one continuous settlement, and that there would be an appointment in three months, which would have considerable advantages for the taxpayer. If he got rid of the trust completely, it could be very attractive, if he got a low market value, wouldn't it?

A. Yes, I mean, in the nature of any settlement, there has to be advantages for both sides.

Q. Of course.

Could I ask you, just for the sake of identifying a document and confirming the note. Document Number 53 in

the book of documents.

A. Yes.

Q. This is the 23/3/1988, "per Liam Reason", so obviously it's a conversation you had with Mr. Reason?

A. Yes.

Q. I think I may have said 23/3. It was the 22/3. About 11 days after your previous working paper.

A. Right.

Q. About two weeks after you had previously spoken to him. You may have spoken to him in the interval, two weeks after your previous note of a conversation with him.
"Chairman met Ben Dunne and Fox yesterday" something "with Revenue"

A. Sorry, I beg your pardon, I'll try and help you with it.
"Letter with Revenue re reorganisation reply required now traced to VAT copy received by fax."
There is no great mystery about that. Apparently Noel Fox was complaining that he had sent in a letter looking for some VAT clearance

Q. It was a separate matter altogether?

A. Exactly. And he was saying he hadn't got a reply. And we were concerned, when the Chairman says a client has written and hasn't got a reply to his letter, so we tracked that down.

Q. And that was to do with another client altogether, was it?

A. No, no, it was about the Dunnes; it was about reorganisation and about VAT.

Q. But in any case, it had nothing to do specifically, in any case, nothing no do with the C.G.T. issues?

A. No.

Q. Are they what we come to in the next paragraph, or the next part of the note?

A. Right. Shall I continue?

Q. Please.

A. "No progress at meeting had not come to grips with the problem they promised to do so. Chairman told them to let him have their proposals.

"I rang Noel Fox's office, message left.

letter now traced to VAT branch see attached.

Rang Liam Reason and advised him. Agreed to go ahead with formal preparation for appeal."

And then do you wish to continue?

Q. Yes.

A. On the 23rd March, then, "Noel Fox rang. I said I had traced the letter and reply would issue.

He said the changes were for commercial reasons.

He said they had had a detailed and lengthy meeting with the Chairman. They will be meeting again soon. I said I hoped they would settle the outstanding matter so. I said I thought that the 1995 move was a mistake"

Q. '85, obviously.

A. Sorry, "1985 move was a mistake. He said they would have to talk more about it.

It was a very brief exchange."

Q. Thank you very much, Mr. O'Cathain. I just wanted to confirm your note of that. That's all.

CHAIRMAN: Well, we are right on one o'clock, so I'll leave the balance of any questions from any other counsel until five past two.

THE TRIBUNAL ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CHAIRMAN: Having made inquiries with the various legal practitioners, it appears relatively clear that the remaining questioning of Mr. O'Cathain is likely to last, if not the entirety of the remainder of the day, the vast bulk of it. I don't think it's fair to a further witness to start evidence at perhaps a quarter to four. So what we will do is conclude that evidence today. I am at this juncture reluctant to fix Monday sittings, because it is the only day that the Tribunal, during the working week, can deal with other important aspects of ongoing business; but I think we should revert to a 10.30 start to try and maximise progress. So the next witness will be fixed for 10.30 on Tuesday. We'll take the balance of Mr. O'Cathain for the remainder of today.

Thank you very much, Mr. O'Cathain.

I think you had concluded, Mr. Healy, and we will go in the same order as we have had. It will be Mr. O'Neill.

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

Q. MR. O'NEILL: Good afternoon, Mr. O'Cathain. My name is Hugh O'Neill, and I am going to ask you a few questions, if

I may, on behalf of the Trustees of the 1964 settlement.

I want to start, if I may, with the settlement of the valuation for Discretionary Trust Tax purposes. And as you are aware, there was no dispute in relation to the liability; it was simply a matter of quantifying that liability, and that fundamentally depended on the valuation of the asset the subject of the tax.

And I think you have told the Tribunal that you were there on behalf of the Revenue, but in the context of the Capital Gains Tax which was potentially going to arise down the road.

A. That's right.

Q. And as you said yesterday, that the issue in relation to valuation for Discretionary Trust Tax purposes was, to use your words, "centrally important", and then you said "crucially important" for Capital Gains Tax purposes?

A. Yes.

Q. And the starting point in the context of both taxes, the Capital Gains Tax and the Discretionary Trust Tax, was the valuation of the asset, the gross value, so to speak, and then a consideration would arise, having regard to the legislation, as to what discount should be applied for one tax, what discount for another tax; isn't that right?

A. That's right.

Q. And the reality was, of course, that while the settlement at 82 million was expressly stated to be without prejudice to any liability for Capital Gains Tax, it didn't mean to

say that it wasn't going to raise its head during the course of a hearing in respect of an assessment of the valuation for Capital Gains Tax; isn't that right?

A. Precisely.

Q. What the parties, both the Revenue and both the Trustees could of course do, or if, for example, the Revenue wanted to argue that the Trustees were bound by that figure for Capital Gains Tax purposes, they couldn't do that; they could make an argument "Well, we agree that for a particular reason", and vice versa, that the Trustees couldn't say that the Revenue are bound hand and foot by that?

A. Neither side was bound by it.

Q. But it was something that was likely to emerge during the course of any hearing that may take place in the context of a valuation for C.G.T.?

A. Exactly, because the value of the shares of the enterprise had been accepted at 82 million at 1984.

Q. And while you could argue away from that, both sides could argue away from that, perhaps up had a slightly uphill struggle; both parties had a slightly uphill struggle?

A. Yes.

Q. And you said during the course of those negotiations that you were not you had a watching brief, so to speak?

A. Yes.

Q. Do you remember the day in question?

A. Not greatly.

Q. Vaguely, do you remember it? And I don't expect you'd remember every instance of it.

A. I don't, but reading the memo which I drafted, just recounting who was present and what had been what was the outcome, reminds me that fairly tough negotiations, I take it, from that went on.

Q. And I think Dr. Thornhill said the discussions went on for at least an hour; in other words, it wasn't a five-minute discussion and everything was wrapped up like that?

A. No yes, I think Dr. Thornhill referred to it. I don't recall how long, but my sense of it would be, because it's difficult to understand how such could happen, would be that our counsel would have been coming back to our side, so to speak, and

Q. You think he would have been coming back to your side?

A. I think so.

Q. He must have; he couldn't have gone with a blank sheet of paper and likewise the Trustees?

A. During the course of those negotiations and until a figure was reached which Dr. Thornhill felt he could take to the

Q. He could recommend. And you may have heard the evidence of Mr. Horgan yesterday saying that the Trustees' figure, as far as he was concerned, the Trustees' figure was a figure of 60 to 70 million. Presumably, and it's speculation, presumably that a figure in that region at some stage was proposed to the Revenue by the Trustees, and presumably

Mr. Fennelly recounted that to the Revenue, who presumably said "No, that's too low"?

A. I take it that that's what happened, yes.

Q. And ultimately a compromise figure at 82 was reached?

A. Yes.

Q. And that was a figure, as you have said, the Revenue officials there, and in particular Dr. Thornhill, who seemed to be the expert in relation to valuation, was prepared to recommend to the Chairman?

A. Yes. Dr. Thornhill would have been accompanied by Mr. Reid and Mr. Fitzpatrick, both experienced people from that area.

Q. And the figure of 82 million that was agreed was a figure covering liability for 1984, 1985, 1986 and 1987?

A. There was a spread of years under the C.A.T.

Q. And you have spoken, I think I think it was you of a practice within the Revenue that you would not revisit a valuation for three years?

A. I think Dr. Thornhill spoke about that.

Q. Perhaps it was Dr. Thornhill. And presumably that is simply a rule of practice; it's nothing binding on the Revenue. In other words, if there is reason to believe that there has been a substantial increase in the value of the asset before the three years has expired, the Revenue have the right, and probably the obligation, to revalue the asset, or revisit the valuation?

A. With respect, I am not sure about that. I think I

indicated yesterday, I am not sure is it practice or is it statute, whereby one the valuation for one year is treated as covering the following years.

Q. And in relation to the four-year spread that was covered by the valuation of 82 million, it will of course it was open to the parties to agree different valuations for each of the four years in question; for example, in other words

A. Sorry, I beg your pardon, this is a matter of Capital Acquisitions Tax which, whether I knew it then, I certainly don't know now.

Q. But, as a matter of common sense, one could have agreed a valuation and I am just plucking figures out of the sky at the moment of 70 million for 1984, 75 for 1985, 80 for 1986, and 85 for 1988; one could have approached it that way as well?

A. I am not sure, to be quite honest.

Q. Now, you were asked questions this morning in relation to the valuation, the base cost in valuation in 1974.

A. Yes.

Q. This was the base cost under the C.G.T. legislation, one is deemed to have acquired the asset when the legislation came into force, and you don't have to pay tax on its value up to that date?

A. That's right.

Q. And we have heard that the valuation, and it's referred to in the papers, that the valuation for wealth tax purposes

at that time was 5.5 million?

A. Yes.

Q. And that was based perhaps I should draw your attention to this. If you turn to Tab Number 3. This is a note prepared by an M. P. O'Connor, briefing the Chairman, I think, in relation to the various potential taxes that may arise, or that would arise?

A. Yes.

Q. And in fact this is

A. Is this a document dated the 6th March?

Q. In fact, before the appointment that took place.

A. Yes. I have that.

Q. And if you turn to the second page of that, he is talking about multiples a multiple of 8, and this is the price/earnings ratio. In other words, by what figure do you multiply the annual profits, the annual sustainable profits, to arrive at a valuation of the asset. And he is suggesting a multiple or he says "The multiple of 8 proposed was the multiple agreed for wealth tax purposes. It was agreed after negotiation, and was acceptable to both Revenue and taxpayer only because the low rate of tax (1%) involved. The figure of 8 was coincidentally the quoted Dudgeon average of financial and industrial companies."

A. Yes, I am reading that.

Q. And I think the applying that multiple, one arrived at a valuation of 5.5 million in 1974. I am not sure if the particular figures are but if we can just take that as

the case for the moment.

Now, what was being proposed in relation to the valuation on the date of the appointments in 1985, in March 1985, was a price/earnings ratio of 15 or 16. Perhaps I should refer you to that; it's Tab Number 10. This is Dr. Thornhill's paper, and if you see the second page, it's page number 29 at the bottom.

A. Yes, I have that.

Q. In fact the price/earnings ratio is, in the case of Capital Gains Tax, 16.5, 16 and a half?

A. That's right.

Q. So that it logically followed, presumably, that you are applying a price/earnings ratio of 16 and a half to the annual profits, sustainable profits in 1985, you had to be consistent and apply a similar price/earnings ratio in 1974; wouldn't that be right?

A. I wouldn't think so at all. I am no expert on valuation, but presumably the price/earnings ratio depends on the market, on the price being paid for shares at any given time. It depends on how bullish, I suppose, people are, how many multiples they are prepared to pay. So that proposition sounds fundamentally unsound, I think.

Q. But there seems to be something I take your point, but there seems to be something a little bit strange, if I may put it like that, in a price/earnings ratio of 8 in 1974 and a price/earnings of more than double that in 1985. Certainly it would be the subject of vigorous

cross-examination in the context of any valuation?

A. It seems a huge increase, all right.

Q. And indeed it would seem, certainly, to justify an increase, and an increase that seems to have been ultimately recommended by Mr. Reid, an increase in the valuation of the asset from 5.5 million in 1974 to 8 million in 1974?

A. I think undoubtedly he must have been influenced by that.

Q. So it's not as if, or can I suggest to you, it's not as if the suggestion that was made to you this morning maybe I put it too strongly by saying that, but the question asked of you this morning, was the increase in the base cost, from 5.5 million to 8 million in 1974, was that simply an exercise in decreasing the amount of tax payable and therefore making it easier to come to a palatable figure for settlement; that wasn't the basis at all?

A. No.

Q. Now, can I ask you to turn to Tab 30, please. And there are a number of attendances between, or memos between April and May of 1987 following the agreement of the valuation for Discretionary Trust Tax purposes. And an investigation by you in particular, and others as well, I have no doubt, of issues in relation to the likely outcome of the tax appeal in respect of Capital Gains Tax?

A. Yes.

Q. Both in the context of 1) is there any liability, and 2) if there is a liability, what is the likely quantum of that

liability, how much is the tax going to be?

A. I think so. To put it another way, I think what the Chairman like, he would be testing the strength of our case. You had to argue both sides. He was evaluating how strong, and that would be a factor in what he would do in negotiating.

Q. And just as an overview of those memoranda, there doesn't seem to have been anyone prepared to raise his or her head above the parapet and suggest that the valuation of 120 million, giving rise to a chargeable gain in 97 million and tax of nearly 39 million, was easily stood over? That doesn't appear to be no one appears to have suggested that in the course of those memoranda?

A. No.

Q. And if I you have Tab 30 there, do you? And behind at the back of Tab 30 is what's called Tab 30A, and there is your handwritten note of two conversations, and then behind that, the typed version.

A. Sorry, I have a 30A, yes.

Q. And on the 13th April, you'll see the last two lines of well, perhaps you can read. We have on the screen the manuscript, but it doesn't matter. The last two lines are "JR" that's John Reid, I presume?

A. Yes.

Q. "Wants to know what liability would be thrown up by the 82 million value of the shares" obviously, I presume

A. Yes, this is obviously written in a rush. I think what was

at issue there, again you have just the capital taxes people were the people that provided the valuation. We did the computation. The tax followed inevitably from the valuation figure.

Q. And here seems to be some recognition by Mr. Reid that somehow you are going to be constrained by the 82 million valuation?

A. I think that's a reasonable inference.

Q. And then on the 14th, it appears that you come back to him and say, "Based on an 82 million valuation in 1984, our claim for C.G.T. would now be 23.6 million."

A. Exactly.

Q. And that, I think, is a straight and we can come back to these figures in due course but that seems to be a straight assessment of the C.G.T. without allowing any discount from the 82 million?

A. I think it probably is. I don't have the computation.

Q. I'll come back to that in a minute, in any event. And then if you turn, to put this in sequence, if you turn to the next tab, which is 31, you see an extract from a paper prepared by Mr. Reid, presumably for discussion among the group, and at the third page of that, under the heading "C. Capital Gains Tax. On the basis of values of 5.5 million at 6 April 1974 and 82 million at 15 March 1985, the Capital Gains Tax would be 3.6."

A. I beg your pardon, I am on

Q. Tab 31.

A. I have that, yes. Sorry, what paragraph there again?

Q. The very last sentence, or the paragraph on that page.

Page 3.

A. I don't have any page numbers.

Q. It's not numbered. The third page in. Do you see it, the top is headed "B. The late Norah Dunne as disponer."

A. I have that page now.

Q. At the very last heading "Tax: On the basis of values of 5.5 million at 6 April 1974 and"

A. I am adrift again here. The last paragraph on that page?

Q. Yes. Tab 31.

A. Bear with me a minute.

Yes, Tab 31. I have a document that's without any heading; that's "Contents".

Q. That's the correct document. And if you move two pages further in?

A. B?

Q. "The late Norah Dunne as disponer"

A. "Disponer, the late Norah Dunne", is the one I have.

Q. Can you see the screen just beside you. Do you have perhaps if we could scroll that to the top of the page.

Is that the page that you have?

A. No, I have a similar heading, but mine is headed it's "B. Disponer, the late Norah Dunne."

Q. I think you may have gone a little yes, that's a few pages extra.

A. It's Tab 31 all right.

Q. I think it may be there is a page to that effect later on in the document. Perhaps we can

A. Yes, I have a page now, "B. Disponer, the late Norah Dunne".

Q. That's right, and then you see at "C" at the bottom of the page you will see the last three lines?

A. The last three lines, yes.

Q. "On the basis of values of 5.5 million"; do you have that?

A. Sorry, no, no, the last three lines are "The Trustees have mentioned".

Q. Perhaps if you look although I want to put this in context. The third page of the document that you have?

A. Yes, the third page is sorry, is headed "B. The late Norah Dunne as disponer".

Q. Is there a "C" at the bottom of the page?

A. There is.

Q. That's the page I am referring to. As I say, this is Mr. Reid's document that he has prepared for the benefit of the group of the cross-cutting group put together, I imagine.

A. Right.

Q. And at "C"

A. What date did you say the document?

Q. The document is dated 14th March.

A. Right.

Q. 14th April 1987.

A. Thank you.

Q. And what he says at "C" is: "On the basis of values of 5.5 million at 6 April 1974 and 82 million at 15 March 1985, the Capital Gains Tax would be 23.6 million."

A. I see that.

Q. This is the information this is simply the calculation that you had provided to him and presumably he has incorporated into his report?

A. That's right.

Q. Now, if you then turn to page and I just want to bring you through these in sequence, because what we have had are two documents of April of 1987; we now turn to May of 1987 Tab 32.

A. Yes, I have that.

Q. And the last paragraph above the line sorry, the second-last paragraph on the page, in other words "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."

A. Yes.

Q. And I think you have made the point that this, of course, is an internal Revenue document, and there isn't any concession at the moment that that's the totality of our tax?

A. Yes.

Q. But the reality is that it's it would be difficult to argue for anything substantially higher than that?

A. Yes, that's what we are talking about now.

Q. So there is there was a realisation within the Revenue at that stage that in reality, what you are talking about is a bill of 23.6 million?

A. Yes.

Q. And not only by you; this seems to be something that's accepted by the meeting generally, attended by the Chairman, Mr. Clayton and you at that meeting?

A. Sorry, no sorry, this is a note of a phone call, I think. Yes, it is.

Are you referring to the same document?

Q. I hope so.

A. It says "Meeting arranged".

Q. I am afraid I'm not.

A. Sorry?

Q. No, I am referring to have you got Tab 32? Sorry, a meeting with An Cathaoirleach arranged for Monday 10.30 next."

A. Yes.

Q. Dated the 5th May of 1987?

A. That's correct, yes.

Q. And I am referring to the second-last paragraph.

A. Yes.

Q. "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."

A. Yes.

Q. And the point I'm making to you there is, it seems to be accepted by Mr. Clayton and the Chairman that the reality of the matter was that the revised claim, whether it was formally acknowledged to the Trustees or not, was 23.6 million?

A. That's a reasonable inference.

Q. Now, can I ask you to turn to Tab 34, and this is a note of a meeting I think prepared by you of the 15th May of 1987, some ten days later.

A. Right.

Q. Attended by Mr. Clayton and the Chairman, and of course you?

A. Yes.

Q. And you set out, in the bottom half of that note, extracts from the Revenue Statement of Practice, the UK Revenue Statement of Practice?

A. That's right.

Q. And what that is saying it's making two points, I think. Or you are making two points and the Revenue Statement of Practice highlights two points, or these passages do, that having regard to the Revenue Statement of Practice, the UK one refers to the Bond -v- Pickford case, which highlights the fact that if an appointment is revocable, there isn't a deemed disposal. This is UK practice?

A. The thing is the British Revenue were taking this approach.

Q. On the basis of authority of the House of Lords?

A. That's right.

Q. And so that was one problem or one hurdle that had to be overcome in this case, because the appointment was expressly stated to be revocable?

A. It appears later on to be the central issue, yes.

Q. The second point was, of course, and I'll read the second point there: "Further, when such a power is exercised, the board considers it unlikely that a deemed disposal will arrive when such trusts are declared if duties in regard to the appointed assets still fall to the Trustees of the original settlement their capacity as Trustees of that settlement."

Bearing in mind the provisions of the Capital Gains Trust Tax Amendment Act of 1979?

A. Yes.

Q. And that was another issue, because under the terms of the settlement or that was something that was open to argument and certainly an argument being made by the Trustees was that under the terms of the appointment, the Trustees still had duties to perform referable to the 1964 settlement?

A. Yes.

Q. That was a case that you anticipated. Perhaps they hadn't articulated their case, but you anticipated this may very well be a case that was going to be made?

A. Indeed, indeed.

Q. And you summarise that, then, over at the end of that:

"The deed of 14/3/1985 is stated to be revocable, clause 2, and the original settlement is stated to be continue to have effect." So in other words, if the deed is taken at its face value, there is a potential problem in relation to the context of liability to C.G.T.?

A. Yes.

Q. And you then go on to say that you expressed some of the views "which are in my memos from him of this date?

A. "For him."

Q. Excuse me. And then at the very bottom of that memo, you say that "He" presumably the Chairman "wants me to do a study of the four tax cases as I suggested to compare them with the deed of appointment of 14/3/1985."

A. Yes.

Q. And if I then turn to the next meeting of which we have been given notes that's the meeting a week later, of the 22nd May of 1987 Tab 35, you say at the third paragraph you refer to a number of cases in the second paragraph, and you say: "In light of my review of the cases, I said they" presumably the Trustees

A. I am with you now, yes.

Q. "In light of my review of the cases, I said they" the Trustees, I assume "seem to have good grounds for arguing for continuing settlement."

A. Yes.

Q. In other words, at this stage, within the Revenue, you are recognising weaknesses in the assessment in terms of

liability?

A. Yes. But all the time I think, Mr. O'Neill, with respect, it's giving the Chairman the best information so as he can evaluate how best to deal with the case.

Q. I appreciate that, and I am not leveling any criticism at the raising of the initial assessment; but what I am saying is that when you get into it in more detail, you are finding that "Gosh, maybe this assessment isn't as firm, as secure as we thought it may be in the first instance"?

A. Exactly. It has to be borne in mind, though, that we were in a difficulty. All we had was the deed and an assertion that there was no liability.

Q. Yes. And an assertion as well, which I think you have referred to, that the deed was prepared by senior counsel and vetted by a further four senior counsel on behalf of the Trustees?

A. That's true.

Q. And at this stage, I think in the other notes that you have prepared, or that have been furnished to the Tribunal, there is a reference to the Ramsey decision; in other words, looking at the substance of what was achieved, rather than the documentation gone through?

A. Yes.

Q. And in fact, is it fair to say that that leave aside the fact that that was subsequently, Ramsey wasn't followed in this jurisdiction, leaving aside that for the moment, isn't it clear that that really wasn't a runner in any event,

because what you were trying to do was in fact have regard to the document that was executed, the appointment of 14th March, as giving rise to the C.G.T.?

A. Yes.

Q. You couldn't have it both ways; you couldn't look for tax on the basis of that document and at the same time argue that you shouldn't have regard to that document, you should look at the bigger picture?

A. I beg your pardon, would you repeat that?

Q. You couldn't have it both ways, on the one hand saying that the document of the 14th March of 1985, we say, the Revenue say, gives rise to a disposal, and therefore C.G.T., and at the same time argue, "Well, in fact, the document of 14th March 1985 should be ignored; you should look at the bigger picture".

A. Yes.

Q. You couldn't have it both ways?

A. You can't have it both ways.

Q. And indeed, to be fair to the Revenue, I don't think it was ever argued and I know you had departed from the scene at this stage, but it was never argued before the Appeal Commissioners that the Ramsey principle applied?

A. I think that's probably true.

Q. And even before, again, while I am dealing with that issue, if I could ask you, and I know it's sorry, dealing with the issue in relation to liability, if I could ask you to turn to page 58. I appreciate by this stage you had ceased

to have involvement on this case.

A. This is

Q. This is Mr. Sherlock's note

A. Right; I have that.

Q. of the 7th October 1988. The appeal hearing before the Appeal Commissioners has taken place. The Appeal Commissioners have gone off to consider the matter, and their decision is awaited at this stage. And what Mr. Sherlock does in that note is set out the various options available: If you win, if you lose. And just I just want to refer you to the last paragraph, although if you wish to read the whole document, please do so. What he says in the last paragraph: "At this stage it is felt that if the Revenue lose before the Appeal Commissioners, the matter will go no further."

So it seems, at that stage, in any event, to have been accepted by the Revenue that they were on weak grounds in the context of liability, because if they thought they were on strong grounds, a statement to that effect presumably would not be included.

A. I don't know am I qualified to comment about what the solicitor might or might not have included, with respect. But certainly

Q. Well, can I

A. Certainly the sentence taken on its own indicates that, "At this stage it is felt that if the Revenue lose before Appeal Commissioners, the matter will go no further." That

speaks for itself, I think.

Q. In other words, you don't even have to read between the lines; the Revenue did not expect to win. And if they lost, they were probably a final decision, of course, had to be made they were unlikely to take the matter any further. And it seems to be a recognition of the points that you had been making to the Chairman earlier, that "Look, there are doubts or questions in relation to the liability, having regard to the fact that the deed is revocable or the appointment is revocable", and that the appointment may not may not have created a new settlement, isn't that right, or one or other or both of those?

A. It may well be an acknowledgment of that, among other things.

Q. And I think you referred during the course of the morning to the opinion that you had received from senior counsel in respect of the liability, or potential liability, of the Trustees to C.G.T. at an earlier stage, long before the hearing ever came on?

A. Yes.

Q. And then we have, on the 15th November, 1998, that same senior counsel expressing his views this is after the decision has been has issued from the Appeal Commissioners in favour of the Trustees.

A. Sorry, what tab are you on?

Q. Tab 60, six zero.

A. 15th November.

Q. Letter of 15th November from senior counsel to Revenue solicitor. It says: "Dear Sir, thank you very much for your letter of the 11th November enclosing note of the decision of the Appeal Commissioners" this was the decision deciding there was liability for C.G.T.

"Having regard to the way in which the hearing proceeded, I am not unduly surprised at the result."

That seems to be consistent with the note Mr. Sherlock had made prior to the decision being issued.

A. Yes.

Q. "I do not think it is necessary for me to write a full opinion about the issues in this case unless that is required. If so, I will be glad to do so.

"Basically I would agree with the analysis upon which the Commissioners appear to agree. It will be recalled that at the hearing, I conceded on behalf of the Revenue, on the second day, that the question of the power of revocation was crucial."

And just to pause there, that was always going to be an issue. There wasn't a concession, in essence, by the senior counsel, was there? This was one of the legal principles that had been identified in the Pickford case.

A. Yes, but you are bringing me into an area now, I wasn't involved in this at all; I hope you aren't going to be asking me to comment on the appeal hearing.

Q. No, I am not.

A. This was one issue, and it then it seems to become

centre stage.

Q. I am highlighting, I suppose, the fact that the issues that you were bringing to the attention of the Appeal Commissioners proved to be spot on and correct.

It continues: "In other words, if the later deed could validly be revoked, then it could not be said there was an exhaustive creation of a new settlement by the deed of 1985. From my point of view, therefore, there was really only one point in the end of the day.

"Frankly I would find it difficult to disagree with the opinion of the Appeal Commissioners. While the creation of a revocable appointment on the last possible day for the exercise of the power of appointment in the original settlement was undoubtedly a device to prevent a vesting so as to give rise to Capital Acquisitions Tax, and to that extent the device was merely a device. Nevertheless I have to say that it appears to have been successful in achieving its purpose. As a matter of form, the original settlement conferred a power to revoke the appointment. The power was also reserved by the deed of appointment itself.

Therefore, there was no new settlement created by the deed of 1985, and for that reason, there was no disposal for the purpose of the Capital Gains Tax Act of 1975.

"I would be quite pessimistic about any chance of reversing the decision of the Appeal Commissioners on appeal."

Then he says he is returning all the papers. In other words, he whatever opinion he may have given to the

Revenue Commissioners early on, and we haven't seen that, and of course it's a privileged document whatever he may have been saying initially, he had certainly come round to the view that no, this transaction did not give rise to a disposal or a deemed disposal.

A. Very clearly.

Q. And in that sense, proved, or demonstrated that the points that you had identified in May of 1987 to the Chairman and to Mr. Clayton were apposite?

A. Yes.

Q. If we stay I think sorry, go back to Tab 35, please. And if you turn to the third of the typed pages.

A. Yes.

Q. This is, as I say, is a meeting of the 22nd May of 1987, and the first paragraph starting on that page: "The Chairman moved the discussion of the valuation of ordinary shares for C.G.T."

A. Sorry I beg your pardon, where is the sentence beginning "The Chairman"?

Q. It's five lines down on the top of the page. The first paragraph starting on that page, on the third page

A. Sorry, my pages are out of sync.

Yes, I have that. I have that.

Q. It says: "The Chairman moved the discussion to valuation of the ordinary shares for C.G.T. what about discounting from the 82 million for not having the preference shares."

A. Right.

Q. And "John Reid is to examine this for Monday. Fen" I presume that's Mr. Fennelly?

A. Yes.

Q. "First said ordinary shares had no rights. Then said they could put down as at AGM for liquidation and vote on it as in liquidation and distribute to them of all the shares in D Stores Limited."

A. Yes.

Q. "If he is wrong, what about discounting."

I just want to ask you in relation to discounting. If I bring you back to Tab Number 10.

A. It's a private company share valuation.

Q. Private company, revision 12 March 1986. This is Dr. Thornhill's revised paper, position paper to the cross-cutting group and specifically, I presume, to the Chairman. If I can ask you to turn, then, you'll see about five pages in, the page numbered 33 in bold.

A. There is no bold in my book.

Q. Page 33.

A. I have it, yes.

Q. This is only an extract of the entire paper, and at paragraph 47, he is drawing conclusions in relation to the Discretionary Trust Tax and in relation to Capital Gains Tax. And if we just concentrate for the moment on Capital Gains Tax. He puts three scenarios forward.

The first, under Capital Gains Tax:

"A. If the hypothetical purchaser of the total holding

(99,000 ordinary shares and 100 preference) is able to enfranchise the ordinary shares, he will have full control, and the only deduction to be made will be as set out at 1A above."

And 1A above was the nominal value of the preference shares, ï¿½900, the other

A. Right.

Q. And you will recall, of course, that the Trustees at that stage held the entire of the ordinary share capital in the holding company?

A. Right.

Q. But the ordinary share capital, unusually had very, very limited voting rights?

A. Yes.

Q. And all they could vote on was a resolution to wind up the company or a resolution to alter the rights attaching to the ordinary shares. In other words, they had some say if the rights of the ordinary shares were to be diluted even further?

A. Yes.

Q. And I think there was a third qualification, a third instance, a matter upon which those ordinary shares could vote. Yes, a resolution you will see it earlier in Divide Number 10, page 30; if you go back, in other words, three pages.

A. Yes, I have that.

Q. 1. Was a resolution to increasing or reducing the capital

of the company. 2. A Winding up of the company and 3. For varying and abrogating the rights or privileges attached to the ordinary shares. Those were the only three instances on which the holders of the ordinary shares were entitled to vote.

A. Okay.

Q. And the issue, therefore, arose, having regard to that somewhat unusual scenario, what discount, if any, should be applied to take account of the fact that the ordinary shareholders in essence couldn't do what they wanted to do; they didn't have a free hand to do whatever they wanted.

A. Yes.

Q. And the first scenario, back to page 33, 2A

A. Sorry, I beg your pardon.

Q. Back three pages on

A. I beg your pardon, what tab should I be on?

Q. I am still at Tab 10. Further on, paragraph 47, "Conclusion."

A. It's the same paper.

Q. It is, yes.

And having presumably gone through the exercise of looking at all these various aspects, he says "There is three scenarios effectively for Capital Gains Tax purposes of valuation. 1. If hypothetical purchaser is able to enfranchise the ordinary shares he will have full control." And there didn't seem to be any particular mechanism whereby that could be achieved, isn't that right, without

the cooperation of the shareholders?

A. Yes.

Q. So that seemed to be a non-runner, so to speak?

A. Yes.

Q. And then the second one

A. You are getting into a level of detail now that I may not be able to follow you on.

Q. And I don't want to do that, but I do want to ask you a question in relation to Number B.

A. I take your point that the ordinary shares were circumscribed, as they would be in the ordinary event.

Q. Then one was looking at the extent of these limitations, and at B: "If the purchaser was able to initiate in effect the winding up of the holding company, he would be entitled to receive the entire assets of the holding company less ï¿½900 for the other preference shareholders. "Accordingly the deduction from the full market value will be ï¿½900 plus the costs of liquidating the holding company." Technically that may be correct, but if the shareholders, the Trustees, took that nuclear option, that will of course give rise to a disposal by the company to the liquidator and Capital Gains Tax; isn't that right?

A. Yes.

Q. At 40% of the entire value of the company.

MR. HEALY: That's not what the document says. It says if a hypothetical purchaser did that. Not a trustee.

MR. O'NEILL: Sorry, we are bringing this scenario into

some degree of reality.

MR. HEALY: In fairness, if we could just stick with the document, I am interested in what Mr. O'Neill is saying, but it refers to the purchaser effecting or becoming involved in effecting a winding-up. For him, there would be no capital gains, because he would have paid 82 million, if that's what we are talking about for the company.

MR. O'NEILL: I am sure this can be clarified later.

CHAIRMAN: I am sure this is a matter for of observations afterwards. I certainly take a degree of force from what you have put in that regard. It may be a little unfair to press this witness on a matter that he has indicated wasn't the essence of his expertise.

MR. O'NEILL: Well, this is to do with Capital Gains Tax, which is the essence of this witness's expertise, sir. And I am simply asking him to identify to the Court if this if the hypothetical purchaser adopted this course of action, what would be the consequences for him.

Q. And I think, Mr. O'Cathain, you agree in those circumstances, if the hypothetical purchaser wound up the company, in the first instance Capital Gains Tax of 40% would be payable on the disposal by the company to the liquidator?

A. On the disposal by the company of what? Sorry, I must say it's such a hypothetical event it's almost incredible, the idea of breaking up a trading enterprise.

Q. I mean, it is put forward as a possible scenario by

Mr. Thornhill for suggesting maybe there shouldn't be any deduction, and I just want to go through that and see if there is any legs to that at all.

A. Okay.

Q. And I think you agree with me it is not a reality at all?

A. I think so, yeah.

Q. Not only would there be Capital Gains Tax payable by the company on the disposal to the liquidator, but there would also be Capital Gains Tax payable by the shareholders on the 60%, the 60% of the company they receive, they would then themselves have to pay capital gains on that?

A. If there was a chargeable gain.

Q. 40% of 60, so they'd be paying 64% of the value of the company in taxes to the Revenue?

A. I couldn't go with you that way, but just so say that there would be an exposure to Capital Gains Tax if a charge arose. It would depend on

Q. It may be slightly less than that, because there would be a base valuation as well, of course. But you'd accept that that really isn't a realistic option for a hypothetical purchaser or an actual purchaser?

A. It doesn't seem an attractive proposition.

Q. And then the third scenario was "If a purchaser is unable to achieve enfranchisement or winding-up, then a substantial deduction will have to be made. Precedent cases already quoted suggest a discount of up to 18%. Any discount in excess of 18% appears (subject to further

research)to be bringing us into uncharterd territory."

So it seems to be if one excludes Options 1 and 2, it seems to be the case at this stage that Dr. Thornhill is accepting that there must be a discount from the gross value of the company, if I may so describe it?

A. That's right.

Q. Now, there was another potential basis upon which there might be a limitation to the amount of the discount, and that's at Divide Number 11. And this is a meeting of the 12th March 1986, or a note of a meeting of the 12th March 1986, attended by the Chairman, Dr. Thornhill, Mr. Reid, Mr. Clayton, Mr. McDermott, and you?

A. Yes.

Q. And if you turn to the second page of that, he says sorry, you say

A. Sorry, my second page is blank on that one. Hold on, I beg your pardon, was I given I may have the folder.

Q. I think you might have been, but it may be loose.

A. Yes, I can get that. Yes, I have that document now.

Q. The second page, under the heading "Control for Capital Acquisitions Tax", "At this stage" the last paragraph under that heading C: "At this stage, J. Keane said that he had reconsidered his attitude to the size of deduction to be made"

A. Sorry, I beg your pardon, I am not with you.

Q. Sorry, "Control for C.A.T." is the heading.

A. Sorry, I have it.

Q. The last paragraph under that subheading, C. "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."

Now, would you accept that for valuation purposes, that one ignores the position of a special purchaser? It may be a question that should have been put to Dr. Thornhill, but unfortunately we didn't have this unredacted version of this document when Dr. Thornhill was in the witness box.

A. All I can say at this distance, I couldn't accept that, and it appears from this comment that I certainly at that stage wouldn't have or wasn't aware of what you are saying, if such is the case.

Q. There is a House of Lords decision in Inland Revenue Commissioners v. Crossman of 1977 saying that ignored the position of a special purchaser, 1977. Maybe you don't remember. That doesn't jog your memory?

A. It doesn't.

Q. Now, if I can ask you to turn to Tab Number 40, please. And this is a position paper, or briefing paper, prepared by you, dated 26th May 1987.

A. Right.

Q. Again, to put this in context, we have seen a number of

memos of April and earlier in the month of May of 1987, when the issue both in relation to liability and, if there was liability for C.G.T., the amount of that liability was being put under the microscope.

A. Right.

Q. And you were presenting to the Chairman and the other members of the cross-cutting group the what would appear to be the views that you had, or the concerns that you had, particularly in relation to liability and the mechanical exercises thereafter of applying the 82 million valuation and finding out what the tax is likely to be.

A. Yes.

Q. And this document is more related, I think, to the mechanics of identifying, assuming there is a liability, what is the extent of that liability.

A. Right.

Q. On the first page of that document, you have set out the first page, going over to the top of the second page, you have set out computations of possible liability on the basis of a market value of 82 million as of the valuation date of March of 1985, and on the basis of a base cost in 1974 of 8 million.

A. Right.

Q. And if you move on three pages, you'll see, I think, a note from Mr. Reid to you

A. Right.

Q. in which he sets out, at paragraph 5, his view of what

the base cost valuation in 1974 should be?

A. That's right.

Q. And he is recommending as reasonable a valuation of 8 million?

A. That's right.

Q. And that's his figures. In the context of figures, I think in terms of valuation, you have resorted to the Capital Taxes Branch?

A. We defer to them, yes.

Q. And applying the two figures of 82 million and 8 million, you have then looked at the potential tax on the basis of discounts of 10%, 20% and 30%, going back to the first page of that document?

A. That's right.

Q. And for a 10% discount, which is in fact less than the discount that Dr. Thornhill originally suggested, he suggested 15%, I think, in his first document that he prepared?

A. 15 or 18.

Q. 15, then he said not greater than 18 in another document.

A. Okay.

Q. At a discount of 10%, you had a tax bill, if there was a liability, of 17.5968?

A. That's right.

Q. 17 and a half million, roughly? On a discount of 20%, you had a bill of 15.64 million. And on a discount of 30%, you had a potential tax bill of 13.69.

A. That's right. And may I say that in addition, the value forward is given there, of course, which was seen as being crucially important.

Q. Indeed. I mean, there is no doubt in this case that even if the Revenue lost the assessment, it was determined by the Appeal Commissioners there was no liability, at the end of the day, the Revenue were going to collect tax on this settlement?

A. That's right, and in a note earlier it seemed that the regime might even have got tougher on these.

Q. Indeed. And in fact, there was while the Exchequer might have liked the money from the point of view of cash flow, there was actually a significant advantage in leaving the trust in situ, because not only were you going to get Capital Gains Tax at the end of the day on the then market value of the shares, of the entity, but in the meantime, you were going to get a 1% Discretionary Trust Tax on an annual basis?

A. Yes, I am sure these were considerations in the mind of the Chairman.

Q. And the Discretionary Trust Tax in this country was different from the Discretionary Trust Tax in the UK, where I think in the UK it was ultimately or it was regarded as a payment on account of Capital Gains Tax, and you got an allowance for the Discretionary Trust Tax you paid. In this country you didn't. In this jurisdiction you didn't?

A. Sorry, you have two questions I am not sure about the

if you are referring to a relief, there was a relief in Great Britain whereby in a trust situation where you had a deemed disposal such as ours, the tax wouldn't be sought on that. That would be carried forward to be rolled up into the next real disposal, so to speak.

Q. And also there was Discretionary Trust Tax in the UK, I think. If you don't know about this

A. I am not well versed on it, but there is some reference to it.

Q. And it was allowable against C.G.T. at the end of the day; in other words, it was deemed as an advance payment of C.G.T. If a person, a taxpayer, wants to tie up his affairs in that way, well, the Exchequer is not going to be done out of the tax in the meantime.

All right, we'll move from that.

Coming back to the issue in relation to discounts, as I say, you have looked at the position from the point of discounts of 10, 20 and 30%, and if you turn one has reference to where the 30% comes from, if you turn to the very last page of that tab, Tab 40. And under a heading, "If we assume that the ordinary shareholders would not be able to gain"

A. Sorry, I am not with you there.

Q. Tab 40. The last page in that tab.

A. The last page is headed "Settlement of the Appeal", is it? In mine. Am I looking at the right one?

Q. No, mine goes on up another four or five pages. Do you

have that?

A. No. I have a three-page document. This is the one headed "A Cathaoirleach"?

Q. Yes, I have that document. And then behind that there is

A. Oh, sorry, I beg your pardon, there's John Reid's valuation, etc., that you are speaking about, and where in that?

Q. A summary of discounts, and then the very last page of that document.

A. Yes.

Q. "If we assume that the ordinary shareholders" do you have that? It's underlined.

A. The top of the page, yes, I have.

Q. I suspect there is a "Philip Curran" that's lost in the photocopying.

"If we assume that the ordinary shareholders will not be able to gain control of the company what is the position:" And then there is analysis of that position, and at the second-last line, I don't think it's necessary to read down through it all, the conclusion is "Accordingly, a discount not exceeding 30% should be applied. This produces a value of ï¿½57 million." I think that's probably in the context of your exercise of allowing discounts or doing calculations on the basis of discounts of 10, 20 and 30%. That's probably where the 30% comes from. Is that fair?

A. Yes.

Q. So, on the basis of that, and even assuming that there was a liability for C.G.T., if a discount of 30% was allowed, the total tax bill would be 13.69 million; that's the figure that you have in your calculations?

A. Are you back

Q. Yes, I am back to the beginning of that document, beginning of Tab 40.

CHAIRMAN: I think we had it a minute ago; if it's 10% it would be 17 and a half million, and if it was 30%, it would be 13-odd.

A. Yes, Your Honour.

Q. MR. O'NEILL: Now, would you turn to Tab 49, please.

A. "Note for Chairman"?

Q. "Note for Chairman".

"This case arises from a family trust". This is your note, a year later, in March of 1988. In the meantime, to put this in context, the discussions in relation to compromising the tax bill at 16 million, which were not acceptable to the Trustees, that's gone by the board. And we are now the Revenue and the Trustees are now preparing for the imminent tax appeal?

A. That appears to be the case.

Q. Is there anything on the records of the Revenue to suggest that the Trustees were happy to accept the 16 million settlement being offered, that you are aware of?

A. Not that I am aware of.

Q. Okay. And isn't it a fact that they did not accept that,

or that the potential liability or supposed liability was not accepted for that amount, was not settled for that amount, or indeed any amount?

A. That seems fairly clear. It went to appeal.

Q. It went to appeal.

MR. HEALY: I don't want to interrupt My Friend, but his clients, certainly two of them, have told the Tribunal that they knew nothing about this in their statements that have been alluded to by Ms. O'Brien in her Opening Statement. Whereas Mr. Fox may have known about it because he was involved, as I understand it I am subject to correction I think neither Mr. Bowen nor Mr. Uniacke knew anything about the 16 million. So I don't know how they could have rejected something they knew nothing about. It would be of assistance if we knew a bit more about it; I appreciate that.

CHAIRMAN: It will arise, presumably, next week, Mr. Healy; but I won't prevent Mr. O'Neill eliciting such matters as he thinks fit from the papers.

Q. MR. O'NEILL: Now, in relation to this document, 3rd March of 1988, at the fifth paragraph on the first page, this I think is a briefing paper for the Chairman, who was then Mr. Curran

A. Yes.

Q. and who may or may not have had any significant involvement in the matter before this stage?

A. Yes.

Q. And you are bringing him up to speed so to speak. You say in the fifth paragraph: "The Capital Gains Tax alone would have been about 39 million on our original estimation. This is now estimated at about 20 million see later note."

And the later note seems to be, if you move four pages in, it's the second-last page of your note. Do you see a Capital Gains Tax assessment for 1984/85, do you have that page?

A. Yes.

Q. And

A. I see the computation you are referring to.

Q. And first what you have is the basis upon which the assessment was raised, the 38.8 million?

A. Yes.

Q. And it's apparent from that that well, sorry. That reads: "Market value of shares at 14 March 1985, 120 million; market value of shares at 6th April 1974, 5.5 million". And the multiplier then is applied. It's apparent from that that no discount was applied; isn't that right?

A. From that, yes.

Q. And that results in an assessment at 38.8 million, which is the amount of the assessment.

And then, further down the page, you say jump down three paragraphs "Therefore we'd be prepared without prejudice to accept 82 million as the market value on the 14 March

1985, also the Capital Gains Tax for both the ordinary and the preference shares. We would also be prepared to concede a market value for the ordinary shares of 8 million at 6 April 1974."

That presumably is on the basis of what Mr. Reid has been telling you?

A. That's right.

Q. And you then do a computation on the basis of a base cost of 8 million and a market value, as of the date of disposal, of 82 million; and you come out at a bill, a potential tax bill, of 19 and a half million?

A. Yes.

Q. And again, and to be fair to you, you highlight, then, that in fact you then have to take into account the issue of discount.

You say in the next paragraph: "In addition, there is a question of whether a discounting factor should be applied to the ordinary shares to allow for the fact that the preference shares carry the voting rights. Such a discount would be negotiable."

A. Yes.

Q. Now, from that document, it appears that even though the Revenue internally accepted that there must be some discount to take account of the limited voting rights of the ordinary shareholders, there was no allowance for that discount at all made in the assessment in late 1985, the assessment of 38.8 million; isn't that right?

A. In the way that is put there, the computation at the top of the page, there is no allowance. But

Q. An allowance should have been made. It may be a matter of argument as to what the amount of that allowance or discount should be.

A. One would have to go back and look at how that 120 was arrived at. Maybe there was. This was shorthand?

Q. Well, is that correct? Because you must be consistent. If you apply a discount in 1985, you must also apply a discount in 1974; isn't that right?

A. I agree, yes.

Q. So looking at that, it would very strongly suggest to you that there was no discount applied?

A. That is true.

Q. Now, on the basis of the documentation and your recollection, I have to suggest that the Revenue have, in fact for the benefit of the Exchequer, undoubtedly been playing, they had been playing hardball; they had been playing a tough game with the Trustees. They are trying to get, for the benefit of the Revenue, or for the benefit of the Exchequer, as much as they can; isn't that right?

A. Yes.

Q. And any potential settlement, and there wasn't any settlement, any potential settlement at 16 million would have in fact been a wonderful windfall for the Revenue, wouldn't it?

A. It would have been satisfactory.

Q. And it would have been against a background where there was doubts being expressed by you in relation to liability, ultimately established to be correct, and in the context of an amount where the tax could have been somewhere between 17 and a half on a 10% discount and 13 and a half, roughly, million we are talking about, on a 30% discount?

A. Yes.

Q. Also we have seen that the Revenue were playing hardball insofar as it was suggested that the issue in relation to the surcharge tax in other words, the allowance against surcharge tax of any Discretionary Trust Tax paid, that could be used as a bargaining factor in the context of an overall settlement?

A. Yes.

Q. I won't ask you to say whether that's unfair or fair. But if that allowance was to be granted, it would be an allowance granted not only to the Trustees of this settlement, but to all Trustees in similar situations?

A. Yes.

Q. And in this particular case, however, being withheld from the Trustees unless and until, or potentially withheld from these Trustees unless and until they came to an agreement in respect of the C.G.T.?

A. I think it was used in the advice that was given as an encouragement to negotiate.

Q. And as I have indicated, and I think you agree, against a background where in fact there was significant advantages

to the Revenue in keeping the trust alive, because instead of getting the once-off C.G.T. tax, and of course Capital Acquisitions Tax, they would get possibly Capital Acquisitions Tax on a 1985 basis with additional Capital Acquisitions Tax on a relatively low valuation into the future, and also a 1% Discretionary Trust Tax on an annual basis?

A. Yes.

Q. And in the circumstances, any hint that there was any form of collusion, conspiracy within the Revenue, to do the Exchequer out of funds, has no basis in fact at all; isn't that correct?

A. If I am allowed to answer, of course, absolutely, I would have thought it was beyond reproach, the handling of this case.

Q. And everything that was done was done, as far as you are concerned, was done in an open manner?

A. Absolutely.

Q. And fully recorded in the attendances that you prepared. There was no attempt by you to remove attendances from files or anyone else

A. Absolutely.

Q. Was there any discussion between you and anyone else within the Revenue or indeed outside the Revenue that "We will massage the figures in this case so as to let off so as to excuse the Trustees of a liability which we, the Revenue, believe they have"?

A. The question hardly warrants a reply. It's a preposterous suggestion.

Q. The Trustees would be somewhat aggrieved in relation to the approach of the Revenue, but that's because they are on the other side; the Revenue, you would agree, I think, did a good job in this case. They pushed the boat out as far as they could and sought settlement in respect of a liability which ultimately proved proved not to exist?

A. Which ultimately was defeated at appeal hearing.

Q. Thank you, Mr. O'Cathain.

CHAIRMAN: I didn't want to interrupt your examination, Mr. O'Neill, but perhaps one very mild matter I might raise with you were your couple of questions about perhaps the issue of the inheritance tax, or the valuation being raised if the substantive case had gone ahead, and valuation, would I not be correct in thinking if you had been appearing for the Revenue, disputing the quantification issue on the substantive case, if your opponent had sought to introduce the earlier valuation, you'd have been immediately on your feet to vociferously object on the basis that it was attempting to prejudice the current issue in the teeth of the prior settlement?

MR. O'NEILL: I don't think the settlement goes that far. I think the settlement provides that this is not a binding valuation for the purposes of C.G.T. And in other words, you can argue that different considerations apply; and because the tax is only 3% and 1% annually, well, we were

more relaxed in our approach. But I don't think the settlement goes so far as saying these figures may not be referred to or relied upon in the context of C.G.T sorry, they can't be relied upon as binding. They can certainly be referred to, I would submit, sir.

CHAIRMAN: It's relatively moot. I am certainly prepared to accept they assumed pragmatic reality in the ongoing negotiations, but I have my doubts that the matter would have been accepted as pertinent or admissible testimony had it been proceeded with in full.

MR. O'NEILL: Of course, what would have been admissible is the valuation for wealth tax purposes which applied a price/earning ratio of 8, as distinct from the 16.5 that the Revenue were contending for, and being the basis of the 120 million valuation. A matter of observation.

CHAIRMAN: Mr. Nesbitt.

MR. NESBITT: I have very few questions.

THE WITNESS WAS EXAMINED BY MR. NESBITT AS FOLLOWS:

Q. MR. NESBITT: Just something that I was trying to slot into what I have been listening to, for the assistance of the Tribunal.

This was a tax, Capital Gains Tax, which at the time was a tax that was the subject matter of an assessment by the Revenue; isn't that right?

A. That's right.

Q. These are in the days before self-assessment, before the 1988 changes in the legislation?

A. Yes.

Q. And I think that said, and notwithstanding the consolidation of the Tax Acts, the driving force for any Inspector who has to issue the assessment and am I right in thinking Inspectors are the people who make assessments?

A. Yes.

Q. And you would have been a Senior Inspector?

A. I would have been.

Q. You didn't make the assessment in this case; is that right?

A. I?

Q. Yes.

A. No, I didn't.

Q. You didn't make the assessment, but you were part of a team who discussed the issue of what the right amount of an assessment could be?

A. That's right.

Q. And as I understand it, the important thing is that the Inspector acts to the best of his judgement?

A. Yes.

Q. That's what you have to do if you are raising an assessment?

A. Yes.

Q. And I assume it's safe to say that a judgement call requires a lot of influences to be looked at and somebody to make a decision to the best of their judgement?

A. Yes.

Q. And I suppose, if you discuss those issues with other

people, you may see things you hadn't thought of before; you may see the force of arguments that were being made by other people, and you may change your judgement, without taking away from what you first thought, save the amount might change?

A. Yes.

Q. Now, what I am concerned to understand is this: Throughout the process that you were involved in, which appears to be a discussion of what the right value should be for the purposes of understanding what would be an appropriate amount of tax to take on foot of an appropriately judged assessment, did you ever feel that there was somebody trying to overbear the exercise of the judgement of the people involved in this discussion?

A. Absolutely not.

Q. And I'm not going to repeat what Mr. O'Neill has said, but is it fair to say that, if anything, this was a case in which greater care was taken to ensure that appropriate judgement was exercised for the purposes of obtaining the appropriate amount of tax?

A. Absolutely. The documentation I think testifies to that.

Q. Now, we have been through lots of written notes. You have been asked to try and remember what occurred 20 years ago. And I have to say this, a sort of underlying current of there is something wrong here. Do you agree that that underlying current is a proper current to be flowing through the circumstances of the assessment and the

valuations that you have seen?

A. From my point of view, there is absolutely nothing of the nature of you're speaking of flowing through the papers or the work done on my reading it was. If you are talking about the conduct of the Tribunal here, are you, no?

Q. Just deal with the papers. That's the evidence maybe I missed maybe it's a feeling I got sitting listening, but from your point of view, reading your papers, you see nothing, and the papers that have been produced to you, you have seen nothing that alerts your antennae to say, "Here is something the Revenue were doing wrong"?

A. Absolutely not.

Q. And these are just the normal notes you get in any case?

A. You mightn't have them as detailed.

Q. And it was a big amount of money, but that really doesn't stop you exercising the principles of obtaining the appropriate amount of tax?

A. Absolutely.

Q. Exercising your judgement, as you are required to do under the law, as to the best of your judgement?

A. That's right, yes.

Q. Now, I assume Mr. Pairceir would have been a very experienced Revenue person?

A. That's right.

Q. And he would have been understood clearly the importance of exercising judgement appropriately?

A. Yes. My recollection is he had a tremendous grasp of the

detail of this case.

Q. So he would have been an influence, he would have been encouraging everybody to do the right thing?

A. Yes.

Q. And I assume you put yourself there too?

A. Absolutely.

Q. And Mr. Reid

A. To try and provide him with the best quality information, absolutely.

Q. And it's as simple as that, as far as you are concerned?

A. Yes.

Q. Thank you very much.

THE WITNESS WAS EXAMINED BY MR. CONNOLLY AS FOLLOWS:

Q. MR. CONNOLLY: Now, Mr. O'Cathain, I want to ask you some questions on behalf of the Revenue Commissioners.

Just to set the scene and how various figures came to be put in place, I want you to start by looking at Tab 22, which is the date of the original assessment, where we'll find the date of the original assessment. The assessment itself is at Tab 23.

I think we see that at Tab 23, the date of the assessment is the 27th January, 1987, in relation to Capital Gains Tax; is that correct?

A. Right.

Q. And the point is that that assessment was raised before the C.G.T. settlement came into place; isn't that correct?

A. Absolutely.

Q. So as a result of the C.G.T. settlement discussions, obviously everything that was going to come into play sorry, C.A.T. settlement that came later, the Discretionary Trust settlement came after this assessment had been raised?

A. The Discretionary Trust appeal hearing?

Q. Yes.

A. Yes.

Q. That came after this?

A. It did.

Q. And at the time when this assessment for C.G.T. was raised, a certain amount of information was available to you, and this was your best judgement at that time in relation to the appropriate tax to be raised?

A. Precisely.

Q. Now, as matters evolved and as more information came available to you, either through discussions or through the hearing which took place in March of 1987, different factors came into play in determining what was the appropriate amount to be raised under other headings of tax; isn't that correct?

A. That's right.

Q. Now, although everyone has looked at the figure which emerged from the Discretionary Trust Tax appeal hearing of March of 1987, there were other reasons to come into play even after that that would suggest that even lower figures might be more appropriate from the Revenue's perspective,

rather than the 82 million asset aggregate?

A. You are referring to the discount thing?

Q. Yes, I am referring to discounting; that's what I was going to come to. There were other factors that still had yet to come into place; isn't that right?

A. Yes.

Q. In that context, would you look at Tab 3, please. It's a document that Mr. O'Neill referred you to, but there is an item in it that I want you to comment upon.
This is a document of Mr. O'Connor that Mr. O'Neill asked you about, dated 6th March 1985. And in the first page of this, the last paragraph, there is an item on which I want you to comment upon. This says: "For capital tax purposes, the shares must be valued on the basis that the owners have 100% control".

A. Capital Acquisitions Tax.

Q. Capital Acquisitions Tax. "This consideration also applies for the Discretionary Trust Tax, but it does not apply for the Capital Gains Tax." Do you agree with that?

A. Yes.

Q. And that is the reason why discounts came into play, because there wasn't overall control of this shareholding, and a discount had to be applied for that in relation to Capital Gains Tax assessments that otherwise wouldn't come into play for the C.A.T. assessments; is that correct?

A. Yes, and that was another feature that made valuing unquoted shares so notoriously difficult; just what level

of discounting, apart from its value as a whole, what level of discounting, was notoriously difficult, was a further uncertainty in valuing sharing.

Q. I think you said previously there is always a difficulty in valuing shares in a private company, particularly an unquoted company; but here was a situation where some discount had to be applied in relation to the notional purchasing price from the hypothetical purchaser in the open market, because you now had a situation where the person who would be the hypothetical purchaser would be coming in to buy these shares would never be able to get overall control, even if he had 99% of the shares; isn't that right?

A. Yes.

Q. That figure can vary, it can be 20% or 30%, but that's a judgement call to be made by the person evaluating the shares; isn't that correct?

A. That's right.

Q. And there is a document prepared by you which I think was referred to by one of my colleagues, which is at Tab 40, which is a memorandum, a note of a meeting prepared by you on 1987.

And I think on the second page in the second-last paragraph, your thinking at that stage was and I'll quote this; second-last page, it says sorry, second page, second-last paragraph: "A computation based on a market value of 5.5 million at 6/4/1974 and 82 million at

14/3/1985 would give a tax charge of 23.69 million. If this amount was ultimately found to be payable, the interest due would be 3.55 million". And so on.

And that was the state of judgement that had been reached at this stage in 1987; is that correct?

A. Yes.

Q. So in that context, while I appreciate the efforts to try and negotiate a settlement came to nought, but in that context, I respectfully suggest that the figure that was being put in place for an intended settlement of 16 million was not very far off the mark, when we look at that document and another document that was referred to earlier by Mr. O'Neill?

A. Yes.

Q. I think one of the figures that you came up with, in response to Mr. O'Neill's questioning, was at a particular time prior to the intended settlement negotiations, the appropriate tax figure should be 15 million and something?

A. There was a range of figures, yes.

Q. So the figure of 16 million, which was intended as a possible settlement figure in this, was a realistic figure in terms of quantification without any reduction to allow for the risk of losing the assessment; isn't that correct?

A. I don't understand that question, sorry.

Q. The figure of 16 million, which was possibly intended as a settlement figure when there were discussions on the matter, was comparable to a figure that was realistically

obtainable in the event that the Revenue had won the appeal against the Appeal Commissioners?

A. If it went to appeal.

Q. So the risk factors of losing it weren't brought into play in discounting the appropriate tax figure downwards; they simply would have come into play in reinforcing the attractions of a ï¿½16 million settlement, if one was on the table?

A. Yes.

Q. Now, I think there was discussion from Mr. O'Neill with you in relation to English tax cases and Irish tax cases. You were in fact involved in this McGrath case that we were discussing?

A. I was, yes.

Q. I think the actual dates of that are in July of 1987, there was a High Court judgement of Ms. Justice Carroll which found against the Revenue, and that was upheld in the following July in the Supreme Court; that's July of 1988?

A. That's right. We had won at Appeal Commissioner level, resoundingly, and we felt confident on that, but the High Court had equally resoundingly refused to follow the persuasive English judgement at that time.

Q. Now, the relevance of all of that is that the appeal hearing in this case concerning the Dunnes Trust was postponed from June to the autumn in 1988 so that the judgement in the McGrath case was something that, in the background, certainly had to be part of the Revenue

considerations?

A. Yes.

Q. And while there was interesting case law which might have allowed for some discussion as to the merits of raising this appeal back at the time of the original raising of the appeal, by the time you were coming towards a hearing before the Appeal Commissioners, there was every reason to be apprehensive that a strict reading of the actual wording of the document would be the approach taken, if not by the Appeal Commissioners, certainly by one of the superior courts; isn't that correct?

A. That's fair comment.

Q. And in the event that the appeal had been successful and the trust was, sorry, and the trust was no longer operative after 1985, that would have led to a Capital Gains Tax liability for the beneficiaries at that stage; that would have been the best result from the Revenue's point of view. Isn't that correct?

A. Subsequent disposals out of the trust.

Q. And there would be liabilities then for the individual beneficiaries of the trust?

A. That's right.

Q. But one of the side effects of that would have been that the Revenue would have had to pay back the sum of 3.564 million which had previously been paid to them as Discretionary Trust Tax on the 25th May, 1987; isn't that right? The trust would have been struck down as an

effective shell. If the trust was struck down

A. That's it, there are so many if you actually strike down the trust.

Q. If you strike down the trust, then the Discretionary Trust Tax was not an appropriate tax to provide. That would have to be paid back with interest; isn't that right?

A. Yes.

Q. Now, when the Appeal Commissioners decided as they did, Mr. O'Neill has referred you to legal advices which were obtained, but that was the view that was held not just by the legal advisers, but it was also held in the Revenue as well by appropriate persons, including the relevant Inspector of Taxes dealing with the file ; isn't that right?

A. I beg your pardon; my attention slipped there.

Q. Mr. Savage was I think the Tax Inspector at the time; isn't that right?

A. Sorry?

Q. Mr. Savage.

A. Yes, he was with us in Capital Gains Tax.

Q. If you turn to Tab 61, we'll see what Mr. Savage had to say at the time. 17th October, 1988, is a letter from Mr. Savage concerning the

A. 17th of Samhain, that's November.

Q. Sorry. He deals with the amount of time required to process an appeal. He says: "I discussed this question with" blank "Revenue counsel after the hearing ended 23

September 1988. We were both of the opinion that the decision would go against the Revenue and that there would be little prospects that the High Court would overturn the decision. My recommendation was that the Revenue should not pursue the matter further." And that was the view taken by the Inspector dealing with the file, Mr. Savage?

A. That's right.

Q. That is endorsed further down, because I think we have in handwriting, at the very bottom of that, the endorsement of Mr. Reason. He says: "I have consulted other members of the board" Mr. Reason was then the I think, was he the Chairman at the time?

A. No, Mr. Curran he would have been Commissioner.

Q. "I have consulted with other members of the board, and they agree with me that High Court proceedings should not be taken". And that's Mr. J. Reason there, 2nd December. It's addressed to Mr. Cleary; is that correct?

A. That's right.

Q. And the situation would have been, then, that the matter was only appealable on a legal issue rather than a factual issue, as far as the Revenue were concerned, under that type of tax at that time?

A. That's right. It could only go to the High Court.

Q. I think one of the things you mentioned was at the end of the day, this wasn't the worst thing that could happen to the Revenue, because in the event of ultimate disposal of the trust assets, the Revenue would have a later windfall,

in the sense that they were now working from a different base figure, so that matters would redound to the Revenue's benefit in any event under another tax heading for all that at a much later date?

A. Exactly.

Q. And that was something that had to be taken into account by the Revenue in assessing whether it was worth taking matters any further into the High Court or the Supreme Court.

A. Indeed.

Q. Just generally, back at that time I think you said it was a different economic situation back then in the 1980s. Will you agree that there was a certain amount of flexibility exercised by the Revenue in relation to recovering interest on unpaid tax under various tax headings during the 1980s?

A. Yes.

Q. Thank you, Mr. O'Cathain.

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

Q. MR. HEALY: Just to clarify a few small matters. I appreciate you have been a long time in the witness box, Mr. O'Cathain, and you have provided a lot of assistance and indeed towards the end of a long day, there is a tendency, listening to long questions, just to perhaps not get the question right. But I think you were asked by a moment ago, by your own counsel for the Revenue, you were asked about the adjournment of this particular further C.G.T. case after the McGrath case, and I think it was

suggested to you that the adjournment was related to the McGrath case, and because of the McGrath case.

MR. CONNOLLY: That was wrong. I simply said it was against that backdrop. Is wasn't because of that. I certainly withdraw that if that's the impression anyone takes from what I said. It wasn't adjourned for that reason. It was adjourned from June to the autumn for other reasons.

CHAIRMAN: But you are saying that a more doom-laden climate had become evident, through happenstance, by the time the matter was actually listed.

Q. MR. HEALY: And in fact I suppose the difference is that you were going to be dealing, as we have learned, with a situation where the deeds were going to be looked at more carefully, rather than what prompted them; isn't that right?

A. Yes.

Q. Now, just one or two other small matters.

Mr. O'Neill has, in any case, of course, I think put us right on, and indeed, I think, echoing something in your own notes on the whole question of the McGrath case. If the Tribunal or if the Revenue went down the McGrath case route, there would have been no Capital Gains Tax at all anyway, sure there wouldn't.

A. Sorry

Q. If the Revenue had gone down

A. I am just trying to understand the question.

Q. If the Revenue had gone down the McGrath case route. You have answered this question already to some extent; I want to clarify your answer.

If the Revenue had gone down the route of the McGrath case and argued that there was no real trust at all, there would have been no question of Capital Gains Tax assessment; isn't that right?

A. I can't follow the question. If at the time we put in the assessment, you are saying?

Q. Yes. If you were seeking to challenge the transfer that you deemed to give rise to a deemed disposal as an artificial transfer, you wouldn't have been able to treat it as a disposal giving rise to a charge to tax; isn't that right?

A. I am sorry, I am just not able to engage with the question. We didn't have the McGrath decision.

Q. Yes, I appreciate that. Maybe I want to be clear about this.

A. If you rephrase the question.

Q. At the time of the McGrath case and before the decision was given, the Revenue considered that the Irish courts might follow the decision of the English courts in the Ramsey and Furnis -v- Dawson line of cases; isn't that right?

A. Right.

Q. If the Revenue had gone down that route in relation to the transaction that they were seeking to tax, there would have been no transaction to tax, because they would have

attacked the transaction as an artificial one; isn't that right?

A. I am sorry

Q. Do you remember canvassing this transaction in the notes we looked at this morning on the basis that it might be treated as an artificial transaction devised legally just wait devised legally to avoid tax?

A. Yes.

Q. It would have been possible, had you wanted to do it, to consider attacking the transaction on that basis, wouldn't it?

A. I think, though, that what has more to do with establishing the facts underlying the document, to assist an arbitrator in deciding what weight should be given to the clauses in the new document to decide, therefore, whether or not there was this very technical deemed disposal.

Q. But that's to look at the facts of the deeds themselves, not at the dominant purpose in creating them; do you understand me?

A. I do, but I took the view that it would be important anyway.

Q. I appreciate that, but you did canvass the Furnis -v- Dawson route.

I'll pass on from it, because I think you have agreed, and I hope I am right in thinking you agreed with Mr. Hugh O'Neill that it would have been of no assistance to the

Revenue if they were treating the deed as a valid and a live deed.

A. If the deed was live, then the Furnis -v- Dawson, yes

Q. It went out the window, didn't it?

Now, just one or two other small matters.

Just in relation to the 38.8 million, I want to clarify one other answer I understood you to give. I thought you said that you did not think that any discounting had been applied to arrive at that initial assessment; am I wrong in that?

A. No, I agreed with Mr. O'Neill that if discounting was applied in the '85, that it would also apply for '74. In the computation, since there was none as shown in the document we were looking at for '74, it could be inferred that it wasn't there either in '85.

Q. We must assume discounting was applied to '74, because

MR. O'NEILL: With respect, sir, you can't make that assumption. It's a different tax.

Q. MR. HEALY: If you discount the '74 figure, then that's not in ease of taxpayer, is it? If you discount the '74 figure, it's certainly not in ease of the taxpayer, is it?

A. Certainly not what? I beg your pardon.

Q. In ease of the taxpayer.

A. Could you use some other

Q. If you discount the '74 figure, the gain becomes larger; isn't that right?

A. If you discount the '74 figure, yes.

Q. The gain becomes larger, not smaller?

A. Yeah.

Q. So if you were to discount the '74 figure and you think it wasn't done here if you had discounted it, and if it was appropriate to discount it I don't know, maybe some other witness will tell us the gain would have been larger, not smaller?

A. I take your point.

Q. I just wanted to clarify that point. And if in fact it wasn't discounted and if it should have been discounted, that was in ease of the taxpayer; isn't that right?

A. If it was sorry, repeat that question.

Q. If it should have been, but if it wasn't discounted somebody else who did the calculations will tell us it would have been a help to the taxpayer, wouldn't it?

A. Yes, yes.

Q. Now, in relation to the way you approach discounting, you were asked about two things. I think your attention was drawn to what I think is in Leaf 40, and this was a note to you on the 26th May, 1987, from Mr. John Reid in which he referred to a number of discounts, possible discounts that might apply. And your attention was drawn to the situation which might apply if you assume that the ordinary shareholders would not be able to gain control of the company. Have you got that?

A. Sorry, I have 40, and

Q. Go to the very last page of that leaf, and I think the

first document, as Mr. O'Neill says, "If" has probably been obscured in the photocopying: "If he assumed the ordinary shareholders will not be able to gain control of the company, what is the position?" And that was canvassed with you, and the appropriate discount was one not exceeding 30%, was the suggestion. Do you see that?

A. Yes.

Q. Now, if you go on to the previous page, however, you will see that Mr. Reid considered that in circumstances in which the ordinary shareholders could provoke or could merely provoke or stimulate a winding-up, and therefore had some powers, or could apply to the courts under Section 205, then the discount, if you look at the second-last sentence I won't go into the whole detail of it: "In the circumstances, a discount of up to a maximum of 10% would be reasonable." Do you see that? Second-last sentence.

This is just in the scenario which I think Mr. O'Neill described as, I think, the "nuclear option"; in other words, if the shareholders had only one power, the power to provoke a winding-up, if it's assumed they had some control and had that degree of control, then in that circumstance, you'll see that the discount canvassed is 10%. Just one of a range of discounts.

A. Right.

Q. Presumably that must have been taken into consideration or ought to have been, in any case?

A. In what?

Q. In approaching how you applied a discount to whatever the appropriate market value arrived at was?

A. I am just having difficulty in concentrating.

Q. You have actually

A. This is a paper prepared by somebody else.

Q. But you have applied the basis of that paper in your own document, which is the front document.

A. Right.

Q. And it's just that from your evidence, one might have the impression that you only canvassed one discount. You canvassed a number of different discounts?

A. That's true, yes.

Q. Including that 10% discount?

A. Yes.

Q. And just one last thing. You were asked about whatever what the appropriate price/earnings ratio was to be applied to maintainable profits in arriving at the market value of a company. I am not sure that's your area.

A. It isn't.

Q. And you were referred to various passages in various documents. Do you remember reading, at the time, the long report prepared by Mr. Thornhill and Mr. Reid?

A. The very first that's when I came into the case?

Q. Yes.

A. Yes, I would have read that in detail.

Q. I think the price/earnings ratio you apply is dictated by

the current circumstances when the valuation is carried out?

A. The day of the valuation, yes.

Q. It doesn't have to be the same. You don't apply the same price/earnings ratio today as you'd apply in 1974?

A. No.

Q. You might apply a lower one today?

A. Indeed. You hardly would.

Q. Depending on the circumstances?

A. When markets are buoyant.

Q. I'm not going to go into the details of this document, but what it does is it sets out the basis for applying a particular price/earnings ratio in 1987; isn't that right?

A. That's right.

Q. It's different to the price/earnings ratio applied in 1974. But if the economy crashed, the you'd have a much lower price/earnings ratio, wouldn't you?

A. Right.

Q. In other words, there isn't any rule you apply the same price/earnings ratio to a '74 base valuation as you are applying to an '84, '85 or '86 current valuation?

A. That's right.

Q. That's my understanding as well.

Thank you very much, Mr. O'Cathain.

CHAIRMAN: Thank you, Mr. O'Cathain, for your assistance over two pretty long and tiring days.

10.30 on Tuesday.

THE TRIBUNAL ADJOURNED UNTIL TUESDAY, 21ST JUNE, 2005

AT 10.30AM.