

THE TRIBUNAL RESUMED ON THE 21ST JUNE, 2005 AS FOLLOWS:

MR. COUGHLAN: Mr. Clayton.

CHAIRMAN: Good morning, Mr. Clayton. Thank you for your assistance and your help thus far. You are already sworn.

CHRISTOPHER CLAYTON, PREVIOUSLY SWORN, WAS EXAMINED BY MR. COUGHLAN AS FOLLOWS:

Q. MR. COUGHLAN: Mr. Clayton, I think you've furnished the Tribunal with two memoranda of intended evidence.

A. That is correct.

Q. One dated the 13th April 2005, and the other dated the 18th May 2005. And you know the procedure whereby we go through the memoranda in the first instance and then come back to deal with certain matters.

A. Yes, I understand.

Q. If we deal with the 13th April, 2005 memorandum first.

I think you have informed the Tribunal that you were employed as a civil servant in the office of the Revenue Commissioners up to July of 2004. That from March 1979 to October 1986 you were in charge of the Capital Gains Tax Section of the Office of the Chief Inspector of Taxes.

Your immediate superior in 1985 and 1986 was Dr. Donal De Butleir, Superintending Inspector of Taxes, who also had responsibility for corporation tax and Value Added Tax. In October 1986. You were promoted to the grade of Superintending Inspector, and you were assigned to income tax work, reporting to Mr. Seamus O'Connell, who, in turn, reported to the Board of the Revenue Commissioners.

A. That is correct.

Q. I think you have informed the Tribunal that in early 1985, you became aware, you think as a result of a phone call from the then Chairman, Mr. Pairceir, that a certain tax position that had arisen in relation to the Dunnes Stores Group had been raised with him. The position arose from the fact that the shares in the Dunnes Holding Company were held by Trustees under an indenture, a deed of settlement, which was executed on the 16th March, 1964, and which had a vesting day on the expiry of 21 years.

You say, having looked at the available documentation, you observed that a C.G.T. occasion of charge, a deemed disposal of assets by the Trustees under the provision of the Capital Gains Tax 1975 seemed to be imminent. In the Dunnes case, a charge would be computed by reference to the difference in value of the shares on 6th April, 1974 and 1985, subject to inflation relief, which is described as indexation, and expenses.

A. That's correct.

Q. You say that as the 1985 value was probably substantial in relation to the 1974 value, it seemed likely that a C.G.T. liability was imminent, the size of which would be largely dependent on the 1985 valuation. As the shares were not quoted shares, valuation issues arose. Revenue work on the valuation of unquoted shares had for many years been centralized in the Capital Taxes Branch, not in the Chief Inspector's Office. When questions arose in relation to

such valuation, they would be referred to VAT Branch for guidance?

A. That is correct.

Q. You have informed the Tribunal that it is your recollection of the relevant events of 1985 that the primary concern of the Trustees was, understandably, the minimisation of the imminent tax liability, and that consequently a critical factor at the outset was the 1985 valuation.

A series of meetings ensued. There were meetings with Trustees and also, naturally, internal Revenue meetings. The bulk of the discussions were concerned with share valuation issues.

You have informed the Tribunal that you recall that as the deadline for the expiry of the 1964 deed became close, there was some indication from the Trustees that various possibilities were being considered, but these are not spelt out to Revenue. There was no agreement with the Trustees.

In May 1985, you were told that further legal documentation had been submitted by the Trustees . This documentation, two deeds of appointment dated 14th March 1985, was referred to you for consideration and opinion as to its effects.

You say that after examining the deeds, it was your view that the Trustees of the 1985 deeds seemed to have become absolutely entitled to certain assets as against the Trustees of the 1964 deed at the precise times the new

deeds were executed, thus triggering a C.G.T. charge on the disponers, the 1964 Trustees.

Because of the large sums involved and the provisions of the legal deeds, Revenue decided to consult with senior counsel in the matter. His opinion was to the effect that a disposal of the shares had occurred on the execution of the new deeds. This was also your view, you agreed this, and it was conveyed to the Trustees as the Revenue's view of the events.

The Trustees did not agree. Discussions continued with them. The old valuation questions were dominant in meetings with them, but issues relating to the new deeds and capital taxation issues were also discussed. Agreement with the Trustees was not reached.

Having regard to Revenue's view of the share values in 1974 and 1985, you arranged for a C.G.T. assessment to be entered as follows: 97 million, that being the value subject to whatever inflationary and charges

A. Not quite. That, I haven't got the computation in front of me. The value, the '85 value as communicated by Capital Taxes Branch was, I recall, 120 million. The 1974 value was given to me as I think 5.5, subject to inflation relief. That brought it up to perhaps 20-odd, subtracting the 20. And then I included, or I gave allowance for potential expenses which were likely to have been incurred, I think of the order of perhaps 230,000, to bring it down to a round chargeable gains figure of 97 million.

Q. And then, applying the tax rate at 40%, you arrived at a figure of 38,800,000?

A. That is correct.

Q. You say that this assessment was made on the 27th November, 1986, by Mr. Sean O'Siochain, the Senior Inspector dealing with trusts, inter alia. The assessment was appealed by the Trustees; is that correct?

A. That is correct.

Q. You say that when you were promoted in October 1986 following a civil service-wide competition for the post of Superintending Inspector of Taxes with responsibility for income tax, you ceased to have responsibility for the C.G.T. section. From then on you were preoccupied with two matters: firstly, the overall management and administration of the income tax system, including PAYE; secondly, in early 1987, the question of introducing a system of self-assessment for income tax, a radically different way of dealing with liabilities and Revenue collection, and subsequently all the necessary steps to initiate the new system as and from the 6th April 1988, first payment date on the 1st October, 1988, and to make it as efficient and effective as possible.

Incidentally, self-assessment was applied to C.G.T. with effect from the tax year 1990/1991?

A. Correct.

Q. Did it also apply to Discretionary Trust Tax around this time?

A. The Capital Gains Tax regime applicable to Discretionary Trust Tax would have come in in 1991, at the same time.

Q. I'm talking about self-assessment in respect of the

A. But income tax, income tax payable by a Discretionary Trust would have been covered by the self-assessment regime brought in in 1988.

Q. I see.

A. That's income tax.

Q. I am just trying to understand it.

A. Yes.

Q. Now, you say you had some minor involvement with C.G.T.

matters after your change of duties in October 1986, which essentially consisted of handing over papers and giving information about particular cases. Mr. Sean O'Cathain was promoted to your previous post, in charge of C.G.T.

Section, in December 1986. Your involvement with the Dunnes Trust continued for some time but on a reduced and diminishing basis. You were not involved in a major way with the subsequent processing of the Trustees' appeal, and you were not involved in any way with the hearing by the Appeal Commissioners or preparation with it, nor with any decision as to proceeding with the case.

You do not recall when you first heard that the appeal had been heard and that Revenue had lost the appeal and had decided not to take it further, but you were sure that it was after the decision had been taken. You then turned to specific points which were raised by the Tribunal and which

are not covered in the preceding paragraphs, and the following are your responses.

I think you were asked for details of the involvement of the Chairman of the Revenue Commissioners in the approach adopted to the raising of the assessment, the valuation of the assets the subject matter of the of the trust, the interaction between the Revenue Commissioners and the Trustees, and persons on their behalf, and the strategy followed in relation to the appeal by the Trustees Appeal Commissioners.

And you have informed the Tribunal that your knowledge of this is reflected in the available documentation. I think we'll turn to that in due course.

A. Right.

Q. The then Chairman, Mr. Pairceir, up to the time of his retirement in September 1987, was involved in internal discussions with the C.G.T. assessment, relevant valuation matters and meetings with trustees. He approved your proposal that the Trustees be assessed and in the amount considered appropriate by you.

A. That's correct.

Q. You do not know about his involvement, if any, re the Appeal Commissioners hearings.

A. That was the position when I wrote that note at 13th April. Obviously papers that came to my attention within the last fortnight would require me to change that if I were writing it now.

Q. Is that result of what you read in the papers, or does it trigger some memory?

A. It doesn't trigger any memory.

Q. It's really an analysis of the papers?

A. What I read last Thursday week, after I got that dossier of witness statements, was news to me in relation to this matter.

Q. Was news, yes?

A. I didn't know that he had been involved privately regarding the Appeal Commissioners hearing.

Q. But just when we come to deal with the papers, I want to be able to distinguish between information which you gleaned from now looking at the papers as opposed to the papers triggering an actual memory.

A. There is no triggering of memory in that.

Q. I think you were then asked for details of all dealings and contacts, formal or informal, between the Revenue Commissioners and the Trustees.

You were asked for your knowledge of all dealings, meetings and contacts between the Chairman of the Revenue Commissioners and the Trustees, Mr. Bernard Dunne, or any other person on their behalf.

You were asked for your knowledge, direct or indirect, of the meetings between the Chairman of the Revenue Commissioners and Mr. Bernard Dunne, dating from May 1987 to September 1987, including their understanding of the meeting of the purpose of the meetings and the outcome

of the meetings. You were asked for your knowledge, direct or indirect, in relation to the outcome of the proposed settlement of the C.G.T. assessment at $\text{£}1,600$ million that appears to have been discussed between the Chairman and Mr. Bernard Dunne at a meeting on or about the 4th June 1987. And I think you were asked for your knowledge, direct or indirect, of all matters, factors or considerations which prompted the then Chairman's determination to compromise the assessment at $\text{£}16$ million. You were asked for your knowledge of the further meetings between the then Chairman and Mr. Dunne, the Trustees, in or about July/August 1987 and/or about the 10th September, 1987, and the outcome of such meetings.

I think you were asked for your knowledge of the meeting between the Chairman and Mr. Dunne/the Trustees in or about March 1988, including the purpose and outcome of such meetings.

And you have informed the Tribunal that the knowledge you have of such contacts is confined to what is recorded elsewhere in writing. So you mean in the documents that we have

A. Absolutely, yes.

Q. you are not aware of any contacts which had not been referred to in the available papers. As to the report at $\text{£}16$ million possible compromise settlement, the Chairman, Mr. Pairceir, would have been conscious of the undoubted uncertainties regarding the share values in 1974 and 1985.

He would also have known that Revenue could not be certain as what decisions the courts might make regarding various legal points.

I think you were then asked for your view, prior to the determination of the appeal by the Appeal Commissioners, as to the liability of the Trustees to Capital Gains Tax and the likely outcome of the appeal and the basis on which those views were held. And you have informed the Tribunal that by reference to legislation case law and the known facts of the case, you believed that liability existed.

You did not accept that, of itself, a simple statement of a purported power of revocation was sufficient in relation to an asset to enable the disposal of the asset to be disregarded. You did not accept that the 1964 settlement had been extended beyond the 14th March 1985. And senior counsel's opinion in 1985 and 1986 supported this view of yours.

A. That is correct.

Q. As to the outcome of the appeal, while you could not of course be confident, you were hopeful and not pessimistic about the ultimate result; that is, you thought that Revenue would probably win. Because of the amount of tax involved, you would have expected that the losing side at the initial stage of the appeal process would be taking the case further, unless the Dunnes side were to lose on the facts by reference to particular evidence obtained from the Trustees, potential beneficiaries, and other parties.

I think what you are saying is you were confident that the probabilities favoured the Revenue going into this; that was your view?

A. Yes. I hesitated about the word "confident", but certainly I was hopeful.

Q. You were hopeful?

A. Yes. I thought it was a probability that Revenue would win ultimately, whatever about earlier stages.

Q. Yes. And it was also your view, at that stage, whatever about happened in the case subsequently, and you also thought that whoever lost this case would probably go the whole way?

A. Yes. That was my view at the time. This is not hindsight.

I felt that Revenue obviously it's not hindsight, because we didn't go further; but I felt at the time that we would probably win, and I also felt that whoever lost, whether it was the Revenue or the Trustees, and the would be going further, and the Trustees, and I think Mr. Ben Dunne, had indicated that they would be going to the Supreme Court if necessary.

Q. I think you were then asked for your knowledge of the involvement of Mr. Seamus Pairceir as adviser to Mr. Bernard Dunne/the Trustees following his retirement as Chairman of the Revenue Commissioners. I think you have already responded to that by something you said earlier, that you know nothing about this?

A. That's right. I did not know at the time.

Q. Until you saw the papers here?

A. Until I saw the papers in April.

Q. I think you were then asked for your knowledge of all dealings or contacts, if any, between any official of the Revenue Commissioners and Mr. Seamus Pairceir at any time in relation to the Capital Gains Tax assessment appeal to the Appeal Commissioners or the decision of the Revenue Commissioners not to appeal the adverse finding of the Appeal Commissioners. And you refer to 2 above.

I think you were then asked for an outline of the process whereby it was decided that the Revenue Commissioners would not appeal the adverse decision of the Appeal Commissioners on the C.G.T. assessment, details of the input of the officials, Commissioners and Chairman into such decision, and the knowledge of the officials, direct or indirect, of all factors these were directed to a number of Revenue officials, so it wasn't unique to you, this series of questions.

A. I understand that.

Q. And in relation to all these matters, you had no such knowledge at the time, and you were not involved in any way. That is in consideration of whether there'd be an appeal taken from the decision of the Appeal Commissioners.

A. I didn't know that the appeal hearing was actually on, or listed, and I didn't know of the result until much later.

Q. I see. I think you furnish another memorandum, the one dated 18th May, 2005?

A. Yes.

Q. And I think the query that was raised with you here was you were asked for your knowledge of any agreement or assurances provided to the Trustees of the Dunnes Settlement Trust by the Revenue Commissioners that there would be no further liability to income tax on distributions made for the sole purpose of discharging Discretionary Trust Tax to include details of inquiries which you may have made into the matter and details of your input into the determination that an income tax assessment should be raised.

And you have informed the Tribunal that you have no recollection that there was an agreement of the kind claimed by the Trustees. One would not have expected there to be such an agreement, especially an open-ended agreement. If there had been an attempted agreement, one would have expected such contemporary some contemporary write about it, or at the very least, a mention beforehand to someone in the Chief Inspector's Office. As it would have been extrastatutory, such an agreement would probably have been very controversial, especially in the circumstances of the ongoing relationship between Revenue and the Dunnes. It would have been memorable by anyone in Revenue involved in the Dunnes case who had heard of it. A memo under Item 31 of your Book 1 on the 24th March, 2005, contains a reference to possible relevant communications, apparently on the 16th March 1987 involving

Mr. F Bowen, Dr. D. Thornhill, and apparently Mr. S.

O'Cathain. You had not been aware of these communications until recently. The memo is somewhat unclear, but it might be regarded as being contemporary and of some relevance.

I'll come to deal with that in due course, that particular document.

A. If I could just modify, perhaps the penultimate sentence on that paragraph: "I had not been aware of these communications until recently." I think it would be more accurate to say I have no recollection of being aware of those communications until recently. I have no recollection of being of hearing of them at the time.

Q. Yes. I understand.

Your present recollection of the discussions referred to in paragraphs 6 and 8 of Mr. O'Connell's note is not detailed.

You vaguely recall that he consulted you briefly to check if you were aware of any basis of the Trustees' claim in this matter and that you told him you were not so aware.

As the claim did not seem plausible, you had no confidence in them. You did not check with anyone else about it.

Mr. O'Connell's reputation as a technical expert was very high, and you had no reason to review in detail the completed assessment or or, sorry, the contemplated assessment or to advise him against making them. Whatever meetings you had with him on this matter would not have been lengthy.

I'll come to deal with this whole question of the income

tax issue in due course.

A. Okay.

Q. But there is just one matter that in relation to that second memorandum, in the first paragraph of your response there, where you make reference to the fact that any arrangement or agreement that would have been arrived at in relation to forgiving income tax due in the future would have been extrastatutory, and would of course have been memorable in the minds, in your view, of any Revenue official who would have heard it?

A. Yes.

Q. And you say particularly in light of the or especially in the circumstances of the ongoing relationship between Revenue and the Dunnes. What is that a reference to? Is that a reference to matters which arose as a result of McCracken?

A. No, it's a reference to the events of 1987. The alleged agreement occurred in '87.

Q. Yes, I understand that.

A. And a concession, or an agreement of the kind suggested here would have been extrastatutory and would have been memorable by anybody handling the C.G.T. matter at the time.

Q. I understand the point you make that it would be memorable because of that reason. It's the matter which you have in parenthesis where you say: "Especially in the circumstances of the ongoing relationship between Revenue

and the Dunnes". What's that a reference to?

A. The reference to the relationship in March, April, May, all of 1987, where we were, where there was an outstanding C.G.T. matter.

Q. I see. Perhaps we'll come back to deal with it in due course, because we know that in respect of this particular income tax, that it wasn't paid; isn't that right?

A. So I understand from the statements which have been made, yes.

Q. As far as we know at the moment. Can you assist the Tribunal about this? Was this matter completed by the time you retired from the Revenue in 2004?

A. I really can't say. I'm not up to date with regard to what happened in relation to that. I really don't know. I couldn't be regarded as anything like an expert in relation to the Dunnes' recent taxation

Q. It isn't a question of expertise. This is a question of fact that I am trying to ascertain here, because the Tribunal as of yet has not been able to obtain this particular little piece of information from either the Trustees, the Dunnes Group or the Revenue Commissioners as to whether this has ever been resolved, this question of the income tax: Has it been paid?

A. That surprises me. I wasn't handling it. I just don't know. But I would have expected you to be able to find out what the position is.

Q. I am just wondering if you knew?

A. No, I don't.

Q. I suppose, if you got the book of documents, Mr. Clayton, might be the best way to approach this now.

Do you remember how you first became involved in this question of the a potential for C.G.T. in respect of the Dunnes Trust?

A. I'm not crystal clear on the subject, but I think there was a phone call, either to me or possibly to the Chief Inspector at the time, but I had a conversation, I think, with the then Chairman in relation to it, and I was head of the C.G.T. section, and therefore I was involved.

Q. So you think it would have been from the Chairman's office, at least?

A. Yes, and basically from the Chairman's office.

Q. You were brought into the matter?

A. That's right, correct.

Q. And can you remember initially the type of discussion that was taking place, or the type of discussion that was taking place, with you at least?

A. Well, the information which had come into Revenue suggested that or was to the effect that this was this 1964 trust which had a 21-year life-span, and that it was due to expire in March, I think I heard about this in February was to expire next month, and there were significant implications vis-a-vis tax, and a question was arising as to what was, a) was there a liability, and b) what was being done about it, and so on.

These were things that were running through the Trustees' minds, quite obviously, in the light of discussions which occurred later.

Q. Well, if you go to Tab Number 3. This is a note made by Mr. P. O'Connor of the 6th March 1985, and the note opens:

"The Chairman and officials of the Revenue Commissioners met professional representatives of Dunnes Stores on the 7 March to discuss the valuation for tax purposes of the company."

A. Yes.

Q. Do you think you were at that meeting? Or do you know?

A. I don't recall offhand. Perhaps the papers would indicate that I was.

Q. There isn't a reference in this particular paper says:

"The valuation is required in the context of three tax charges that will arise on the proposed distribution (before 16 March) of the funds of the Discretionary Trust which comprise the bulk of the shares in Dunnes Holding Company."

Then the three taxes, I suppose, are raised there.

"Discretionary Trust Tax at 3%." Capital Gains Tax on a disposal by the Trustees of the funds, and Capital Acquisition Tax, that is Gift Tax on the beneficiaries taken by the beneficiaries on distribution."

So, do you have a recollection of being at such a meeting?

A. I may have been at the meeting; I don't know. My papers that I have are not comprehensive.

Q. The reason I am asking you is we can't determine from this particular document who specifically was at the meeting. I am just wondering, would you have a recollection of

A. I certainly was at a meeting, or meetings, where the question of valuation arose.

Q. That's what the representatives of the Trustees, or with the Trustees, as well as Revenue officials; can you remember being at such meetings?

A. Between?

Q. Between the parties?

A. Between the parties, yes. In fact I have a manuscript note here which I probably have, 19th February, where the matter seems to have been discussed. And also, I think, 27th May, but I have nothing here in relation to the date of oh, yes, in relation to the date of 7th March. It's possible, but I simply can't confirm without checking through all the papers.

Q. Do you ever remember then seeing this paper? Because I think what we need to go to then is a reference at Tab Number 6; this is a handwritten note. You see: "Meeting in Chairman's office on the 10/1/86. Present Chairman, Assistant secretary, Christopher Clayton and self. Discussed mainly bringing in outside expert. Chairman not too happy with 15(3) or with annual PF. C. Clayton wanted some reduction in the wealth tax '75 figure for C.G.T. base date. Meet again Friday 17/1/816. Do nothing meantime."

A. Could I just make a small correction there. I think there

is a typo in the middle of the, of that note. "Chairman not too happy with 15(3) or with annual PF." I think "annual PF" might read "Arnott's P/E".

Q. I think that's correct. I think it's "P/E". Yes.

"Arnott's P/E".

A. I think that's it. I cannot be sure.

Q. There seemed to have been some involvement. Sorry, you had an involvement in discussion, so, about valuation for the purpose

A. I was present at meetings where valuation was discussed. I was not the expert on valuation.

Q. I appreciate that. That work was mainly undertaken by Dr. Thornhill and his side?

A. That was their responsibility.

Q. You were aware of the progress of their work, I take it?

A. Yes, generally, yes.

Q. And you were aware that there were discussions taking place, not unreasonably, between the Revenue and representatives of the Trustees, and perhaps some of the Trustees themselves, in relation to the question of valuation?

A. Yes.

Q. Now, I think if you go to Tab Number 7, it's the next tab, there is a reference again, you were present at a meeting, Dr. Thornhill was there and Mr. Reid and the Chairman, and you discussed the question of using an external value and extended to which confidential information "extent to

which confidential information should be made available to him."

So again, there was this question arising of valuation, the work being done by Dr. Thornhill's division or section, and you were discussing whether you should go to something from the outside and how you might maintain security in respect of

A. That question was being discussed, yes.

Q. I think then, if you go to Tab 9: This is a detailed memorandum on computation being contemplated by the Revenue I think. And a copy of it was sent to the Chairman and to you and to Mr. McDermott, as far as I can see?

A. That's right.

Q. And I think if you look at the assignment, at Number 1, paragraph number 1, "Private Company Share Valuation".

Bowen's case, that was the code being used for Dunnes, isn't it, within the Revenue at the time?

A. Bowen's case, absolutely, yes, that's right.

Q. "The assignment was:

"1. Valuation of shares in a private trading company in the retail sector for Discretionary Trust Tax (DTT) for valuation of January 1984 and tax (March 1985)."

That was the assignment; isn't that correct?

A. That was the assignment as recorded by Capital Taxes Branch, yes.

Q. And I don't think we need go through it, because everybody has the documents here, we need go through, and

Dr. Thornhill has giving his evidence, but that gave rise, if you go to page 26 of the document, to conclusion; isn't that correct? This was the work done by the Capital Taxes side?

A. Yes.

Q. And they are taking certain matters into account and taking the suggested range of 8.5 million to $i_c^{1/2}10$ million for maintainable profits, and 15 and 16.5 for price/earnings ratios result in the following valuations of the following orders of magnitude."

Then for Discretionary Trust Tax, they're in a range of (A) from E (8.5) by P/E (15) that's taking 8.5 million as the maintainable, and they have 127.5 million less 5%; that's at paragraph (b). We needn't go into paragraph 6; I beg your pardon that comes back to 120 million, approximately. And then they take E, earnings at 9 million, and that produces 135 million less 5%, as again in paragraph 6, and they give approximately 128 million.

So what they are talking about there, on the work they have done for Discretionary Trust Tax purposes, that the view of the Revenue was that the value of the company would be somewhere as of January 1984, that is would be in the range of 120 million to 128 million; isn't that correct?

A. For Discretionary Trust Tax, yes.

Q. And carrying out a like exercise in respect of Capital Gains Tax for a valuation of the company as of 14th March, 1985, they come up with a range in the region of 126

million sorry, I beg your pardon, 148 million to 165 million, and applying a 15% discount in relation to those, they bring it in the range of 126 million to 140 million?

A. That is right.

Q. And I think that 15% discount was to reflect the restricted voting rights, or the grey area in relation to the position of the ordinary shares in the company; isn't that right?

A. It was with reference to that situation.

Q. So that was the work that had been done in relation to valuation and applying a discount which would be which had to be done in the case of C.G.T., because there was a statutory requirement in that regard?

A. That was their paper as of 25 February, 1986.

Q. Now, as you have said, expertise in that area, that is the area of valuation, as far as the Revenue was concerned, rested with Dr. Thornhill's side of the house; isn't that correct? That's where everyone would go looking for this type of work to be done?

A. That was their speciality. They had been handling, or the valuation of unquoted shares had been handled in that area for many years, starting from the time that, in a sense, the Estate Duty Office was in existence right up to 1974/75. They of course had to be very heavily involved in the valuation of unquoted shares. There was expertise in that area, and that expertise transferred over into the new into its successor, the Capital Taxes Branch?

Q. Now, if you go to Tab Number 11. This is the note of what

appears to have been a reasonably lengthy meeting between the Chairman, Dr. Thornhill, Mr. Reid, you, Mr. McDermott, and Mr. Keane. And really the under the heading

"Assessment of C.G.T.", there were many matters discussed, but under the heading of C.G.T., at B: "The Chairman said that we should not be rushed into an assessment for C.G.T.:

That there were good reasons (including the size and complexity of the case and nonavailability of the 1984 consolidated accounts) for delaying until we were totally satisfied with our valuation. He added that any assessment made prior to the 31 May 1986 would, automatically be published in the appropriation accounts in November."

So, do you have a recollection what the Chairman was counseling here was caution, for two reasons, I think. One was the Revenue had to be correct, or as correct as they could possibly be, in respect of the valuation, in fairness to the taxpayer, obviously. And secondly, that once you went with a figure, that would, at some stage, find its way into the appropriation accounts and would be a matter of record which could be scrutinised by other agencies?

A. I would think that the first mentioned consideration was the primary one, that

Q. I accept that.

A. that in fact it would be wrong to simply slapping in an assessment just out of the blue, thinking that it looked all right. One had to handle it very carefully. Otherwise one could be accused of making a vexatious assessment and

that would be wrong; it would be wrong to assess a taxpayer in an amount which would be known to the Revenue to be excessive.

The other factor, the appropriation accounts, that I think would have a secondary matter in relation to the Chairman, because, as was pointed out last week, the amounts of Capital Gains Tax yield in the mid-1980s were of the order of 11, 12, i.e. 13 million. An assessment of the order of 30, i.e. 40 million would clearly, you might say, stick out like a sore thumb for anybody looking at the figures, and questions would be asked by the Comptroller and Auditor General and possibly other people. There was concern, certainly at that time, in relation to the amount of uncollected debt which gave rise to comment that if only Revenue would go and stir themselves, we would be able to solve all our budgetary problems. Therefore, there was a concern in relation to estimated assessments which would have been, which might have been excessive.

And I would not think that it was the reason in an assessment was delayed. The Chairman's primary concern was to get it as right as possible in the circumstances. I would have to say, my personal instinct would have been to assess earlier. I had in fact sent out internal memos in 1983 and 1984 in relation to much smaller items, saying, "If you have if you think there are unassessed liabilities, go and assess them, and don't wait".

Q. That's in respect of different taxpayers, of course?

A. Different taxpayers, absolutely, yes. I had a perception that people were that liabilities were remaining unassessed for far too long, but there was no danger of this happening in this case. This was getting very active attention.

Q. I'm just trying to be very clear here, and the way the note is recorded and the evidence you give, the Chairman was counseling caution, primarily to ensure that the figure was right, in fairness to the taxpayer; and the secondary issue was also mentioned that once a step was taken once the assessment was raised, it would find its way to the appropriation accounts and would be the subject of scrutiny. And those were the reasons, and we understand your understanding are the primary reasons.

A. The amount would have been become public knowledge. The assessee, in other words, the person who was assessed, would not have become known.

Q. It would have remained confidential?

A. Yes.

Q. Would it have been capable of being determined by the matter appearing in the appropriation accounts that there was just one assessee, or could have been that there were a number of assessees and the figure rounded up?

A. No, it would have been a global figure of, in the circumstances I really don't know what the precise figures were for the year 1985, but it might have appeared, if in fact the assessment had been made before May of '85,

there might have been a figure of, say, perhaps I don't know, 48, 50, 60 million euro, as compared to perhaps only 10 in the previous year. But there would not be any indication for the general public as to how many people were involved.

CHAIRMAN: But the other agency that could have got involved, if there had been an irresponsibly high figure put in, would have been the Comptroller and Auditor General in due course?

A. The Comptroller and Auditor General would have been entitled to know what was going on in this case. But that was internally, he had a right to that information. The public would not have any right to that information.

MR. COUGHLAN: Now, I think if you go to Tab 13 now, Mr. Clayton. Do you know maybe you don't; it just might be of interest did the Comptroller and Auditor General ever raise a query in respect of this case, to your knowledge?

A. I have no knowledge.

Q. Tab Number 13. This is a note of Mr. O'Cathain's, and it's a note of a meeting with the Chairman, yourself, Mr. Reid, John Thornton: technical discussions there were technical discussions?

A. Could I make a slight correction on typing as well.

Firstly the attendance, CC

Q. Then

A. Then it says "Sec Gen". I think that's "self".

Q. That's "self", I think.

A. That's "self", Sean O'Cathain.

Q. I agree with you. And there was a discussion on sorry, "Mrs. Dunne died on the 8th March '86; further charge to C.A.T." You can then see that there is a note here again of the valuations apparently being discussed. "100 and 120 generally agreed".

Now, they seem to be figures the 100 seems to be a reference to 100 million for C.A.T. purposes, and 120 million for C.G.T. purposes?

A. That would seem to be a fair deduction, yes.

Q. Would you think that that's probably what that note would record?

A. That seems to be seems to follow from that line.

Q. Then there is a question: "What" something "to apply to" "what deduction to apply to 120 million for lack of control?"

A. Yes.

Q. "Opinion of awaited on this.

"Chairman will then talk to

Question whether new trust made in '95 a question of fact and law. Fact to be established in evidence by cross-examination of the Bowen family. This will keep Ramsey approach open also.

"Chairman will take advice on matter and this approach to be adopted" "if this approach to be adopted. He could mention it to Bowen. It might get them negotiating. Why

the original share setup and why the change in 1985. Two artificialities to consider" this is all your own discussions and notes on comments that were being made; isn't that right?

A. Yes, they were

Q. You were throwing

A. It's an indication of the sort of conversation that was going on.

Q. It was the type of discussion that was going on?

A. The sort of talk and sort of the discussion we were having, yes.

Q. If you go over, then: "Tax CG likely to be 40 million, extraordinary considering" sort of, you know, you were discussing steps that had been taken by the Trustees. You were expressing views about it?

A. Well, in fact that Sean O'Cathain's personal view there, and he quite rightly observed that under the pre-1982 regime for Capital Gains Tax, there was a tapering relief whereby assets held for 21 years or over could be disposed of without any charge to Capital Gains Tax. That's what is referred to as the tapering relief.

Q. I see. But your point of view, or the Revenue's point of view here, it seems to be that there was a consensus that the valuation of the asset for C.A.T. was in the 100 million region and for C.G.T. was in the 120 million region?

A. That's right. That's correct.

Q. And that there doesn't seem to be any the note doesn't seem to indicate that there was any dissent from that type of view?

A. That was the Capital Taxes Branch's view of the appropriate figure, the figure that they felt at the time might be defensible.

Q. Very good.

A. Sorry, one thing which occurs to me in relation to the tapering relief which I mentioned: Of course, with the trust being set up in 1964, the new Capital Gains Tax regime which came in in 1982, would mean that the maximum life-span, the holding of the shares would not have extended beyond, I think, about 18 years.

Q. That's right. Yes.

A. Nevertheless, the rate of charge to C.G.T. for an asset held for 18 years would, I think, speaking from memory, be as low as perhaps 3%.

Q. 3% on the total?

A. I'm not absolutely sure about the 3%, but it was quite low; it was tapering from whatever it was, 30% down in stages.

Q. Depending on the length of time the asset was held?

A. Absolutely, yes.

Q. So it may have been at 3% at 21 years?

A. No, it was nil if you held it for 21 years or over. And tapering upwards, if I might use that expression, depending on the length of ownership.

Q. And that was that would only have been C.G.T. If

there would have been a C.A.T. arising?

A. There would, of course. And depending on when these things happened, it could have been all sorts of tax consequences.

For example the Estate Duty regime applied up to 1975, and Capital Taxes regime was brought in then, or the

consequences would have been matters for deliberations by

the Trustees themselves, and of course Mr. Ben Dunne

Senior.

Q. Mr. Ben Dunne Senior?

A. Yes, of course.

Q. And Mrs. Dunne, of course?

A. And Mrs. Dunne, excuse me.

Q. Now, if you go to Tab Number 16, this is a note of the 4th

September 1986, and: "Chairman phoned. He has told Frank

Bowen that the big bang C.G.T. charge will not be made just

yet, but that C.A.T. liability will be subject of two

assessments, the 1984" that's the initial "3% charge

on Mr. Dunne's death, and 1% annual charge. And the 1986

3% charge be made just yet lack of information." That's

in relation to Mrs. Dunne's death. "Is likely that the

Bowens will see the Minister next week, which will advance

matters."

A. "Which will advance matters".

Q. "Which will advance matters".

A. Yes, that is what I wrote.

Q. Do you know or maybe you don't, because the C.A.T.

wasn't your responsibility at all.

We can see that there was an assessment, and the value of 100 million used for the purpose of the assessment in respect of Mr. Dunne's death, the 3% on Mr. Dunne's death, and also giving rise to the 1% subsequent. Do you know if the matter in relation to Mrs. Dunne's death was just resolved between the parties, or

A. I have absolutely no information at all on that; I'm sorry.

Q. Now

A. I would just observe, by the way, on the upper half of that page, which is not on the screen, I have extemporary note made, I think, during the phone call.

Q. That's I think you have "Chairman, Frank Bowen, delayed" under that.

A. Deciphering these things is not the easiest, but I think the interesting things are the last two and a half lines, where apparently it's indicated that Mr. Bowen or the Dunnes side would see the Minister; and I think the Chairman, Seamus Pairceir, had told them that they'd have to face up to their liabilities.

Q. Right.

Reference to "Minister", there, I presume is the Minister for Finance.

A. Minister for Finance, I take it, yes.

Q. And do you think that reference there is Mr. Pairceir will be Mr. Pairceir indicating to Mr. Bowen on behalf of the Trustees that they'd have to face up to their liabilities some way, or one way or the other?

A. They just couldn't ignore the liabilities which seemed to exist.

Q. So, can I take it from that note that it was your view that what was being indicated to you, or your feeling of what the Chairman's position was, that this matter was going to have to go ahead; it was a question of when, and that people would have to face up to the real situation. That was your sense of what was being conveyed to you?

A. It couldn't be put on the long finger and postponed. They'd have to go and face up to the fact that there seemed to be consequences.

Q. Yes.

If you go to Tab 21: Is that your note?

A. That is my note, yes.

Q. And it's a note of a telephone conversation on 10 November, 1986; isn't that correct?

A. That is right.

Q. And your first record: "The Chairman phoned. Mr. Bowen did not see the Minister and the Chairman phoned him (Mr. Bowen) telling him that he proposed to have the C.G.T. assessment made. Mr. Bowen inquired about the payment on account provisions and the rate of interest on overpayments. I told the Chairman that the C.G.T. provision in these matters were the same as for income tax (90% and 12% PA respectively)."

A. If you paid 90%, you would escape an interest charge.

Q. There'd be no interest charge. So the first thing, the

Chairman was perhaps looking for information from you as to what the position would be on the question of payment on account reasonable enough and interest charges?

A. That's right, yes. A factual inquiry.

Q. The second note is: "The Chairman phoned back to say that he had communicated the information re PAC"

A. That's "payment on account".

Q. "and interest to Mr. Bowen and had in the course of conversation affirmed his belief that the C.G.T. liability existed.

"The Chairman asked me to arrange accordingly re assessment which should be preceded by a courtesy letter advising re imminent assessment. The Notice of Assessment, preferably, should not be issued in the ordinary post but instead delivered by hand; however, the statutory provisions in this matter will have to be checked out beforehand."

So what the Chairman is telling you here, he has spoken to Mr. Bowen, told him about the technical information, payment on account and interest charge, but that he informed him that the C.G.T. was, in his view was liable, the assessment was going ahead, but as a matter of courtesy, how it would be preceded by a letter, and the technical aspects or the statutory aspects of service would then have to be considered?

A. Two things there, courtesy and confidentiality in all the circumstances.

Q. Yes. So as of this time in November of 1986, as far as you

could understand the situation, the Chairman was of the view that the C.G.T. liability existed; that he was obviously happy to proceed with the assessment on the basis of the valuation work done by Revenue?

A. He was satisfied that liability existed. The amount of the liability would follow from whatever opinions the Capital Taxes Branch people supplied as regards the 1974 and 1985 figures, and these had been obtained from Capital Taxes Branch.

Q. These had already been obtained by this time?

A. They had. I'm not quite certain when they were actually supplied, but they were supplied certainly by that date.

Q. By November of 1986?

A. By November of 1986. I know that I wrote formally to Capital Taxes Branch at some stage asking for the figures, and they replied formally giving me the figures. Now, I don't have those minutes with me.

Q. No, no, fine.

If you just go over the tab, now, to Tab 22, and this is your letter, the letter that you had discussed with the Chairman would be sent as a courtesy before the assessment was raised; isn't that right?

A. That is correct.

Q. It's dated 24th November, 1986.

A. I had written to the Chairman just before that I wrote to the Chairman on the 18th November telling him what I proposed to do, which is broadly in line with this, and

showing him the computation. And

Q. Do you have that document there?

A. I have it here, yes.

Q. Perhaps we could just take it and put it up on the screen for the moment, and we will retrieve the document out of I'll give you back your bundle of documents in a moment again, if we just use that for the screen for the moment.

A. While that's being attended to, perhaps could I suggest, or ask for a change in the typed version of the manuscript on the 24th November.

Q. Yes, indeed.

A. The photocopy hasn't come out clearly, and it has been typed or the recipient has been typed as "Mr. Chairman".

It's not "Mr. Chairman"; it's "Mr. O'Siochain".

Q. In fact I can see that now, yes, indeed.

We'll this is your note to the Chairman.

A. Yes, simply telling him

Q. I just want to deal with the it's re Bernard and Norah Dunne settlement of 16 March 1964.

"1. Further to our telephone conversation on 10/11/1986, I enclose

"1. Draft letter to Mr. Oliver Freaney" we are going to open that in a moment.

"2. Copy of assessing stationery CGA(1) to (4) along with appeal form to accompany the Notice of Assessment.

"3. Draft form of assessment CGA).

"2. As regards 1, the amount of chargeable gains is

computed as follows:

"Market value of shares as 14/3/1985, 120 million

Less: 1974 value of 5.5 million by indexation factor

4.140: 22.77 million. That is 97.23 million.

"Less: Expenses (say) 230,000 - 0.23 million".

And then 97 million is the bottom line.

A. Right.

"Capital Taxes Branch (J Reid) has supplied the valuation figure for 1974 and 1985.

"The possible expenses figure relates primarily to likely legal and valuation fees.

"As indicated in 3.4 of my note of the 16/1/1986, it is my opinion that Mr. Freaney (rather than Mr. Bowen and Mr. Fox) who should be assessed."

That's just a discussion.

A. A technicality.

"3. The Inspector to make the assessment is Mr. S.

O'Siochain, Dublin No. 1 (Income Tax) District. Having regard to provision of Section 184(2) of the ITA 1967 Assessment to the best of the Inspector's judgement..."

you are quoting a section of that particular Act.

A. There is an obligation to make an assessment with due care.

Q. With due care?

A. With due care.

Q. "I have discussed the matter with Mr. O'Siochain and he agrees with the proposed assessment.

"On your agreement I would write to Mr. Freaney as per the

draft letter and Mr. O'Siochain (dealing personally with the matter) would, without delay, make the necessary assessment and send a notice of the assessment to Mr. Freaney by registered post. Section 542 of the Income Tax Act, 1967, contains provisions re the service of notice; personal service could prove awkward and registered post in an envelope marked "Personal and Confidential" should meet the circumstances of the case quite satisfactorily. I would advise Mr. Noel Fox accordingly by phone beforehand.

"It would not appear appropriate, at least at this stage, to regard Mr. Freaney as having an agent, and accordingly the form CGA(4) would not be issued."

Then that's signed by you. There is a manuscript; could you help us read that.

A. "For 1984/85 C.G.T. assessments, whenever made, the minimum payment on account to avoid an interest charge is still 80%. Interest and overpayments as from 27/5/86 is at the rate of 1% per month."

And there is another reference there to some legal background.

Q. Section 114, I think, of the Act. There is just something on the left as well, perhaps.

A. Half of that seems to be missing, and I really I can read what's there, but it doesn't

Q. "Assessed 3/11/86"?

A. I don't know what was

Q. I don't think it affects the content of the note, in any event.

A. Perhaps the second note might suggest that I advise Mr. Fox, and there is some question of his availability, but that's not significant.

Q. I see. So before you wrote to Mr. Fox, or to Mr. Freaney, I think the courtesy letter before the assessment, you wrote to the Chairman; you enclosed a copy of the letter you proposed sending to Mr. Freaney. You informed the Chairman of how the computation was arrived at. You informed the Chairman that Mr. O'Siochain was the appropriate person to raise the assessment, and you pointed out the legal obligation on somebody arising out of the Act of the sorry, that Mr. O'Siochain agreed with the manner of the computation and the figure for the assessment?

A. He was the responsible Inspector. He had a right to know what he was being asked to do.

Q. Yes, of course. And you pointed out the statutory provision in relation to that as well?

A. Yes.

Q. Now, perhaps if you could let us make some copies of that to distribute for the moment, and we'll give that back to you in due course.

A. Certainly.

Q. Thank you very much, Mr. Clayton.

Now, if we go to your letter, then, that Tab 22, this is the letter which went to Mr. Freaney.

It says: "Dear sir,

"I refer to your letter dated 17 April 1986 and subsequent discussions concerning Capital Gains Tax liability.

"It is the Revenue's view that disposal of the 99,000 ordinary shares of $\text{€}1$ each and 100 6% preference shares of $\text{€}1$ each in Dunnes Holding Company occurred in March 1985, and that chargeable gains accrued on those disposals in accordance with the provisions of the Capital Gains Tax Act 1975. The amount of those chargeable gains depends largely on the market value of the shares at 6 April 1974 and at 14 March 1985, and it is the Revenue's view that those values were 5.5 million and 120 million respectively. Having regard to the relevant "Indexation relief" multiplier (4.140) and to possible expenses, an assessment in the amount of $\text{€}97$ million chargeable at the rate of 40% tax (38,800,000 appears appropriate).

"The District Inspector involved in this matter is Mr. Siochain, Dublin No. 1 District. He is dealing personally with the matter, and he proposes to make an appropriate assessment on you as trustee within the next week. Notice of the assessment is to be sent to you personally by registered post.

Yours faithfully. C. A. Clayton, Superintending Inspector of Taxes".

There is then a handwritten note, and it's to Mr.

O'Siochain, as you correctly point out. "Copy of minute 18/11/86 and enclosures are attached."

A. That minute of 18/11/86 is the one that's being photocopied at the moment.

Q. That's the one, I see. "Please change accordingly assessment to be made on the 27"

A. Sorry, that should be "Please arrange"

Q. "Please arrange accordingly assessment to be made on the 27/11/86, notice to be sent by registered post. Please treat very confidentially and abbreviate the settlors' names in the computer to BND". That's signed by you, and dated.

If we go to the next tab, and the assessment is made

A. That's correct.

Q. Now, the figures used for valuation were the figures supplied by the Capital Taxes Branch or the you tell me what the

A. The Capital Taxes Branch.

Q. The Capital Taxes Branch. And the figure that they subjected to you, they had to give you two figures: One was a value for 1974, isn't that right, being the base?

A. The base state for Capital Gains Tax.

Q. And the figure they give you was a figure of 5.5 million for that?

A. Yes.

Q. And that was a figure which the Tribunal understands was a figure which had been agreed in respect of wealth tax in 1974. Do you know anything about

A. That's my understanding.

Q. That's your understanding?

A. Yes, that's right.

Q. So that had been agreed between the parties, I'll just use, the Revenue and the Trustees, or the interest in 1974, to the best of your knowledge?

A. It was agreed sometime when I presume sometime in the mid-'70s.

Q. In the mid-'70s but in respect of a value for 1974.

A. No, no.

Q. '75, I beg your pardon.

A. Yes.

Q. And the other figure which was supplied to you was 120 million for the 14 March 1985; isn't that correct?

A. That's correct.

Q. And was your understanding that in supplying that particular figure, that that figure took into account the necessary deduction from a valuation, bearing in mind the lack of full control that the asset in the trust had?

A. Yes, that was my understanding, and there was no other figure required by me, and that would have been the basis on which any figures supplied by Capital Taxes Branch to the C.G.T. section would have been prepared. In other words, they knew that we had we did not have a deemed control provision in our we were forced to deal with open market value.

Q. So what you now had was two figures, and the exercise undertaken on your side would have been to consider the

appropriate indexation; is that correct?

A. That was a very simple matter, simply to find two dates

Q. That was the exercise carried out. Indexation in relation to the base state value of 5.5 million, and a consideration of what would be reasonable expenses in respect of the transaction?

A. Correct. And that was my estimation; I think 230,000 was the estimate. I presumed

Q. People might argue around the edges, but that was your view of a reasonable estimate?

A. I trust it was not excessive.

Q. So that was the simple task undertaken on your side, and the figure, the taxable figure of 38,800,000 emerged; isn't that correct?

A. That is correct.

Q. And can I take it that that was a view which was well held by you, by the Chairman, and obviously by Mr. Siochain, who had the personal responsibility of raising this assessment?

A. It was my view that liability existed, that there had been a deemed disposal. The question then arose as to the amount, the quantum, the amount of the assessment and the amount of liability. Apart from the matter of the expenses, everything followed from the valuation figures which were supplied.

Q. Which were supplied?

A. Yes.

Q. And which you had no reason to doubt, yourself?

A. Absolutely no reason to doubt that. The figures had been out in the open. The figures were not clearly ridiculous.

They weren't saying to us the value of the Dunne empire at 1985 is $\frac{1}{2}$ 20 billion, or that the value in 1974 was $\frac{1}{2}$ 10,000.

They gave figures which were which seemed not unreasonable in the light of all that we knew of the case.

Q. And in fact, I think if you go to Tab 24 I'm not going into this now. There is a further working paper. I'm not going to open that; it's for DTT purposes.

Now, if you go to Tab 25, I don't think you had any personal involvement in relation to this, and it was the appeal in respect of the Discretionary Trust Tax and the valuation

A. Yes.

Q. and the compromise which arose on the day.

A. On that day, yes.

Q. Were you made aware of this around that time?

A. I cannot say that I was. I don't have a recollection of hearing about it, say, on the day. I dare say I heard about it afterwards. But when exactly, I just really don't know. I wasn't, as you indicated, present at the appeal proceedings.

Q. And we know that that was done for the purposes of the Discretionary Trust Tax. That was valuations and

A. That's right.

Q. Now, that was, I think, on the 16th March, 1987, I think

was the day that that compromise was arrived at. And then if you go to Tab 30A, if you wouldn't mind. And you see there is a note here 13th April 1987 first of all, between the 16th March 1987 and the 13th April 1987, were you asked by anybody to do anything in relation to the assessment which had been raised in respect of C.G.T.?

A. No. I wasn't asked by anybody to do anything about it. There wasn't any actual need to do anything about that, because when an Inspector makes an assessment, that is the figure which goes before the Appeal Commissioners for consideration, even though circumstances may have changed; the appellant may have said the amount is too small or too big, or the Revenue may have taken a similar line that it's not exactly the right figure now, in the light of what has been discovered. But the Appeal Commissioners would take cognisance of an updating of that nature from whichever side.

Q. Could I just help you there, as something did happen, I think, on the 10th April, which is the Revenue applied to the Appeal Commissioners to list the appeal, the C.G.T. appeal on the 10th which is three days before the note that I'm going to open now.

A. Yes.

Q. Just to be clear, if an assessment is raised and a view is taken, and information received that "Look, it's wrong", what happens then? Is it a fresh assessment?

A. No, it's put before the Appeal Commissioners, and the

updating updating occurs during the course of that appeal hearing. The Appeal Commissioners would be told that we have since reached agreement that a certain component of the assessment requires updating, amendment, correction, whatever, and this is agreed with the other side, or whatever.

But there would be no change in the assessment in the meantime. It's only a provisional figure in the circumstances, because it's under appeal.

Q. So, if the situation arises where there is no agreement, and the Revenue changes its mind, having carried out further internal work itself, and says, "Oh, well look, we think that we have either overcharged or undercharged here", what happens, or what did happen in those circumstances?

A. Well, as you suggest, it would cut both ways. At an appeal hearing, the Inspector would come in and say, "Well, the assessment" leaving this case out, "an assessment was made in the case of, say, \pounds 1,000, and information has come to light which would suggest that that figure is excessive; it's only 800. Would you please reduce it to \pounds 800?" Or, "The figure is not enough; would you please increase the assessment to \pounds 1,600"?

And the Appeal Commissioners would be free to either confirm the assessment, reduce the amount chargeable or increase the amount chargeable.

Q. But that would happen on the appeal. But in the meantime,

would the taxpayer be left in the dark about this? I'm just trying to understand what would happen.

A. No. I would expect in such a case I know we are talking hypothetical cases here, but I would expect that Revenue would have formed the view the view that Revenue would have formed might have been influenced by information coming from the other side; but if in fact Revenue had come into possession of information on its own, I would expect that they would communicate that information to the other side and say, "Listen, the assessment really is too high by reference to this or too low by reference to that".

Q. Probably avoid having to go before the Appeal Commissioners at all?

A. There would not be a need for an appeal hearing if in fact both sides agreed that the figure should be fixed at a certain amount, whether it's 900 or 1,200 or whatever.

Q. I am just wondering, in a situation and we'll take the hypothetical situation again where the tax is $\frac{1}{2}$ 1,000, and perhaps really it should be $\frac{1}{2}$ 800, and it's a matter that you'd bring to the attention of the Appeal Commissioner and ask him to make the necessary adjustment. If in the meantime the taxpayer had paid the 1,000, or $\frac{1}{2}$ 900, what would Revenue have done in those circumstances? I'm just trying to understand how it was supposed to have worked.

A. The assessment would be adjusted there and then.

Q. To the amount paid?

A. No, oh, no, no. It would be adjusted to the correct

amount, and if there had been an over-payment of tax, the tax would be repaid.

Q. I see.

I want you to look at, as I said, 30A. And there was a "Call" this is Mr. Siochain's note, I think "Call from John Reid" Mr. O'Cathain's note; I beg your pardon, Mr. O'Cathain's.

"Their tax has not yet been paid. BD has arranged a meeting with the Chairman for the 27th. JR wants to know what liability would be thrown up by 82 million value of the..." I presume the company, the shares in the company?

A. Correct.

Q. "14/4/87. Call from J Reid. D. Thornhill wants a note on the division on Trustees position.

Based on the 82 million in 1984 our claim for C.G.T. would now be 23.6 million as over". And then there is a calculation runs with that, or done.

A. I don't have whatever figure is on that.

Q. Now, did you become aware around this time that this type of discussion was taking place? Not discussion, I beg your pardon, this query was raised?

A. I don't recall which query?

Q. The query by Mr. Reid as to what liability or what would be thrown up by an 82 million valuation.

A. Sorry, by the way preceding sentence, he wants a note on div. to Trustees. That presumably relates to the income tax problem which existed, the dividend, presumably, to the

Trustees, and consequential income tax in the trust.

Now, the other matter, the 82 million valuation as agreed for DTT. I don't clearly recall when I would have heard about this, but naturally I would have, but when exactly, I really don't know.

Q. Well, what the Tribunal is trying to establish here, this query came from Mr. Reid to Mr. O'Cathain. It seems to be the first time in the papers that we see this issue arise.

A. Mm-hmm.

Q. Mr. O'Cathain is also being informed that "Ben Dunne has arranged" "BD" is a reference to Bernard Dunne or Ben Dunne "has arranged meeting for the 27th". That's the 27th April, 1987. And this particular query may or may not be related to the fact that the Chairman was going to meet Mr. Dunne on the 27th?

A. Yes.

Q. One could draw that inference from it?

A. Yeah.

Q. It's the first time, and do you know where this came from, this where the inquiry originated? Did it originate with the Chairman?

A. I don't know, but I would I would suspect from the first paragraph of that, it would have originated from the Chairman, that John Reid may have been asked by the Chairman.

Q. That would seem like a fair inference to draw?

A. It's a likely inference, yes.

Q. So it wasn't coming from well, the inquiry was being made of your branch; isn't that right?

A. Yes.

Q. So it didn't start in your branch anything to do with valuations?

A. No, no.

Q. All the information that was being supplied was the appropriate calculations and tax which would arise based on various valuations?

A. Based on a figure of 82 million, would be the tax consequence.

Q. Were you aware that the Chairman was going to meet with Mr. Bernard Dunne? Or when did you become aware of that?

A. I can't really say at this stage when I would have been it obviously was not a secret.

Q. Within the Revenue?

A. No, it wasn't, because John Reid has clearly or Sean O'Cathain has clearly referred to a note where John Reid has advised him that this is happening.

Q. And can you tell me, was there any discussion within Revenue as to what was going on by the Chairman meeting with somebody who was, in effect, as far as the debate was going, was the beneficiary of a Discretionary Trust, when there was a significant dispute on liability, and now an emerging dispute on valuation? Was there any discussion about that in Revenue?

A. No, I don't recall any discussion on that. I suspect that

I may not have been surprised at that situation, because certainly at the time I wasn't, shall we say, fully prepared to accept that the 1985 deed, in relation to the ordinary shares, told the full story. And certainly, as is clear from the papers, Mr. Ben Dunne seemed to behave, if he wasn't quite a Trustee, as if he was actually an owner or part owner of shares.

Q. A principal?

A. A principal on the other side. So in the circumstances, I wouldn't have been that surprised to hear of the then Chairman meeting Mr. Ben Dunne. It would of course have been quite obviously better if the other side, the Dunne side, had been asked to clarify who was actually speaking for them, who had authority on their side. Was it Mr. Fox, Mr. Bowen, Mr. Dunne? Obviously, with hindsight, that is a question which should have been clarified, and that having been clarified, the Revenue should have been dealing only with that person from that point on.

Q. Well, of course, it had two possible implications. One was, as you say, Mr. Ben Dunne or Mr. Bernard Dunne seemed to have been, from the papers anyway, behaving as a principal.

A. Yes.

Q. Which would perhaps have confirmed an opinion or a view you had about what transpired in 1985, that in fact there would have been a vesting, almost, and that what happened in 1985 didn't give rise to

MR. O'NEILL: With respect, there is no discussion anywhere in the evidence of Mr. Clayton that there was any vesting in any of the potential beneficiaries. There was a question as to whether there was a vesting in the existing Trustees, but in a capacity as Trustees of the new settlement, but no question of any vesting in the beneficiaries themselves, i.e. the potential beneficiaries.

MR. COUGHLAN: All right: I accept that.

Q. But Mr. Bernard Dunne was negotiating, as far as you are aware, from it wasn't a secret in Revenue, but from the papers in particular, Mr. Bernard Dunne was negotiating virtually, or appears to have been negotiating on the basis that he was the owner of shares or had an interest?

A. Yes, that would seem to have been the case, and it possibly is the reason why, at various stages during the course of deliberations on this, the suggestion was being made that we really ought to get individuals at the appeal hearing to give evidence as to what, for example, they perceived their entitlements to be at the beginning of March of 1985, what discussions took place, what understandings there were between the parties. That question is running through these papers. Get witnesses to find out what was going on.

Q. Yes. Would you go to Tab 32, perhaps. And this is a note dated 5th May 1987. And it records "Meeting with An Cathaoirleach arranged for 10.30am on Monday next. CC"

I presume that's a reference to you "and myself to attend.

What looks like information is being conveyed to

Mr. O'Cathain by you. "Per CC. An Cathaoirleach met BD and had full and frank discussion. He does not accept that there is a disposal but would rather not gamble on the outcome especially in view of the fact that it might take some years to resolve. An Cathaoirleach pointed out that Revenue believed there was a disposal and have to pursue it.

"Apparently BD would like to settle no indication of what figure might bring a settlement. Only figure was mentioned of 23.6 million as being our revised claim based on an 82 million valuation at 1985.

"Case discussed earlier with CC along lines of my memo attached of this date."

Now, as of this time, had you any awareness that there was a revised claim by the Revenue?

A. I think that phrase there is probably overstating the

Q. You think it's used loosely rather than technically?

A. It's loose, the language, obviously written within six weeks of the DTT hearing where the figure of $\frac{1}{2}$ 82 million was settled, basically without prejudice and everything else. But the figure was on the table, obviously.

Q. But that may be an understanding, that it's used in a loose sense rather than a technical sense?

A. Quite, yeah.

And the earlier reference up the page, there, there is a small ambiguity which or room for doubt in the second

paragraph, starting "He does not accept there is a disposal but would rather not gamble on the outcome." The "he" there is not, I take it, to the Cathaoirleach.

Q. No, I read that as being a reference to Mr. Dunne.

A. So do I. Both parties might have had the view that delays could occur in the handling of this case. But it does, it being I think we are correct in this it being

Mr. Dunne, it confirms what we were talking about in the last few minutes, that he was acting as if he was the

Q. Principal, or a principal?

A. Yes.

Now, if you go to Tab 33 then. 11/5/87 meeting with Chairman 10.30 to 12.45, Christopher Clayton and self from this office."

"He had met Ben Dunne and Mr. Fox recently at the request of An Taoiseach.

It was the C.G.T. they wished to talk about. The C.A.T. 4 million would be paid. They had had a frank discussion.

BD did not believe on his advice that there was any C.G.T. due, but he did not want a long drawn out appeal and he recognised that at least the full tax would only be deferred.

"23 million was too much for (him) to pay now. He would like to come to some agreement if possible. The Chairman pointed out that Revenue's claim was for the full amount and he was only nominee for the Dail and the Board in this matter but he would seek further advice on the matter.

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

"We discussed generally the latter point and agreed to examine the implications of it."

Now, first of all, that is, I take it or do you have a recollection of that type of account, I presume, being provided by the Chairman of what had transpired between himself, Mr. Dunne and Mr. Fox at a meeting?

A. I accept that as being reasonably accurate, yes.

Q. Did you have any understanding of the situation at that stage that Mr. Dunne was in any way confused about what was going on between the Dunes and the Revenue Commissioners?

A. No, I wouldn't have thought so. I wouldn't have thought that he was confused.

Q. The note and correct me if I'm wrong, and you were at the meeting seems to indicate that there was a fair level of interaction between the Revenue side and Mr. Dunne/Mr. Fox in respect of matters; they were discussing matters in detail?

A. That would seem clear from the note, yes.

Q. And were you in any doubt but that Mr. Dunne had an

understanding of the tax implications, or a reasonable understanding of the tax implications of all the matters which were under discussion?

A. I would have expected him to be conversant with that. After all, this was May of 1987, two years since the critical events occurred. And I would have expected him to have become quite au fait with the ins and outs of the situation since then.

Q. Now, the note continues, because this is a matter now of discussion that was taking place, I think, between yourselves: "With a multiply of almost 5 since 1974, might not receive much C.G.T. on such disposals.

"The Chairman was interested in the idea of treating the disposal as being to 5 separate trusts and discounting the 20% holdings for nonmarketability with the consequential reduction in the deemed acquisition cost of those holdings of the new trust."

What was going on there? What was the discussion that was taking place there?

A. I think the critical word there is "discounting," what discount would be applicable to the shares. 5 separate trusts, and so on, that would have obviously one could consider that might have had some bearing on the value of the shares, and I think that really is the thrust of that paragraph.

Q. Now, again, the note continues: "He was fairly sure there would be no C.A.T. on such an acquisition by the trust and

on checking" I presume "disposition by the trust", "and on checking it seemed for trust tax purposes such holdings would continue to be valued a proportion of the 100% of the company with no discounting. He was not an enthusiastic about having the value of" I presume that's the 1974

A. That I think is correct, yes.

Q. "Raised to 8 million but he would like to hear more about it."

A. Yeah.

Q. "He looked at the trust deed setting up" "We looked at the trust deed setting up the 5 funds and saw that where on the one hand Trustees were given power to appoint as they wish, each of the 5 children would could nominate what grandchildren of the original settlors should benefit from each named fund consequent on the nominator's death. We discussed the possible level of discounting for the 20% holding for nonmarketability and the tax values forward appropriate to these.

"The Chairman asked us to study the five separate trust aspects and to meet him again at 10.30am on Friday next."

Then "Mr. O'Cathain mentioned the surcharge, that might be indefensible but would be used as a bargaining counter.

John Reid had passed him my note on this. It was agreed that the deed of the 17/3/85 having been accepted for trust tax would not now be challenged. But to ascertain whether it involved a disposal might call from evidence from the principals as to what precisely went on at March 1985 and

what understandings or other documents were entered into to copperfasten the 5 children's individual interests. This could be put to BD in negotiating."

The point that latter paragraph is the point that you were making, I think; is that correct?

A. Correct. The first sentence clearly states that we have recognise the deed a typo there, 14th March, that we can't very well say that it didn't happen, but let's hear what actually what were the understandings as a result of that, what preceded the execution of that deed.

Q. Just going back the note, the reference there, it seems to be a reference to the Chairman: "He was not as enthusiastic about having the value", the 1984 value, I think, "raised to $\frac{1}{2}$ million." Do you remember that discussion taking place?

A. I don't remember the details of that. I can easily sort of see the thought process going into that.

Q. The thought process of whom?

A. The Chairman.

Q. Yes. Not being enthusiastic about it?

A. Not being enthusiastic, because '75 wealth tax figure of 5.5, and with inflation and so on, one would ordinarily expect a previous year's figure to be lower. But those were the Capital Taxes Branch's opinions on the situation. I don't know what factors came into their head when they were thinking about this. I would mention, speculate that the mid-1970s were a quite extraordinary time economically.

There had been a major war in the Middle East, an oil shock in I think October '73, inflation was rampant, there was considerable gloom and pessimism as to what was going to happen to the Western World, if not the world generally.

So that a value of a company at the beginning of '74 might have reduced significantly by the beginning of '75.

Now, that is speculation on my part. I don't know what went into the Capital Taxes Branch's minds in relation to this matter, but I would think that you're not talking about a steady economic state in the mid-1970s at all. You are talking about a very uncertain position with very certain doubts about prospects. You are talking about heavy inflation, major problems for companies generally. I can understand why Capital Taxes Branch's figures might have been thinking in terms of a higher figure. I can also understand why the Chairman might have felt a little bit uneasy about it.

Q. Yes. What the Tribunal is trying to ascertain is why this discussion was taking place at all. Work had been carried out by the Capital Taxes Branch, isn't that correct, for the purpose of valuation for Discretionary Trust Tax and for Capital Gains Tax?

A. Yes, work had been carried out. It was, one might say, ongoing, and I would say that Capital Taxes Branch in relation to all valuations of unquoted shares would tend to have an open mind and be open to observations, say, from the other side in relation to the valuations. I mean, they

would not be rigid in their opinions on valuation, because

as we all know, valuation is not an exact science.

Q. Yes, I appreciate that.

A. And factors may have been brought to their attention.

Q. Yes. But maybe you can help us there, because that would

be helpful. The papers don't seem to disclose any

information being furnished to the Revenue by the other

side for the purpose of valuation, as far as we can see.

A. I am not aware.

Q. You are not aware.

A. I am not aware of such communications. I really don't know

what gave rise

Q. Sorry, if you just bear with me now, Mr. Clayton. You

agree that you never saw any papers coming into the Revenue

from the other side in relation to valuation?

A. No, I don't recall seeing any such papers, no.

Q. Do you ever remember anyone saying to you we do see

references to Mr. Dunne informing the Chairman that 23-odd

million would be too much now, that's as much as we see in

the papers, to pay now, but do you remember any interaction

you had with any of the Trustees or debate in relation to

valuation where anyone from the other side made the

suggestion that you'd up the base value of 5.5 million?

A. No, I don't recall any such discussion. I did not meet or

discuss the matter with the Trustees.

Q. The papers seem to indicate that all of this was happening

inside the Revenue on its own, and it seems from the

papers, at least, anyway to all have started around the time that the Chairman had an appointment with Mr. Dunne; isn't that right?

A. There would be a contemporary there was a coincidence in time, certainly.

Q. And when there had been earlier meetings, I think cross-cutting meetings, I think they might have been referred to, in the earlier days to deal with discussing the question of valuation, the base of 5.5 for 1974 was taken because that had been an agreed figure on everyone's understanding in relation to wealth tax, and then there was a range of figures for the 1984 and 1985 valuations produced by the Capital Taxes Branch?

A. That's right.

Q. And you had made a contribution yourself, because the issue of your side of the house had to look at open market value, effectively, isn't it, of the asset?

A. Absolutely, yes.

Q. And looking at the value of the shares in 1985, you would have to say, "Well, look, what would a man, or a person, or an entity be prepared to pay for these, bearing in mind this bit of a problem there is with them", and we'd have to discount that value accordingly and arrive what appears to have been arrived at was a figure of around 15% discount; that appears to be the situation?

A. Well, I hesitate about the 15%.

Q. Whatever the percentage was.

A. In actual fact, I mean, there was even some discussion as to whether there was any discount at all appropriate. I think our senior counsel raised that point in 1985, perhaps 1986, I am not too sure, but it wasn't there was nothing fixed at, say, 15% or 5%.

Q. Whatever it was, there was a discount, as you understood it, given, considering all the discussion that had taken place whether there should be any discount down to a range of discounts, as you understood the valuation, there had been a discount when the valuation of 120 million arrived on your desk?

A. I asked them for the valuation figure for Capital Gains Tax purposes, and I'm not sure if in fact we are given this figure they said that they were giving this figure with zero discount or 15% or 20% discount; they gave me a flat figure.

Q. What you were looking for the Capital Gains Tax purposes, was based on an open market value of that particular asset; isn't that right?

A. Open market value, yes, that's right.

Q. Now, when you had been at the initial meetings with Capital Taxes Branch, because you understood that it had to be an open market value in relation to Capital Gains Tax, and the question of discount was being discussed, you expressed the view that if a discount was being applied in respect of a valuation for the 14th March 1985, a like discount should be applied in respect of 1974 because of the question of

lack of control, or lack of full control. You made that observation?

A. That would have followed, yes.

Q. That was your view?

A. That was my view. I am not aware of any material change in circumstances.

Q. There is no reason why your view has changed in relation to that?

A. I am not aware of anything that would have changed my view on that. Whatever discount applied in '74 would have applied in '85 and vice versa.

Q. So if a discount had been applied in respect of 1985, it was your view that there should have been a discount in respect of the 1974 figure which would have brought the figure down from 5.5 to a lower figure rather than increasing it to 8 million; isn't that right?

A. Sorry, would you repeat the question, Mr. Coughlan? Sorry.

Q. I will. If a discount was applied in 1985

A. Yeah.

Q. and it's your view that a like discount or a similar type of discount should have applied to the 1974 figure because of lack of control

A. Yeah.

Q. that the figure of 5.5, which was the base figure

A. I see the point.

Q. would be reduced to whatever, let's say 3, 4 million, or whatever the rather than increasing it to 8 million?

A. Certainly for that particular date in 1975, yeah.

Q. And of course the effect, when you apply the indexation multiplier of 4.140 has quite a significant effect on whether the base value is 8 million, or whether the base value is 3, 4, whatever, or 5 million?

A. Yes, it's effectively, any change there is worth four times as much.

Q. It's worth four times as much. Whereas every million you reduce the 82 million, which would be a value let's take that that was a value that was just taken, has only the effect of reducing it by 1 million each time; isn't that right?

A. Yes.

Q. So performing an exercise of increasing the base figure is far more significant because of the implication of indexation; isn't that right?

A. It is. As you say, the factor of 4 comes into it.

CHAIRMAN: Well Mr. Coughlan, we are pretty close to the half-way period of what's obviously quite a lengthy day both for you and Mr. Clayton, and it might be an appropriate time to adjourn for lunch.

Could I just raise one matter apropos of what you referred to as, some minutes ago, when you stated, Mr. Clayton, that in retrospect, when you became aware of Mr. Dunne having appeared to act in a personal capacity, it might have been wiser to have ascertained who was undoubtedly calling the shots or with whom you were actually dealing.

A. That's right.

CHAIRMAN: May I take it that at this time, dealing with the more substantial C.G.T. cases in your office, the norm would have been you'd be dealing with agents like Freaneys; there'd be very few lay litigants, so to speak.

A. The great majority of cases would have involved an agent, an accountant or a solicitor. A small number would have represented themselves, but the majority would have had an agent of one kind, a lawyer or an accountant acting for them.

CHAIRMAN: But it was rare for a dilemma to arise in which you would have been having substantial dealings with perhaps a number of agents, and then there might have been some involvement on the part of the principal?

A. Well, I have a recollection of substantial cases arising where we would have been conversing with the principal as well as the agent involved; but there would have been that would have been very open, and I think neither we wouldn't have dealt with the principal on his or her own. We'd have dealt with that principal in the company of the agent. We would have got involved, understandably, we would have been conversing with the principal, but the agent as well.

CHAIRMAN: We'll take up the balance of matters at five to two. Thank you very much.

THE TRIBUNAL ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

Q. MR. COUGHLAN: Mr. Clayton, I think before lunch we had been looking at, I think, Document Number 33, Tab 33. But if I might just go back for a moment, it's not in these books; it's a document which is in the black book. I don't know if you have that with you.

A. The black book?

Q. A black book of documents which was I think furnished to the Revenue. I'll just get it to you.

A. Sure.

(Documents handed to witness.)

Q. MR. COUGHLAN: They are Mr. O'Cathain's documents.

A. Right.

Q. I am told that this will in due course be called Book 66, just for ease of reference.

Now, if you go to the second tab on that, please. It's a bit it's dated the 4th May 1987, do you see, up on the top left-hand corner?

A. Oh, yes.

Q. And then it has "Per CC"; I presume that's a reference to "Christopher Clayton".

A. I would expect so.

Q. "BD wants to settle C.G.T., what can be offered." I take it that this must have been a discussion between yourself and Mr. O'Cathain, either by telephone or personally, I don't know.

A. Obviously it follows a conversation, but what led to that conversation, obviously, I would deduce from that, if the

Chairman had indicated

Q. That's what I am trying to ascertain first of all. Yes, you communicated with Mr. O'Cathain, and you believe or you would deduce that the Chairman must have made contact with you?

A. Yes, that would seem to be the case.

Q. We then see in this particular document now, I take it did you have any hand, act or part in the calculations which we see in this particular document various positions being worked out depending on the value for 1985, the value for 1974, and matters of that nature?

A. I am not I think this is the first time I have seen this document.

Q. I see.

A. But I recognise some figures here; for example, the 23.69, and so on. There was obviously some discussion on that, on various possibilities.

Q. Yes. And these were this was carrying out an exercise to see what figure could be arrived at for what purpose?

Do you know?

A. For the purpose of a possible compromise settlement.

Q. Right. And again, at this time, can I take it that you had not been appraised of any information which had been furnished by the other side about valuations or anything of that nature?

A. That would be so, yes.

Q. All the work was being done on the Revenue side?

A. I think perhaps at a very early stage, perhaps in February, March of '85, the other side would have suggested the value of the Dunnes empire was of a certain

Q. I think 33 million was the figure.

A. A very low figure, at any rate, yes. After that, I don't believe they came in with any other figure.

Q. Well, in any event, the information came to you from the Chairman, that you passed on?

A. That is what I deduce from that, yes.

Q. I wonder, would you now go to Tab 34, please. I think this records it's a meeting on the 15th May, '87, and it's a meeting with Chairman, yourself and Mr. O'Cathain, and Mr. O'Cathain gave him three documents which he had prepared on a basis for discussion. The Chairman will read these, I presume.

"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." Do you remember such a discussion at the time?

A. Well, this has prompted my memory of that. This would have been mentioned, Seamus Pairceir would have mentioned this at the time, but it wasn't a particularly important observation, really. It's recorded here, but I don't think anything turns on that. Because it was now the middle of May, and tax outstanding at the end of May would have figured in the appropriation accounts.

Over lunch, incidentally, I looked at some papers which

reminded me that in 1988, the amount of uncollected debt on record for all tax debts was in the order of I think 40% or more.

Q. 40%?

A. 40. And I think maybe two years ago, for a variety of reasons, that figure had come down to perhaps one-tenth of that, perhaps three or four percent, but the figure was extraordinarily high in the mid-80s. It gave rise to a lot of concern; in fact, some people would say it was one of the factors in the reason to introduce self-assessment.

And in fact, if I may possibly digress for a while, just to refer to that, it gives you perhaps a context on that .

The Minister for Finance in January of 1987, Mr. John Bruton, produced a booklet, you might say launching a public debate on whether self-assessment should be introduced or not. And in the opening paragraph of that booklet, he says: "The present system of tax collection and enforcement is proving increasingly inadequate. Some key features of the system are now too slow and cumbersome for the volume of cases requiring attention. There is a perception among a growing number of taxpayers that non-compliance has reached an unacceptable level, that there are considerable delays in the payment of tax, and indeed that large amounts of tax remain uncollected."

So the Chairman would have been very conscious of this in May of '87. This was published in January of 1987.

Q. And you are saying they'd be very conscious, thereby making

him keen to provide a response to a query which he anticipated would arise from the Comptroller and Auditor General?

A. Well, I think the response to the to a query from the Comptroller and Auditor General would not have presented insuperable difficulties. I think a greater difficulty might have perhaps arisen if in fact that liability, or a suspected liability of that order or it was a liability of that order was suspected and had not been assessed. I think the Comptroller and Auditor General might have something else to say about that. Easier to defend an assessment on which tax had not been paid.

Q. There was well, there was in position an assessment; isn't that right?

A. There was.

Q. I just want to and I understand the point you make about that booklet launched by the then Minister for Finance, as you say, perhaps commencing a debate on the question of the introduction of self-assessment, and that there was difficulty in collecting outstanding taxes, and there was delay in collecting outstanding taxes.

A. The figures had reached very high levels. Most of the liability was uncollectible; it was unreal, for various reasons, because estimated assessments had been put in in the absence of returns.

Q. I understand that. And this was also the whole question of clogging up the whole system in enforcement or

A. Quite.

Q. But am I correct in understanding that that was a view which was applied to this particular case, because as I understood the matter, this was virtually unique in that on the basis of the assessment of 38.8 million, this would have been at least two to three times all of the capital tax which would have been collected for C.G.T.?

A. All of the Capital Gains Tax, yes, that's right.

Q. For that year for the whole country?

A. That would be about right, yes.

Q. So could I take it that in those circumstances, where it was one

A. One case.

Q. one case, a very large case, that that would have been the type of case which the Revenue may have decided we should concentrate on, and not put it in the general category of the problems that you were describing there?

A. I am not sure that I'd go along fully with what's in your question. This case was being dealt with because of the what had happened. It wasn't a question of looking at, say, a thousand cases and which one will we concentrate on; it was there on the table, and we just had to go and deal with it. And it was an extraordinarily large case, of course, but it wasn't a case of we will concentrate on this case.

Q. I understand that. But it's the opposite to that that I wanted to consider, that it wasn't because of the general

difficulty that had arisen in relation to tax matters; that

it was one that would fall into the general category

A. Absolutely. It wasn't because of the general situation at all. The only reason I mentioned that was it gives a context for the C & AG reference.

Q. I understand that reference.

A. Right.

Q. Now, again, as of this date, had you received any revised valuation from the Capital Taxes Branch about the value of this company?

A. No. I think the only figure that I got from Capital Taxes Branch formally was the figure or the figures were 120 and 5.5; those were the only figures communicated formally to me which led to the assessment.

Q. And as I say, even during this period now, when there has been certain discussion taking place between the Chairman and Mr. Fox and Mr. Dunne and perhaps representatives, again, no figure was communicated to you which would lead you to believe that the figures raised in the assessment should be revised on the basis of receiving actual information from the Capital Taxes Branch?

A. No figures had been produced, but I suppose at this stage people would have been conscious of the fact that or conscious of the question, what would happen if the case goes before the Appeal Commissioners, what figure would emerge from a hearing before the Appeal Commissioners with expert witnesses on both sides? And there would have been

uncertainty on that. I certainly was not in any position to tell the Chairman that we would get the figure of 38.8 million confirmed.

Q. I understand that. And I can perfectly understand, you certainly had, on your side that's on the Revenue side had work carried out by Dr. Thornhill's branch; isn't that correct?

A. That's right.

Q. In fact, I think we heard evidence from Dr. Thornhill that your counsel had conveyed back to the Revenue that Dr. Thornhill was to be congratulated for the work he had done; that is, by counsel acting for the Revenue, and that such a comment had also been passed by counsel who had acted for the Trustees, I think, in relation to the C.A.T. hearing?

A. I wasn't here when Dr. Thornhill was talking about that.

Q. But apart from the figure suggested of 33 million way back by representatives of the Trustees, as far as you were concerned, anyway, you had never seen any document from any expert relating to valuation of the assets in the trust?

A. Not from the other side. No, I didn't I don't recall seeing any such document at all.

Q. Sorry, if you go to this Tab 30, as we are at Tab 34. The note continues, and there is in the nature of a technical discussion going on, isn't it, at the meeting there. I read out "The Revenue statement of Practice, wherein particular followed Bond v. Pickford, they say, and there

seems to be a discussion going on

A. That of course, as you know, is a United Kingdom statement, Statement of Practice, Inland Revenue Statement of Practice.

Q. So there was discussion taking place on the legal matters here?

A. Yeah, yeah, there obviously was, as I mentioned, a legal point.

Q. Then you go over, I think if you come to that portion, "He is now beginning to have doubts about discounting as a method of settlement. The only other variable is to increase the 6/4/74 value to $\frac{1}{2}$ 8 million." I take it that must be a reference to the Chairman. "He is now beginning to have doubts about discounting as a method of..." or somebody having difficulty, and this is discounting from a value, I think, of 82 million; isn't that right?

A. Yes. Sorry, I have a small typing issue here. I'm not sure if that's a 5 or an 8. It's typed as a 5.

Q. I think it has to be an 8, because we know it's a 5 we know it starts off as a 5; so if it's going to be increased, if you increase

A. Yes.

Q. It has to be to 8, I think.

A. Yes.

Q. And then if you continue on down: "He would like to be very sure that any value dropped would ultimately be got again for C.G.T. see previous note on this."

So the Chairman here seems to be I presume it's a reference to the Chairman.

A. I presume so, yes.

Q. Do you remember anything about that?

A. Not particularly. As I say, this memo sort of triggers the memory, and I'm not in dispute with most of it.

Q. With the note?

A. Not generally, no. It's not a transcript, but I think it's a reasonably reliable indicator of the sort of discussion which was going on.

Q. I take it that you were aware that the Discretionary Trust Tax matter had been compromised at some stage?

A. I am sure that I was. By then I would have been, yes.

Q. And I think can we take it that you are aware it had been settled for a figure, 80 million plus?

A. 82, and it was expressed to be without prejudice.

Q. Would you also have been aware that it was without prejudice, that it was supposed to be without prejudice?

A. I think I would have been, yes. I'm not certain about that, but I think I would have been.

Q. In other words, neither you nor the Trustees could be held to that particular figure; isn't that correct?

A. That would seem to be so on the face of it; but I wonder, as a practical matter, if the settlement, or the compromise figure of 82 million, if information about that could be really withheld from the Appeal Commissioners. I think, if they thought about it, they would ask, "Well, has this

question been considered previously"? And the truthful answer, of course, would have been yes. And the next question would have been, "At what figure"? I don't think the 82 million could have been concealed, withheld from the Appeal Commissioners.

Q. Well, you see, this is what the Tribunal is trying to ascertain. There are occasions when matters can be dealt with on a very technical basis when dealing with Revenue matters. And then we come to certain occasions when very technical legal expresses are used, like "without prejudice"; and I just want to tease that out with you, as to whether it is reasonable or realistic to suggest that they shouldn't be afforded the true meaning which any lawyer would understand about those matters.

You see, could I put the scenario, when you say if the question was asked by the Appeal Commissioners, and you say it was settled, and the Appeal Commissioners says "For how much", wouldn't the truthful answer be, "That is without prejudice to anything going on here"?

A. That certainly could be said. And moreover, the fact of the matter is that if $\frac{1}{2}$ 82 million was hammered out, and I wasn't involved in that negotiation at all, if that was hammered out, it was obviously a deal done for a particular tax at a particular time, and it was done, I think for a base date of '84. It didn't have a bearing it didn't necessarily have a bearing at all for '85.

Q. Yes. So we have the double situation that it was without

prejudice. In fact, I suppose one would presume that the Appeal Commissioners would understand what that would mean and wouldn't continue to make an inquiry once that was brought to the attention that anything was without prejudice?

A. Yes.

Q. It's the sort of thing that happened, and we all know it happens in the course of litigation on numerous occasions, even for the Revenue, and we all understand what it means?

A. Yeah.

Q. And as you say, then, over and above that, in your own mind, there could be the argument, in your own mind, that this was hammered out for a specific tax, for a specific date, and it had nothing to do with what was in issue here?

A. That would be an argument open to the Revenue, yes.

Q. I think you might now go to Tab 35, if you wouldn't mind, Mr. Clayton. I think it's just when you handled the bundle of documents, there is one particular document that is of interest, and you may be able to assist us. And I'm just going to circulate it now, because a question that I suppose yes, I'll circulated all the additional documents in due course, both of them have been extracted by us, but just in case anyone requires them for the purpose of asking you any questions.

A. What documents are you talking about?

Q. Do you remember the bundle of documents you handed over earlier, which you had extracted

A. I gave you one document for copying.

Q. There are other documents there. There is another document which I just wanted to ask you about, and there is no major concern about it; I just draw it to your attention because it gives rise to this particular line of inquiry.

The Revenue had never had an opportunity to have an insight into the Dunnes company; in other words, it had never gone to a hearing in relation to a valuation before the Appeal Commissioners for any tax purpose; isn't that correct?

A. That, I believe to be so, yes.

Q. And I think when this situation arose, first of all, on the question of Discretionary Trust Tax, and secondly, on the question of C.G.T., the Revenue were obliged to conduct their own work to arrive at their own valuation, or a fair and reasonable valuation in view of the Revenue in relation to it; isn't that right?

A. That's correct, yes.

Q. Now, for whatever reason, a settlement occurred in relation to the valuation on the DTT, but and this isn't your document, in fact, and it's something perhaps that I'll just ask you about generally. It's Mr. O'Cathain's document, and I'll just identify it. It's a Revenue document; it's in the files. It's not a document unique to you or to Mr. O'Cathain. It's obviously with our documents, it's in the files. Do you see this particular document?

A. Mm-hmm. 11/2/87, is that it?

Q. That's the one, yes. And it says it's discussing an approach that might be taken to and it says: "An assessment for 1984/85 of 97 million at 40%, 38.8 million tax was made on the 27/11/86. This was being appealed on the grounds inter alia that there was no disposal for Capital Gains Tax purposes. The specified amount is nil. The trust tax assessment for April 1984 is under appeal and the hearing has been arranged for March 16, 1987, before Commissioner O'Huigh and Diggin. This is likely that all that will in effect be at issue there is the value of the trading enterprise as of January 1984."

I think there would have been no dispute, or everyone would have expected that.

"The Revenue solicitor and counsel did not favour a suggestion that the valuation of March 1985 for the purpose of the Capital Gains Tax assessment should also be dealt with at that time. It is likely, therefore, that at the Capital Gains Tax appeal hearing, the technical legal argument would first be heard, and if the Appeal Commissioners found for the appellants, they would hear no evidence on valuation. This would leave Revenue going to the High Court on a point of law only, but the case being referred back to the Appeal Commissioners for valuation purposes if Revenue subsequently won the point of law. The technical legal argument will relate to the interpretation of the trust deed 16 March 1964 and Section 15 of the Capital Gains Tax 1975. In particular it would centre on

whether the trust deed executed on the 14th March 1985, whereby the ordinary shares in the holding company were transferred to the new trust constituted a disposal of those shares under Section 15.2 or 15.3 of the C.G.T.A 1975. It seems advisable that a meeting with our counsel should be held as soon as possible to discuss the timing approach for the C.G.T. appeal hearing and its coordination with the forthcoming appeal hearing on the trust tax assessment. At that meeting we will discuss with him also the question of whether members of the family should be called to give evidence on the background of the deed."

These are all matters you had raised yourself?

A. Yes.

Q. "Such evidence would show that the main purpose of these deeds was to avoid the Capital Gains Tax." We understand that that is the type of argument that was being discussed.

Now, I think you can go to the next page, and go to

Point 3: "It is intended to list the Capital Gains Tax appeal for those two days" sorry, I should start off

"An assessment for Capital Gains Tax for 1984 has also been entered as follows", and that's shown.

"It is being appealed on the grounds, inter alia, that there is no disposal for Capital Gains Tax purpose and a nil specified amount has been offered. Bowens say they will go to the Supreme Court if necessary.

"2. The appeal against the amount of Discretionary Trust Tax assessment in respect of January 1984 has been listed

for hearing for Monday the 16th and Friday 20th March 1987 before the Appeal Commissioners. Counsel will appear for both sides.

"3. It is intended to list the Capital Gains Tax appeal for those two days also so as to get a decision on the valuation of the shares held in the trust as of March 1985.

Unlike the C.A.T. appeal, there may then be argument about what proportions of these shares need to be valued and what discounting should be applied for nonvoting status. It is possible the valuation of the shares held in the trust as of the 6th April 1974 would also be dealt with at that hearing. Our counsel has been contacted on this proposed procedure."

So there was thinking in the Revenue that one should have a look at the valuation, or a hearing in relation to the valuation, to see what value would be attaching to the shares as of March of 1985.

A. Quite obviously that was being kicked around, how was this going to be handled, and

Q. The technical way one might get to that position?

A. This was the possibilities were being canvassed, should we throw it in along with the DTT valuation appeal or handle it on its own, and so on.

Q. Now, if you I think I asked you to look at Tab 35, now, I think, is that correct, and we'll go to the 22nd May of 1987. This is again a meeting with the Chairman, you, Mr. Reid of Capital Taxes, and Mr. O'Cathain himself. And

he said: "At the end of meeting I'll get a copy of my summaries of the 1964 and 1985 deed and announces the letter and synopsis of Haugh v. Biscoe, Bond v Pickford, Europe v. Taylor. In the light of my review of the cases I said that there seemed to be good grounds for arguing for continuing settlement. I mentioned:

"1. That if the deed had been in 1982 for three years, the 1985 deed had only one day left would be revoked within that and all that fell back on 1964 settlement."

He's dealing with the legal aspects of matters there?

A. He is exploring various

Q. All the various positions.

If we go to the next page, again, he is going into the detail and giving summaries of his understanding of the English cases and his understanding of views that may have been expressed by counsel in relation to such matters?

A. That is so. That is there is a fairly lengthy recitation on 3 and 4 and so on which, by the way, I don't necessarily agree with, but they were his thoughts at the time.

Q. Absolutely. When people are having discussions about legal matters like this, one can get a variety of views?

A. Obviously it's no harm to I think it's very desirable to have a devil's advocate, and not have a yes man or a yes woman around the place.

Q. And debate the issue?

A. Yes.

Q. I want to move on to the note now where it continues: "The Chairman moved the discussion to valuation of the old shares for C.G.T. What about discounting from the 82 million for not having the preference shares. J Reid is to examine this for Monday." You see that?

A. Mm-hmm.

Q. Then if you continue on down: "Discussion re valuation of 82 million for '85 because of 8 million"

A. "Because of '84 and '86 figures" I think.

Q. "Chairman feels, apart from a bargaining point, we are constrained by it." So the Chairman seems to be expressing a view here that he felt constrained, he felt the Revenue was constrained by virtue of that settlement having taken place; is that correct?

A. That is what is recorded there. I think it might be expressed a bit more carefully that there was a constraint, perhaps, in relation to it, rather than it was suggested that he was totally constrained.

Q. I'm not suggesting and I'm not suggesting this is a transcript

A. I appreciate that.

Q. I'm trying to get the flavour of what was being the Chairman, of course, would have been aware, and keenly aware, that any settlement had been without prejudice; isn't that right?

A. He was, but at the same time, he was conscious of what we were talking about a few minutes ago.

Q. Now, if you go on down, and I think this is a comment made by Mr. O'Cathain himself: "I said that if discounting were to apply, especially from '74 value as up to 8 million, it will give us the outcome I was first aiming at when I heard of negotiation, that is reduced charge with one trust and reduced value forward to within." Does that ring any bell? I think an exercise was done at some stage whereby the '74 valuation was brought up to 8 million. You then took 82 million as the 1985 valuation.

A. Yeah.

Q. You discounted the 82 million because of lack of control, and you discounted the '74 valuation, but based now at 8 million, for lack of control.

A. Yes.

Q. Giving rise to a figure still in excess of the 5.5 million, which was the base figure; do you understand?

A. I understand that, yes.

Q. And I'm just wondering, it seems to suggest that figures were being worked on to arrive at a result; do you understand me?

A. Yes.

Q. Do you have any knowledge or memory of that?

A. Only vaguely. I would say, in relation to all of that, the Chairman would seem to have been anxious to go and settle the case without arguing the point of law, and without arguing valuations. The question which was arising is, what can we get from the case? Believing that liability

existed, because if we didn't believe that liability existed, we had no business doing any settlement at all. We should have wiped out the liability.

Q. Absolutely.

A. So we believed that liability existed, but what was the amount thereof? That was the question.

Q. But you also believed that liability existed sorry, it's a given that you must have believed liability existed. The Chairman had been adamant the whole way along, had told the Trustees to face up to their responsibilities in relation to matters, had instructed you in relation to the issuing of the assessment; isn't that correct?

A. He agreed with my

Q. He agreed?

A. With my opinion that there should be an assessment, and in the amount that I recommended.

Q. I take it if the Chairman had queried the matter, you'd have had thoughts about it, would you?

A. Oh, obviously there would have been some conversation on the subject, yes.

Q. And we now have a situation where an inquiry appears to emanate from the Chairman as to what deal can be done that Mr. Dunne is prepared to settle; that seems to be the

A. That would have been that clearly was in his mind at the time; I have no doubt about that. Now, how a certain figure, whatever it is, whether it's 30, 25, 20, 15, 16, whatever, you can, I suppose, because of all the variables

that exist in this area, you can juggle figures up and down and so on to produce a certain result, and there are huge differences of opinion in this area on the valuation of unquoted shares. It's terribly easy to muddy the waters.

Q. Can I ask you yes, I appreciate that, and I understand that. But can I ask you, where was there a divergence of opinion within the Revenue that we see in the papers on the question of valuation?

A. What divergence?

Q. Was there any?

A. Was there a divergence?

Q. Was there a divergence within Revenue, bearing in mind the work that had been done by the Capital Taxes Branch?

A. I couldn't say there was actually a divergence. There was certainly a recognition that nobody could stand up and say, "I firmly believe that if this goes to the Appeal Commissioners, the final liability that will emerge will be X million pounds".

Q. I understand. I understand that, and that's around the edges. I understand that entirely, around the edges, one couldn't say, "I put my hand on my heart and that's what it's going to be". But the figure that you are working with is one which is, in broad terms, in the area that you believe to be the tax due; isn't that right?

A. Well, at this stage there were there was a wide range of possible settlement figures being canvassed.

Q. I understand that, Mr. Clayton. I'm trying to bring the

matter back now. I'm trying to bring the matter back.

The assessment was made based on figures supplied by
Capital Taxes Branch?

A. Correct.

Q. The experts in the area, as far as Revenue was concerned?

A. Correct.

Q. No figures had been given to Revenue, or no papers had been
given to Revenue by the other side, as far as you know?

A. As far as I know, yes.

Q. As far as you know. The first time on the question of
C.G.T. valuation that figures are worked on is when a query
is raised by the Chairman as to what deal could be done;
isn't that right?

A. Correct. It may have possibly been prompted well, I
don't know what prompted it, but it could have been
prompted by the DTT settlement in March of '87 on the
figure of 82 million. It would certainly have prompted
anybody to say, "Well what bearing has that got on the
Capital Gains Tax", even though it is expressed to be
without prejudice.

Q. You see, again we'll come back to taking a general approach
to something and a technical approach to something. The
Revenue take very technical approaches to many things.
They took a very technical approach to the best of their
ability in relation to the valuation; they took a very
technical approach to the best of their ability in relation
to valuation. Isn't that correct?

A. Correct. One does that, certainly, at the initial stages of the valuation argument. But when it comes to horse-trading and so on, I think technical arguments take a secondary role.

Q. I understand about horse-trading. But and I understand, and I thought we had agreed what "without prejudice" meant.

A. Yes, that is so.

Q. Now, after all of that, and between the time that there had been a compromise in respect of the Discretionary Trust Tax and the query being raised by the Chairman about coming from the Chairman, what would the figures be, or words to that effect, on an 82 million valuation, your branch had received no revised valuation of the shares from Capital Taxes Branch, had it?

A. I don't think we had, no.

Q. What I'm trying to do is focus on the facts here.

A. Mm-hmm.

Q. You then have a working of the figures, taking various situations, discounting starting off with 82 million now as the value, so we now have a figure of 120 million, which, according to Dr. Thornhill, contained a 15% discount or thereabouts.

MR. O'NEILL: Mr. Chairman, I don't think that accurately records what Dr. Thornhill said. He wasn't in a position to indicate that this question was put to him that doesn't that include a discount, and indeed I put to him also in questioning, it does not include a discount. He did not

accept, I don't think, that it did include a discount, and it's a matter of record and it can be demonstrated from the papers that it doesn't include a discount.

MR. COUGHLAN: Very good.

Q. As far as you were concerned, Dr. Thornhill's branch provided you with the open market value of the shares; is that correct?

A. Correct, yes. That is

Q. For the purpose of C.G.T.?

A. That was the only figure that I was interested in.

Q. Now, to then take the figure of 82 million, that is a discount from 120 million, isn't that correct, working a figure?

A. It's a reduction from 120, yes.

Q. And we also see, at the same time sorry, and just working on that basis, when the figure is taken at 82 million and the calculations are done, I think by Mr. O'Cathain, bearing in mind the base value, that would have given rise to tax liability in the region of 23 million-plus, 23.12, whatever it was.

A. Yeah, there are computations there, yes.

Q. The papers disclose that at a meeting between the Chairman and Mr. Ben Dunne and I think Mr. Fox, but I stand to be corrected in relation to that, but I presume Mr. Fox was there what Mr. Dunne said was 23 million or thereabouts was too much for him to pay now; that's what the papers disclose. Isn't that correct?

A. That is the record.

Q. The chronology.

A. Whether it's entirely accurate or not is another matter.

Q. Right. And we then see calculations being done on increasing the base figure of 5.5 million; isn't that right?

A. Yes.

Q. And as you said, you never saw, nor did you ever hear of any figures being put and I'm talking about technical figures in relation to valuation or matters of that nature being put by the Trustees or Mr. Ben Dunne to the Revenue?

A. No. I am not aware of such submissions.

Q. And those are the facts as you understand them?

A. As I understand them, yes.

Q. I'm just going to quickly refer to this. I don't think we need to go into it in any great detail. But it's just you were at a meeting. It's Tab 35, it's the 22nd May, and it's a note of a meeting between the Chairman, you, Mr. O'Cathain and Mr. Reid. It's Tab 36.

And it seems to me, and correct me if I'm wrong, that this particular note seems to be a note relating to technical matters; am I correct?

A. I am just having a quick look at it. Technical as regards valuation, I suppose.

Q. Yes. We'll just run through it. And there is Mr. Reid's paper was attached.

And there is "The right to propose" what was being considered here was what was the position in relation to the ordinary shares; isn't that right?

A. Yes, that's right, the ordinary and the relationship with the preference shares, yes.

Q. "Right to propose motions crucial. If it is there Section 137 to 205 also held while waiting for AGF. Not known when last AGM was. 10% seems like a proper discount.

Undoubtedly a would-be purchaser is not going to pay 100% of the total value of the enterprise considering the number of grey areas affecting the future of his investment."

"I showed 1985 CG notes to An Cathaoirleach, especially re total assets being appointed and intentions of parties. If he can settle with him on the basis of not compromising the principle of the deemed disposal but of agreeing a reduced valuation" "I mentioned Section 44 and interest accruing, etc. I asked JR to do a note on the 5 million for 1984 and me to do a note" '74, I beg your pardon, "and me to do a note on the figures for computation to thrown up on that basis and other points. This as early as possible."

Unless you want to draw my attention to anything in that note prompts you to think about something or that you can assist the Tribunal

A. Not necessarily, except that there is a general point in relation to the valuation of unquoted shares. I came across a document recently which was begin to me by the

late Joe Pairceir, no relation of the then Chairman. When I entered Capital Gains Tax he gave me a paper which sort of gave a background to the valuation of unquoted shares, and if I could just read this out. It's only about ten lines, Chairman. It's an extract from an article written by a New Zealand accountant.

"The valuation of shares from the Revenue point of view.

As to methods of valuation, there are as many methods and opinions as there are methods of valuation of all other classes of property put together. Authorities, accountants and share brokers hold widely different views, and in one recent court case involving the valuation of shares in a private company, four accountants placed valuations from 1 pound ten shillings to 6 pounds on the shares in the same company. This may seem ridiculous, and it was, but it has happened in many more cases than the few that have been before the courts. Within the last twelve months I have seen valuations of ten pounds shares in the same company made by six different accountants at 16 pounds ten shillings, 18 pounds ten shillings, 20 pounds, 24 pounds, 25 pounds and 31 pounds."

That's an indication of the differing views being held, or possible, can be advanced in relation to the values of unquoted shares.

Q. Yes, and I understand. But you see, would I not be correct in understanding that the approach which would have to be adopted by the Appeal Commissioners, like the approach that

has to be adopted by a judge when he listens to an expert give evidence, the expert is allowed express his opinion.

A. Yes?

Q. But the Judge, and I presume the Appeal Commissioner, has to determine the issue, and he doesn't necessarily base it on the opinion of the expert, because it's not the expert one goes to seek clarification from or adjudication from.

What the expert must do is lay out his basis for arriving at his opinion to enable the adjudicator to consider it to enable the view to be formed.

A. Yes, an Appeal Commissioner would hear experts from both sides in relation to the value to be placed on a particular asset. Now, as Senior Inspector in charge of the Capital Gains Tax section, I attended a number of appeal hearings where the valuation of assets other than unquoted shares was the issue. It included, for example, farms, development land, public houses and so on, and the Appeal Commissioners would listen to the evidence from both sides and make up their minds. But what was clear from all of that was that there was no way one could virtually depend upon it, one could depend upon it that the Appeal Commissioners were not going to endorse one side or the other. I don't think you'd disagree with me on that at all.

Q. Of course that is so. Of course that's so. But the experts on the Revenue side had applied a methodology, isn't that right, arriving at the valuation; it wasn't

plucked out of the air.

A. In relation to real property, the valuation officers would have been involved.

Q. I'm talking about this case.

A. Oh, on this case? Well, I had never had the pleasure of working in the Capital Taxes Branch nor in the Estate Duty Office, and I wouldn't be au fait with the methodology.

Obviously you had seen methodology in the papers.

Q. We saw the papers. And as and from the time of the capital sorry, the Discretionary Trust Tax hearing, as far as I can see, the Revenue were unaware of any similar work being done on the other side, although we heard Mr. Horgan say here in the witness box a few days ago that it was the view of the Trustees that it was worth somewhere between 60 and 70 million sorry, the Revenue has never seen, sorry, neither has the Tribunal ever seen any working papers to show that there was similar methodology taking place.

A. That's right. As I have said, I haven't seen any papers from the other side on this.

Q. And all of these calculations which were being conducted inside in the Revenue were being conducted, effectively, adopting worst-case scenarios, from the Revenue's point of view, at all times; isn't that correct? Reducing the 1985 figure, increasing the 1975 figure, squeezing it at both ends?

A. I hesitate using the phrase "worst-case scenario". I think there are computations there which show a possible

liability figure of 13 million at some stage on various scenarios.

Q. But Mr. Clayton, isn't the reality of at least the papers, as we see them at the moment, that all of this work arose not as a result of interaction between experts on your side and experts on their side and arriving at a figure as one might consider it

A. You are correct.

Q. but it all arose as a result of an inquiry being made, what would it be on a value of 82 million, and all that followed from there?

A. Yes, you are correct, yes.

Q. The next document I think that you record as attending a meeting is at Tab 40 sorry, I beg your pardon, this is a working paper arising out of Tab 40. It's Mr. O'Cathain's, I think. And you can see it's working up figures in relation to various matters which had been discussed at the meeting; isn't that correct?

A. Yes.

Q. And Mr. O'Cathain has dealt with this already, so I don't think you need concern yourself with it.

A. Right.

Q. Now, if you wouldn't mind just going to Tab 42 for a moment. This is in Irish, but we have a translation at the back. And this is Mr. O'Cathain's note, of course. And it's dated the 4th June 1987: "Call from the Chairman, he met BD. They settled or agreed 16 million." That seems to

be in respect of a liability for the C.G.T.

"He was offered three years to pay it. Maybe he will clear it within that time. It isn't accepted yet by BD. He is going to think about it and come back to the Chairman. I explained to him about the provisions of Great Britain.

Look at the figures for this."

Now, were you aware around this time that this had transpired?

A. I may have been. Could I just come back on one point there. The English translation of the Irish note. In the middle of the Irish note, it's typed here as "Nil se lar a glachta fos ag BD" I think that should be "lan a glachta fos". In other words, it's not fully accepted. The English translation says it isn't accepted, whereas the Irish would suggest that it wasn't fully accepted.

Q. Right.

Now, you then see, if you go to Tab 44, it's just a little note of a telephone call from the Chairman. This is made by Mr. O'Cathain. "BD and N. Fox to come in next week. He would like to get the draft of the settlement form that would be needed."

Were you aware

A. That's right.

Q. That seems to indicate there was a view taken in the Revenue that maybe this was being put to bed?

A. That it was possible that it could be closed off, yes.

Q. Then if you go to Tab 45. This is a note:

"Per JS and CC: "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 in the order of 30 million and 5 years would have been allowed to pay it. The C.G.T. would be allowed as a credit against the C.A.T.

"CC has retained some papers. He will advise me in more detail later. He had several meetings with An Cathaoirleach, who met the other side on his own."

Next note we'll deal with that one first, of July of 1987.

A. Mm-hmm.

Q. So, the question of the C.G.T. negotiations had effectively foundered, isn't that right, that Mr. Dunne what's indicated here is that Mr. Dunne wanted an inclusive settlement. I'm not quite sure what Mr. Dunne he wanted to deal with C.A.T. also now. I hadn't actually read that into it. I simply read something at the first line of that, says the negotiations have foundered.

Now, why they foundered, why exactly they foundered I don't know, and I don't know if a note of this nature could cover this situation. It would seem, as you suggest, that he also wanted to deal with C.A.T. , and that raises sort of serious issues as to what was going on, what had gone on in 1985. I'm not quite sure what was in his mind.

Q. Fine. We'll just look at the note, because you seem to be conveying this type of information to the note here.

A. Yeah.

Q. Forget about and I can't ask you to look into his mind as to why it foundered. But first of all, the negotiations had foundered, as far as matters were conveyed to you; isn't that right?

A. That's right.

Q. It was conveyed to you that Mr. Dunne wanted to deal with C.A.T. as if the shares had vested in the beneficiaries, and that would give rise to a C.A.T. liability of approximately 30 million or thereabouts, based on whatever valuation

A. If they vested in 1985, yes.

Q. And taking into account whatever valuation you were working from for 1985, of course?

A. Yes.

Q. Well, of course 1985 of course it would be C.A.T. liability. The question of control doesn't arise. Anyway, that's another day's work.

There was some discussion about the length of time that would be allowed to pay it.

A. I'm not quite sure what the position is in relation to Capital Acquisitions Tax, whether that was a statutory provision or a matter of practice.

Q. Right. But at least there seems to have been discussion about it, or it was being conveyed?

A. Yes, that's right.

Q. And the question seems to have also been raised as to

whether C.G.T. would be allowed as a credit against the C.A.T.?

A. I would think that that was not in any doubt whatsoever, because as soon as the Revenue noted in 1985 that the a gift situation such as might be said to have occurred in the Dunnes case would give rise to a double charge to tax, legislation was enacted that very year which would allow the amount of the Capital Gains Tax as a full credit against the C.A.T. So, in fact, the overall liability in that case could be would have a ceiling of the amount of the C.A.T.

Q. Yes.

A. Sorry, it just occurs to me, of course the C.G.T. could theoretically have been higher.

Q. Could theoretically?

A. Yeah.

Q. What I'm trying to, or what the Tribunal is trying to ascertain here is these were significant issues relating to the affairs of the trust and the Dunnes Group being discussed here, isn't that correct, from a Revenue point of view?

A. They were significant, yes.

Q. Did it, or was it conveyed to you, and just whether the note assists your memory, that there was any confusion on the Trustees or the Dunnes side in relation to matters they were discussing?

A. I suppose this comes back to what I was referring to this

morning, that Mr. Ben Dunne and the Trustees may not have been singing off the same hymn sheet in relation to this matter. I don't really know what was going on on the other side, and there could have been confusion, perhaps, as a result of that.

Q. Confusion, do you think, as between the Trustees and Mr. Ben Dunne, or confusion as to

MR. O'NEILL: Mr. Chairman, sorry to interrupt, I don't know how this is pure speculation on the or this witness is being asked to speculate on what was in the minds of the Trustees and what was in the mind of Mr. Dunne. I don't understand this witness to have met either of those parties.

CHAIRMAN: My disposition is to give a limited amount of leeway, Mr. O'Neill. I don't think Mr. Coughlan is going to spend any great time on it.

MR. O'NEILL: Well, I would just question the probative value of speculation by this witness.

CHAIRMAN: Noted.

MR. COUGHLAN: Sorry, I think you volunteered about the Trustees. I didn't ask you.

A. My apologies if I have gone too far on the speculation.

Q. MR. COUGHLAN: All I was asking you, there appears to be significant tax issues being discussed between the Revenue, the Trustees and Mr. Ben Dunne?

A. There were, yes. They were significant issues.

Q. Now, I think the note continues: "CC has retained some

papers. He will advise me in more detail later. He had several meetings with An Cathaoirleach, who met with the other side on his own."

Do you know who did advise in relation to this matter, can you remember?

A. I don't remember. I vaguely recall, I suppose prompted by this, there was a lot of to-ing and fro-ing in relation to the issues involved, but nothing conclusive came out of it. And obviously, in the light of the fact that the negotiations foundered, it wasn't necessary to record in detail what had gone on.

Q. Then you 29th October 1987.

A. I think that's a that should be perhaps 27/7/87, I would suspect.

Q. You are probably right, yes. It looks like it. Yes, it has to be, you're right. It has to be. "Per CC.

Appellants interest again and request to pay by way of huge fees from company to directors each year see note attached exclusively in relation to directors' emolument".

What's that about? Can you help us?

A. I don't know what is involved in that. The method of payment obviously would have tax implications. For example, there was the dividend matter which has already been mentioned; that was a possibility. But the tax implications of that, the tax implications of paying directors' fees, whose liability it was, who was actually going to pay in the heel of the hunt? There were a wide

variety of issues arising there.

Q. And then "Attached figures to be published. Per CC, the beneficiaries may be assessed by agreement instead of the trust. This would bring forward change in interest"

A. "Charge"

Q. "Charge in interest and abolish the charge on the trust."

A. That's right.

Q. What is that?

A. I think what that is referring to is that the possibility that the assessment on the Trustees would be cancelled, and by agreement, the beneficiaries would be assessed. That would bring forward the due date for payment of the tax.

Q. Which tax are you talking about?

A. Of the Capital Gains Tax.

Q. Sorry, I am trying to understand.

A. Because if it were decided that the assessment on the Trustees was not appropriate for whatever reason, an assessment in respect of the disposal of the shares would need to be made on somebody else, and it is the beneficiaries, obviously, that is in contemplation here, with the due date for payment of that tax and for the charge of any interest, if it were to arise, would run from the date of the assessment, not from the earlier date of 1986.

Q. I am sorry if I am slightly confused.

A. I am sorry if I haven't expressed it clearly.

Q. No, you have expressed yourself clearly. My confusion

arises in this regard: How could anyone other than the beneficiaries, or could you anyone other than the Trustees, in the situation of the 1985 deed, be taxed for Capital Gains Tax, as far as the Revenue is concerned?

A. Well, it's coming back to the suggestion which is running through these papers that the deed of 1985 in relation to the ordinary shares did not tell the full story. That is a question which was in our minds.

Q. I see. Perhaps you can tell us about that, because that is of interest to the Tribunal, that you were engaging with the Trustees on the basis of what, that the deed of 1985

A. It had been accepted for DTT purposes, I think, that the deed was valid. Questions were arising throughout these papers, as you can see, throughout these papers, about what actually happened. The question of summoning witnesses as to what happened arise, and it was theoretically possible that a situation, or information might have come to light which would lead to assessment on the beneficiaries or on the Trustees. There was a lot of looseness about this situation at the time.

Q. But that wouldn't have been the C.G.T. would it? Would that have been the C.A.T.?

A. There would have been certainly it was a C.G.T. assessment that was in contemplation, but the effects on other taxes, I haven't gone into those, but I would think there would have been serious implications for the others as well?

Q. I think the Tab 47 I think, and I think this sort of brings together "Call to CC from An Cathaoirleach. Bowen coming in, how much C.G.T.? They wish to proceed on the basis that the deed of 14/3 was invalid and that the beneficiaries became absolutely entitled on the 15/3. The C.A.T. on this would be about 32 million with remission to be given for trust tax paid since 1985.

Any C.G.T. paid would be allowed against this.

CC had a figure of 97 million calculated on the basis of 50% discount of the 82 million. Market value of the preference and ordinary shares which the trust held. He argues for a discount of the value in relation to the size of cash each holding acquired by the beneficiary, presumably one-sixth each. This would have value forward" this would "this would have 49 million value forward which they would hardly accept.

"I pointed out CG 1572 of British Revenue instructions in report of a disposal of full trust holding with no discount. The figures finally in place before summer were 82 million discounted by 15 million to 67 million" 15% is it? "For want a voting power given 16 million on C.G.T. and value forward was 67 value. He was in favour of saying 97 million C.G.T. and values forward to be negotiated later. He took copies of the computations giving 67 million tax and 67 million forward. He will discuss it with An Cathaoirleach."

Now, does that note help you remember anything?

A. Well, I am mystified and puzzled by some reference here to 97 million, which occurs seems to occur twice. I would have thought that was a figure of 17, not 97. But I don't see that. I don't see how $\frac{1}{2} \times 97$ million comes into this reckoning at all. I can see perhaps some rationale to 17, but not to 97.

Q. I see the point you make, yeah.

A. And in fact in the very last line, or the penultimate line, "Copies of the computation giving 67 million"

Q. That's 16 million.

A. Is it 16 million?

Q. Well 16 million tax and 67 million for

A. Oh yeah, 16 million. But the figure of 97, which is typed elsewhere, I'm not quite sure if that if "9" should read "1" there. I don't see how 97 million comes into it at all.

Q. How does 17 come into it?

A. Well, 17 is 1 million more than the 16 that we have been talking about.

Q. How does it make sense of the sentence? The 97 million where does well, we know that there is a 97 million in existence somewhere in the papers; isn't that right?

A. Is there?

Q. That's the capital gain we know there is a 97 million.

A. Hold on, was it 97 at no, no. 97, whatever it was, 97, 98, that was an amount chargeable to Capital Gains. It is not a tax figure, and it is not a valuation figure.

Q. It's a gain; isn't that right?

A. Sorry?

Q. It's a gain. 97 million is the gain. The tax figure is the tax that's charged on the gain.

A. To say that I calculated on a basis of 50% discount of the 82 million doesn't make any sense.

Q. Anyway

A. Because the 82 million did not emerge until after I had made the assessment.

Q. What I want to go back to now in this note, and we'll come back to this issue, is the first paragraph in the note:

"They wish to proceed on the basis that the deed of 14/3 was invalid and that the beneficiaries became absolutely entitled on the 15/3."

Can you tell us about that? What discussion was going on there, and with whom? It's a call from the Chairman.

A. I wasn't present, or I wasn't party to the discussion, but that is probably a fair summary of what was said to me by the Chairman. In other words, let's forget about the deed of 1985 for the ordinary shares, and we'll recast everything and see what emerges. Which mightn't have surprised some people, but however, that would seem to be what was being suggested at the time. But as we know, nothing came of that either. I think was it the 10th or the 11th September, the date on which the then Chairman retired? I have a note, which is not apparently in these papers, which records the fact that nothing happened as a

result of that, of the Bowens coming in.

Q. I see.

CHAIRMAN: I suppose you could say this document appears to record a remarkably a la carte menu compared with the hard and fast computations of earlier periods.

A. It certainly it is something which the papers which I gave oh, yes, there are behind me the note I think is either 10th September or 11th September which records a further conversation with the Chairman saying that effectively, the negotiations had collapsed, and the case should now proceed accordingly. That conversation may have taken place on the very same day, maybe on the afternoon; I don't know.

Q. MR. COUGHLAN: But what proceeded was the question of valuation was parked, anyway?

A. The question of valuation was parked. It would have become material if in fact it remained material anyway if, in fact, they had actually said the deed of 14th March '85 was invalid because it would have been a disposal anyway. To the beneficiary the question was we had assessed on the basis that there was a new settlement, and there was a disposal to the Trustees of that new settlement.

It's now been suggested it wasn't a disposal to the new settlement; it was actually a disposal to actual individuals, to beneficiaries. In either case, there was a valuation issue arising.

Q. And what valuation issue was left to arise?

A. What valuation issue

Q. If the Revenue had been successful, what valuation issue are you saying was left to arise?

A. A value the value at '85 and the value at '74. Those issues would have remained.

Q. I understand that. But give me a figure on it, Mr. Clayton, bearing in mind all the work that had been done here. Give me a figure on it.

A. A figure? I'm not quite

Q. Sorry, if I go back. If the beneficiaries became entitled, absolutely, that was the end of it, wasn't it? It was an inheritance, it was a C.A.T. matter, wasn't it?

A. Also a C.G.T. matter.

Q. Right. But nothing after that?

A. Nothing in relation to those taxes after that, no. There wouldn't have been a follow-on on that.

Q. So where would the value have gone forward to? That's what I'm trying to understand.

A. The value gone forward would have been the value fixed for '85.

Q. Are you saying that in those circumstances, that you would have or that the Revenue would have contemplated going back, putting a value on the shares of 120 million, raising the assessment of 38.8 million, and proceeding on that basis?

A. No, as a matter of reality, we would have requested the Capital Taxes Branch to review the position and tell us

what were the figures now for '85 and for '84. But you I think we could depend upon it, whatever figures would emerge there would not be agreed by the other side.

Q. And what about the 16 million that everyone seems to have agreed as being the right figure?

A. Yeah, quite. Well, this may have been possibly there is no mention in this note of this being conditional on, let's say, a figure of 16 million.

Q. You see, I know that, Mr. Clayton. But we have had a lot of discussion, and people have asked questions when very precise legal language like "without prejudice" is used, and the Tribunal is then asked, "Ah, well, let's forget about that, and let's take a sort of broad common-sense approach to it". That's in that context. Here, where a situation has been arrived at, depending on the outcome on the liability issue, it seems to be that a figure of 16 million, which is a long way off the 38.8 million which had been raised in the assessment, that, "Ah, well, there is nothing in the note there to say, 'Well, we are bound by that, or that wouldn't be the reality, or that wouldn't be the starting point'." Do you see the problem for the Tribunal, Mr. Clayton?

A. In reality, I would say, because of what was hammered out in on the DTT valuation side, the 120 million valuation wasn't going to stand up before the Appeal Commissioners. Therefore, I don't think that in going into into an appeal hearing, that we'd be talking about a liability

figure of 38.8 million. It would have been less than that anyway because of the DTT figure. I'm not saying that we were actually that Revenue would have been stuck with the 82 million, but I don't think that Revenue would be going in as high as 120. I just don't know. It's not my area of expertise.

Q. I'm going to take this very slowly again, Mr. Clayton, because I thought we had established certain facts.

You were furnished with an open market valuation by Capital Taxes Branch of 120 million; isn't that right?

A. That is correct.

Q. On the basis of that this is for 1985 you were also furnished with a valuation of 5.5 million for the base date of 1974; isn't that right?

A. That is correct, yes.

Q. And as everyone understood it, that had been a figure agreed sometime in the 1970s between the Dunnes' interest and the Revenue as representing the value of the Dunnes empire, as you put it, the ordinary shares as of 1975; isn't that right?

A. As of 1975, yes.

Q. And that's what you were furnished with. You then set about doing the appropriate calculations; that is, you applied the indexation of 4.140% to 5.5 million to bring it up to the value of 1985, the '74 value up to 1985; isn't that right?

A. That's right.

Q. You subtracted that from the 120 million, which was the value you were given?

A. Yeah.

Q. You put in $\frac{1}{2}$ 230,000, or there or thereabouts, for legitimate or reasonable expenses

A. Likely expenses, yes.

Q. attaching to it. That gave rise to a sum of 97 million.

You applied 40% Capital Gains Tax to that gain. And you came up with a figure of 38.8 million; isn't that right?

A. That's right, yeah.

Q. You received no revised valuation from Capital Taxes Branch in relation to the 1985 figure or the 1974 figure; isn't that right?

A. That is correct, yes. I had received nothing in writing from them on that issue, nothing formal.

Q. What did you receive?

A. Well, I would have heard various discussions. I mean, I would have been told that they had settled the DTT.

Q. Sorry, that they had settled, I beg your pardon, they had settled the Discretionary Trust Tax, a different tax, based on a different date; isn't that right?

A. That is right, yeah.

Q. And based on different considerations?

A. Different considerations, the control and so on.

Q. The first time there is a record of any question on the on the valuation of the shares for Capital Gains Tax purposes is when a query is received from the Chairman,

isn't that right, as to what the calculation would be on 82

million . Isn't that right?

A. That was shortly after the DTT settlement, yes.

Q. Is that right?

A. That is I think right, yes.

Q. What next happens, and that produces a figure, just based on that, Mr. O'Cathain did a calculation which gave rise to a tax of 23 point something million; isn't that right?

A. Something like that, yes.

Q. The papers then record a meeting between the Chairman and Mr. Dunne and Mr. Fox, and all that is recorded or reported from the meeting because it seems to be per you, I think, to Mr. O'Cathain is that Mr. Dunne said that 23 point something million was too much for him to pay at that time. That's what the papers record, isn't it?

A. Well, that's what is said, but it might perhaps have been more accurate to say, I don't know, that 23.3 million is too high.

Q. I beg your pardon?

A. That 23 million is too high.

Q. All right. We'll take your word.

The note says "now", and "now" is underlined, because it seems to be conveyed too much for him to pay now, and the "now" is underlined, which I suppose to anyone reading the note means emphasis is being put on that word "now."

A. What tab reference is that at?

Q. I'll come back that now in a moment, because I don't want

to lose the train of thought here, Mr. Clayton, and we just want to follow the whole story through, if we can, and we'll just sit back, and we'll go to the documents then.

A. Okay.

Q. So there is a note Mr. Dunne has a meeting. The 23 million is too much to pay. No figures are furnished by the other side, and there is no note anywhere in the papers of negotiations on technical matters with the other side; isn't that right?

A. That is correct, yes.

Q. The next thing that appears to happen is that the figures are worked on again, in that the base figure is increased to $\frac{1}{2}$ million, isn't that right, it is brought up?

A. That was brought in, yes.

Q. And that had the effect of reducing the 23-odd million down to a variety of figures, of 17, 16, down as far as 13, depending on various calculations; isn't that right?

A. That's right.

Q. Again, no figures or technical information being furnished from the other side, as far as you know?

A. That's as far as I know, yes.

Q. So what we see is the whole thing being worked on inside Revenue; isn't that right?

A. That's well, a lot of work, you might say, within Revenue; what was going on on the other side, I have no idea.

Q. Now, of course everyone understands that when the

assessment was raised at 38.8 million, that nobody could put their hand on their heart and walk in and guarantee to anybody that "I will get 38.8 million". But one would, if one raised an assessment at that level, be hopeful, and perhaps confident that one would perhaps achieve a figure in that ballpark; that is, you might reduce it even by 10%?

A. Not necessarily. In my experience, before the Appeal Commissioners and Circuit Court Judge, one could not depend upon such a low percentage.

Q. Well, can I come at it this way, Mr. Clayton: Are you saying that the 38 million assessment that was raised, that to end up with 16 million is what you would have anticipated?

A. No. I would have hoped for a figure closer to 38 on the figures which had been supplied to me, but I couldn't be sure as to what figure would emerge from the Appeal Commissioners or the Circuit Court Judge.

Q. I accept that entirely. I accept that entirely. But 16 million certainly wasn't in your contemplation?

A. Certainly not when making the assessment. If I thought the correct figure of liability was 16, I would not have suggested an assessment of 38.

Q. Now, I think on the papers, you don't have any further involvement; isn't that correct?

A. My last recorded note is the note which you don't have on those papers, I think 10th or 11th September, where the Chairman told me that the negotiations had terminated.

Q. That's your final involvement?

A. That's my final recorded involvement in that, yes. Sorry, not just recorded involvement; up to the time of the Tribunal, of course.

Q. Now, I think you were aware well, the note seems to indicate that you were aware that the Taoiseach and the Chairman had had some communication about this matter; isn't that correct?

A. The Taoiseach and the Chairman, yes, there are yeah, the notes indicate that, that's right.

Q. Another matter I wish to turn to, just and I don't think it will take us too long it's the subject matter of your second memorandum, and that is the question that has arisen about the liability for income tax on the part of the Trustees arising out of receiving dividends from the Dunnes company to discharge the Discretionary Trust Tax.

A. Yes.

Q. And I just want to concentrate on the income tax side. I think Mr. O'Cathain has dealt with the question of the surcharge at the moment.

A. Yes, I think he has, yes.

Q. There can be little doubt but that the Trustees have asserted that there was an agreement that they would not be liable for income tax, any income tax which might arise as a result of receiving dividends from the Dunnes company to pay the Discretionary Trust Tax; isn't that correct?

A. Yes.

Q. You are aware that

A. I am aware of that train, yes.

Q. And in fact they didn't pay income tax all the time from I think 1988, '89, '90, '91, '92, '93, '94, '95, '96, as far as we can see anyway, and we don't know whether they paid it ever, ever, ever, but on those years at least, we can see that?

A. That appears to be the case. Self-assessment was in operation, as we mentioned this morning.

Q. I understand that. But it was known in Revenue that Discretionary Trust Tax was being paid; isn't that correct?

A. It was known in Revenue, sorry, what?

Q. That Discretionary Trust Tax was being paid; isn't that right?

A. It would have been known in Capital Taxes Branch, yes.

Q. And can there have been any doubt in the minds of people not just in Capital Taxes Branch now, but on your side that the sole source of revenue to the Trustees for the purpose of paying this would have been a dividend received from the Dunnes Group somewhere?

A. The precise goings-on, or the income and expenditure of the Dunnes' operation, would not have been a matter on which I'd have been worrying on a daily basis at all. There are many hundreds of thousands of millions and taxpayers in this country. One can't be concerned about whether a piece of information is being matched up. We would presume, because of self-assessment and the consequences which ensue

from self-assessment, that taxpayers and advisers know that a certain situation should be dealt with.

Q. And you had, I suppose, the situation here where the Trustees were all accountants, as far as I can remember.

Mr. Fox, Mr. Bowen

A. The accountancy profession was well represented.

Q. Mr. Uniacke. Sorry, Mr. Montgomery was a solicitor.

A. That's what I said; they were well represented.

Q. Yeah, well represented. You see, what would appear to be unusual is this: that accountants and a solicitor asserting that they had such an agreement, if in fact they didn't have one, this wasn't just somebody walking along the street chancing his arm about something; these were people in professional practice, people who would have been dealing with the Revenue, people who would have been dealing with clients, clients' affairs with the Revenue.

A. I think this may perhaps have been engaged in wishful thinking. The fact that there may not have been any additional liability in the year in which that event happened might possibly have been extrapolated, then, to an agreement for all time. That would not have been right, of course. I don't know what thinking went on there, but I think it was wishful thinking.

Q. What they said is that they had an agreement.

A. That's right.

Q. And they continued to assert that. They didn't pay the tax. They could have taken the big amnesty if they were

incorrect in their thinking. And they went so far as to, as we understand it, bring this matter to the Appeal Commissioners, and to appeal and to bring the matter to the Circuit Court and to seek an Order for Discovery, a unique step against the Revenue, and this is all done by people whom you think were engaged in wishful thinking; fairly lengthy steps and serious steps for accountants and solicitors to be engaging in, wouldn't you agree, on the basis of wishful thinking?

A. I don't think it would be portrayed as being a unique step, to seek discovery of documents from the Revenue. It happens fairly frequently.

Now, I was not involved in any way in that DTT agreement.

I don't know what went on on that date. But what I do what I would say is that I cannot imagine a Revenue officer agreeing, on an open-ended basis, to what is proposed here.

If I may add to that, I would think that if in fact it had been decided, most extraordinarily, that there should be a concession of this kind, Revenue would have been following through by legislation, ideally, and as a second-best, and one which I personally would not favour, a Statement of Practice. But nothing of that nature happened, because there are many Discretionary Trusts and other trusts where a similar situation could have arisen. Why should the Dunnes be the only ones to benefit from that sort of an arrangement?

Q. That's what I am trying to find out, if that was the case,

and why.

A. I don't believe it was the case.

Q. You see, as of 1996, as of 1997, I think, I'm just from the Revenue files, it would appear that there may have been income tax in the region of 700-odd thousand pounds or a liability for income tax of around 700-odd thousand pounds, by 1997. I suppose one might apply interest or whatever to that, too. I don't know, and I'm not going to get involved with that; I am just dealing with the question of tax based on the discretionary tax paid.

A. You see, I am not au fait with this matter. I was consulted by Mr. O'Connell about it. I told him I didn't believe there was ever such an agreement. I don't know what happened subsequently. There was a certain situation which arose in relation to taxation in the 1990s. I'm not in a position to go into that here. But to what extent all these things were covered, I really cannot say. I just don't know. I wasn't involved in it in any detail. I was consulted to say did I know anything about this alleged agreement, and my answer was in the negative.

Q. I wonder, would you look at Document 26, and maybe this might be

A. 26 in the

Q. In the big book. And I just want to make clear you have two handwritten pages, and if you haven't, I'll give you the second page.

A. Sorry

Q. You may not have a second page. The handwritten

A. There is a handwritten one and a typed copy.

Q. No, there is a second page to the handwritten note, I am sorry.

(Document handed to witness)

Q. MR. COUGHLAN: You can see from the previous page that this is discussion in relation to surcharge. Now, if we continue on here, and it says: "First intimation that C1 income tax had of the trust was when we advised them first. Returns for all years will be required in due course."

"Sean O'Cathain."

Does that assist you at all?

A. I am afraid I am lost. What tab did you say?

Q. Tab 26, I am sorry, Tab 26. What I have just handed you is

A. I see that.

Q. is the second page of the handwritten note.

A. That's not typed.

Q. No, that's not typed. I am just asking you to look at the top of the second page. "First intimation". Do you see that?

A. Yeah. "Was when we advised them of it," and "it" is? That date is 20th March, '87; that's about a week, one week, I think, after the DTT hearing, and where as a result of which there was a telephone conversation between I think Don Thornhill and Sean O'Cathain and perhaps Sean sorry, John Reid, and Sean O'Siochain I see is also involved in

this here. I'm not quite sure what your question is, Mr.

Coughlan, at this stage.

Q. I am asking, does this assist you, first of all, in understanding what had happened and why the tax wasn't followed up?

A. Why the tax wasn't

Q. Followed up.

A. I suppose it does, in that the trust would not, I think, in the ordinary course have had a tax situation sorry, an income tax situation, and as such, it wouldn't be figuring on an annual basis in our radar screens. Now, when obviously this situation arose, following the DTT arrangement, Sean O'Cathain would have advised Sean O'Siochain about the situation, and then it would have become known.

Q. So it was known; it would have been on the radar screen?

A. From then on.

Q. 1987, from 1987 on?

A. 1987.

Q. And it should have been on the radar screen, to use your expression, on the radar screen? I just use that and I know what you mean.

A. Yeah.

Q. I want to know was it and I suppose the issue the Tribunal is trying to understand here is, was this as a result of an omission, or was it as a result of an agreement with the Trustees?

A. I would I certainly would not accept the latter option.

I think it was as an omission as a result of an omission on the part of the Trustees. That return of income should have been made

Q. No, an omission on the part of Revenue was this not followed because it was an omission on the part of Revenue? We know what the Trustees were asserting.

A. If the trust had income, it was up to the Trustees to advise Revenue of that position.

Q. But what the Trustees were saying all along was, "We're not liable for this because we have an agreement which says we're not liable for it, and we're not fools, either; if we thought we were liable, wouldn't we have taken the amnesty, for example, at one stage?" And they are saying, "We're not liable", isn't that what the Trustees are saying, "because we have an agreement"?

A. I do not accept their contention that there was an agreement. I have a certain difficulty with this, because I was not present on the day of the alleged agreement. I think you have questioned Dr. Thornhill, I think, on that subject. But and I'm not sure that I can add to that. I certainly was not aware, have not been aware of any agreement. I am aware of an alleged agreement, but I don't accept it.

Q. This matter, I think, did come across your desk at some time in the 1990s, didn't it?

A. When Tadhg O'Connell approached me.

Q. I think your view of it was yes, a question had arisen?

A. Yeah.

Q. Or a query, or an issue, or words to that effect, and that consideration was being given to it. I suppose that would indicate an inquiry was being put in train; you don't just willy-nilly reject something?

A. I am not clear as to what you are referring to.

Q. You see, I'll look for the document now in a moment. I thought I read that a query do you remember coming across your desk in the 1990s

A. This coming across my desk?

Q. This issue. This income tax issue.

A. Yeah, when Tadhg O'Connell raised it with me.

Q. Yes. Tadhg O'Connell discussed it with you?

A. Yeah.

Q. In the context of what?

A. In the context of what of what he had what had arisen with him. And he wanted to know, did I know anything of this, because he would have known that I had been involved to a certain extent with the C.G.T.

Q. Can you remember what he asked you, or can you help us?

A. No. As I have said in my note here, I don't have a detailed recollection. I vaguely recall that he consulted me saying, like, "Is there anything in this?" And I said, "Not to my knowledge; I very much doubt that", for the reasons that we have indicated.

Q. We know Mr. Pairceir, in his memorandum to us, has used the

expression "he'd be astonished" that we know Mr. Horgan used similar-type language, "astonishing"?

A. Yeah.

Q. Was that your response to Tadhg O'Connell, as well, it would be astonishing? I am not saying you noted it there

A. I don't think I would have used the word "astonished," but I certainly did not endorse in any way the suggestion that there was an agreement. I simply did not believe that there was an agreement, for the reasons that I have indicated. If there was, it would have been extra statutory. It should have been a concession of that nature was so, you might say, far-reaching that it should have been covered by legislation as soon as possible. And it wasn't, of course. There was no legislation in relation to that issue. So I don't believe it happened.

Q. As far as your understanding sorry, it's your position that you don't believe there could have been such an agreement; is that right?

A. No. There could not have been such an agreement, is my opinion. I believe that there was possibly a misinterpretation, and possibly some wishful thinking, in that if there was no liability in one year, that it carried through in the minds well, there is never going to be any liability because of this situation.

Q. That's the first point.

And the second point, that the obligation is on the

Trustees to make returns for self-assessment purposes of any income

A. Even before self-assessment came in, if a taxpayer had a liability, that taxpayer was obliged to reveal that fact to the Revenue. It wasn't simply up to Revenue to go and find a taxpayer who couldn't care less.

Q. This was a slightly different situation. Revenue knew all about it. This was being dealt with at Chairman level, at Chairman level. This wasn't an ordinary taxpayer in the net or not in the net, as the case may be.

A. Well, we would have expected the taxpayer in question to be advising us in the ordinary way, especially in the context of self-assessment, which was the subject of an enormous amount of work and publicity during 1988. I simply don't understand how this was left aside. I can understand why you ask the question, but I do not accept that there was an agreement.

Q. Well, why, then, were returns not pursued by the Revenue?

A. There are a great many persons in this country who have not complied fully with their tax obligations. I don't know why, in many cases, that has happened.

Q. It's a rather cryptic response. It's a cryptic response, Mr. Clayton.

A. I really some people are happy to say, "Well this doesn't apply to me; I have an exemption, and let them find me and I'll argue the toss with them afterwards".

Q. Right.

A. That's putting it in very simple language, not cryptic I trust.

Q. But here is a situation where the whole matter had taken up an awful lot of Revenue time, this whole Dunnes issue, on the C.A.T., C.G.T., discussions, hearings. Two chairmen, two chairmen meeting with Mr. Dunne; isn't that correct?

A. That is correct.

Q. The papers recording at least that the Taoiseach spoke to two chairmen, isn't that correct, in relation to the matter? Isn't that what the papers record?

A. I think you're correct, yes.

Q. And surely in those circumstances, Mr. Clayton, this was not viewed in Revenue as being just some other ordinary taxpayer who either was in the net, had fallen through the net, or wasn't swimming towards the net; surely that cannot have been the case, Mr. Clayton.

A. I think, you know, we would have a presumption that if there is a taxable entity with advisers acting for it, that there is a compliance with law. We can't, Revenue as an organisation, cannot go fretting about whether a taxpayer has omitted VAT last month or PAYE for last year. We can't do that. That is why we have self-assessment. We expect people to come to us. There are significant severe penalties if in fact there is non-compliance with the law.

When this matter came to our attention, whenever it was, in the mid-nineties, it was pursued by Mr. O'Connell.

Q. Are you sure about that?

A. As far as I know.

Q. How expeditiously, do you think?

A. I really don't know, because I have not seen the papers.

You are asking me about things

Q. You haven't seen the papers?

A. I wasn't personally involved in this. My involvement on this particular issue was very minor. And apart from knowing about the DTT settlement, the matter of the additional income tax in the mid-nineties occupied only a very small amount of my time, perhaps only ten or fifteen minutes.

Q. Thank you, Mr. Clayton. Thank you very much.

A. You are welcome.

CHAIRMAN: Well, Mr. O'Neill, you are obviously going to be more than ten or fifteen minutes, I would think.

MR. O'NEILL: Yes, I am.

CHAIRMAN: Not perhaps

MR. O'NEILL: I won't be as long as Mr. Coughlan, but I imagine I would be half an hour, three-quarters of an hour.

CHAIRMAN: There will be some other questions as well.

Mr. Clayton, I don't think it's fair to impose any further sitting on you today. It's clear your evidence will end tomorrow. I am sorry it's necessary to ask you to come back then. Is that inconvenient for you?

A. That's convenient.

CHAIRMAN: Maybe, to make sure that we there is no possibility of a third day of troubling you, we'll again

make for a 10.30 start, if that's convenient.

Thanks very much.

A. Thanks very much.

THE TRIBUNAL ADJOURNED UNTIL THE 22ND JUNE 2005.