

THE TRIBUNAL RESUMED ON THE 3RD MAY 2006 AS FOLLOWS:

MS. O'BRIEN: Morning, sir. The Tribunal is interposing one short witness this morning, sir, in relation to another aspect of its inquiries. That witness, sir, is Mr. Paddy Donnelly, Assistant Secretary in overall charge of the Investigations and Prosecutions Division of the Revenue Commissioners. And his evidence is not being heard, sir, pursuant to hearings which the Tribunal has recently had regarding the collection of tax from Mr. Haughey and Mr. Michael Lowry, but pursuant to the Tribunal's general inquiries into the operation of what are known as the Ansbacher accounts, sir, and those inquiries were made as an adjunct, and in the context of the Tribunal's investigations of the money trail pursuant to paragraph (a) and (b) of the Terms of Reference.

You will recall, sir, that in the course of the hearings regarding the collection of tax from Mr. Charles Haughey, it appeared that the balances on the S8 and S9 memorandum accounts, the balances being held in pooled accounts in the name of Hamilton Ross in Irish Intercontinental Bank Limited were expressly excluded from the agreement that was concluded with Mr. Haughey in March of 2003 and on foot of which Mr. Haughey paid a sum of $\text{€}25,000,000$. And you will recall, sir, that it was contended on behalf of Mr. Haughey that he had no access to those monies and the accounts were not in his name. And in that regard, in the course of his evidence, Mr. Norman Gillanders, who was at the time

Assistant Secretary in control of the Capital Taxes

Division of the Revenue Commissioners, indicated, sir, that to his knowledge the balance on the Hamilton Ross account had been used to meet the tax liabilities of an unconnected person to the Revenue Commissioners.

And in that regard, sir, on the 6th April, Mr. Tony Barnes, who was the programme manager of Irish Intercontinental Bank, was recalled to give evidence; and in his evidence, he informed you, sir, that in the very end of December 2005, total payments of $\text{€}900,000$ were made from the Hamilton Ross account to the Revenue Commissioners, $700,000$ of which related to the tax liabilities of Hamilton Ross and $\text{€}200,000$ of which related to the tax liabilities of Irish Intercontinental Bank, which were in fact met by Hamilton Ross, and that those payments were made on foot of negotiations with the Revenue Commissioners as opposed to the raising of any assessments, and that there had been no admission of liability, if you like, for that tax by either Irish Intercontinental Bank or Hamilton Ross.

And in those circumstances, sir, the Tribunal has requested Mr. Paddy Donnelly to give further evidence in relation to the actions taken by the Revenue Commissioners in the light of the revelations regarding the Ansbacher Account in various Tribunals and in the light of the report of the Inspector appointed to investigate the Ansbacher Accounts, and indeed in the light of the Revenue Commissioners' own investigations of the Ansbacher accounts.

So I'll just call Mr. Paddy Donnelly, sir.

PADDY DONNELLY, PREVIOUSLY SWORN, WAS EXAMINED BY
MS. O'BRIEN AS FOLLOWS:

CHAIRMAN: Thank you very much, Mr. Donnelly, for what I
think is the last occasion the Tribunal will be troubling
you. You are of course already sworn.

A. Okay, Chairman. Thank you.

Q. MS. O'BRIEN: Morning, Mr. Donnelly. Thank you very much
for attending to give further evidence.

I think you furnished the Tribunal with you did in fact
furnish the Tribunal with a memorandum of your intended
evidence in this regard, and I wonder if you have a copy of
that with you in the witness box.

A. I have, yeah.

Q. What I propose doing is following the usual approach taken
by the Tribunal. I'll take you through that memorandum;
there may be one or two matters that I might ask you to
clarify in the course of doing that, and then maybe just
one or two matters we might discuss having completed your
memorandum.

A. Okay.

Q. And you say that following on from Revenue's investigations
into the Ansbacher accounts and also the report of the High
Court inspectors, the view was taken that Ansbacher Cayman
Limited, formerly Guinness Mahon Cayman Trust Limited,
Ansbacher Limited and Cayman International Bank and Trust
Company Limited, had an established place of business

within the State and carried on business in the State through a branch or agency from 1971 to 1997. Is that correct?

A. That's correct, that was our approach, yeah.

Q. I take it that that approach arose from evidence and conclusions of investigations regarding the activities of the late Mr. Traynor?

A. Yes. Well, as the Tribunal is probably aware, we started off an investigation into the operation of the so-called Ansbacher accounts back in the late nineties, and in the course of that investigation, we had sought and were granted High Court orders to enable us to gain access to financial information and other information in institutions within the State, and indeed from private individuals within the State under two separate pieces of legislation. The net effect of that was our primary goal was to pursue the Ansbacher Account holders, insofar as we could identify them, and insofar as they had been identified in the literature, if you like, and the High Court Inspector's report. And as we were doing that work, we also turned our attention to other entities that would have played a part in the overall scheme and sought to see, well, were there tax issues in relation to those entities? And if so, how should we address them? This was what brought us to looking at Ansbacher Cayman Limited.

Q. Yes. But the actual activities of Ansbacher Cayman, insofar as they were conducted in this jurisdiction, were

the activities of Mr. Traynor; isn't that right?

A. In effect, Mr. Traynor was the front, if you like, yes, yeah.

Q. And insofar as you refer to there having been an established place of business within the State, that would have been Mr. Traynor's place of business?

A. In effect, yes, yeah.

Q. So, in the years prior to 1986/'87, it would have been the offices of Guinness & Mahon?

A. Yeah.

Q. And the years subsequent to that, it would have been the registered offices of CRH plc?

A. Correct.

Q. I think then a short period after Mr. Traynor's death, when the operations, if you like, were being conducted by Mr. Collery, it would have been the premises in Winetavern Street he set up operations?

A. Yes, in Winetavern Street, correct, yeah.

Q. You continue in your statement, further, the Revenue view was that the bank, which did not have a licence to carry on banking business in the State, was liable to corporation tax on its profits; that's pursuant to Section 25 and 26 of the Taxes Consolidation Act 1997, and income tax on payments of yearly interest in the State pursuant to Section 246 of the Taxes Consolidation Act 1997.

So, as you saw it, there were two, if you like, heads of tax liability: firstly, for corporation tax in respect of

profits generated by that banking business; is that right?

A. Correct. The because we had taken the view that there was business was being conducted through this established these various established places of business, we looked at the tax heads that might apply. And there were two tax heads: A) corporation tax, and B) income tax under the section, what was the old Section 31 of the Finance Act 1974. And they were the two tax heads that we had a look at.

As you are aware from the McCracken Tribunal, there was evidence to the effect that the turn on the deposits, there was a profit to be made by the Ansbacher Cayman, one-eighth of one percent was the turn on the profits, and that this was a matter that was obviously of concern to us.

Q. Is it that element of the profit that gave rise to the income tax, or was it the payment of interest on the accounts that was held with the Irish banks?

A. No, payment of interest gave rise to the income tax charge. The profits from well, any kind of fee income that they would have generated within Ireland gave rise to the corporation tax charge.

Q. I see. The entire premise of all of that, though, was that in effect, the accounts in the name of Ansbacher Cayman and indeed in the name of Hamilton Ross were not genuine nonresident accounts?

A. Well, no, that's not entirely the case, because Section 31 of the Finance Act 1974 wasn't concerned with, essentially,

with residents or otherwise, so this wasn't the basis for it.

Q. I see. So the technical head of tax under which you were, if you like, pursuing the collection of tax was one where the issue of whether they were resident or nonresident accounts didn't really apply?

A. No. Just to explain that, this piece of legislation introduced the concept that where a company in Ireland paid money within the State, that there was a withholding tax to apply in relation sorry, paid interest, so there was a withholding tax to apply to that interest if that interest is what could be described as annual interest, yearly interest. It didn't apply if it was to be regarded as what they term short interest.

Now, that particular provision was brought to bear by us in relation to the Ansbacher Cayman situation because it was a company, as we saw it, de facto, operating within the State through an established place of business, and therefore falling within the framework of this particular piece of legislation. There was an exemption for banks generally in relation to this, but because Ansbacher was in effect an unlicensed bank carrying on business within the State, it fell within the definition in our view, at any rate of a company paying interest, paying annual interest within the State.

Q. I see. Now, in your statement you go on to say that lengthy and detailed discussions and negotiations were held

with the bank and their advisers, and notwithstanding the contrary views on the issues, a settlement which took account of the particular facts and circumstances arising was agreed in December 2003 for $\frac{1}{2}$ 7,500,000. Payment of the liability was made on 12th January 2004. This was a composite payment covering income tax on certain yearly interest payments and corporation tax and interest on late payment. So it covered both heads of liability together with interest; is that right?

A. Correct, yeah.

Q. You say that the liability in relation to yearly interest payments they're the interest payments that you have just been referring to?

A. Correct.

Q. Allowed for amounts otherwise regarded as recovered, recoverable or excluded from charge.

A. Yes.

Q. Could you just explain what those amounts were?

A. Yes. Again, we had to go back to what I said at the outset, our initial inquiries, and indeed those inquiries continue in the case of some individuals, were focused on the individual depositors. Now, insofar as we had recovered tax from other sources, we didn't want to take what might be termed a double dip, so we had to take account of situations where others had actually paid the tax or circumstances where, through double taxation agreement arrangements, people would not have been liable

to pay tax in this country, and indeed, situations where short interest was part of it. And there was indications that some of the interest paid was what could be termed short interest; in other words, it wasn't of an annual character.

Q. I see.

A. And circumstances where, for example, somebody had availed of the amnesty of 1993. So we had to take account of those situations.

Q. Of all those matters, the possibility that you'd recover tax from taxpayers, the possibility of double tax agreements, that somebody had taken advantage of the amnesty or that it wasn't yearly interest as provided for under the section that you had invoked?

A. Correct, yeah.

Q. Now, you say that a similar view was taken by Revenue in relation to Hamilton Ross Company Limited as regards an established place of business within the State and the carrying on of a trade in the State through a branch or agency in the State with liability to corporation tax on profits and income tax on payments of yearly interest in the State. The years concerned were 1992 to 1997.

Following negotiations, a settlement was reached in December 2005 for $i\frac{1}{2}$ 700,000. A cheque payment of $i\frac{1}{2}$ 700,000, postdated 31 December 2005, was made by the company on 29th December 2005. Again, the payment was a composite amount covering income tax on certain yearly interest payments and

corporation tax and interest on late payment; also, the liability in relation to yearly interest payments allowed for amounts otherwise regarded as recovered, recoverable or excluded from charge. And they were the same amounts that were allowed that you have just referred to in relation to Ansbacher Cayman?

A. Yes, indeed. Insofar as Hamilton Ross had taken over a slice of the action at a particular point in time during the nineties, that we applied the same approach in the case of Hamilton Ross.

Q. So, in effect, what happened was that from Ansbacher you recovered $\text{€}7.5$ million; from Hamilton Ross you recovered $\text{€}700,000$; so altogether you recovered about $\text{€}8.2$ million directly from Ansbacher and from Hamilton Ross?

A. Correct, yes.

Q. Now, when Mr. Tony Barnes gave his evidence, and you will have heard me referring briefly to that, he also referred to an amount of $\text{€}200,000$ which was in fact paid by Hamilton Ross but was in respect of an Irish Intercontinental Bank liability to tax, a liability which they didn't concede, but which was ultimately paid by Hamilton Ross. Now, could I take it that a similar payment was paid by Irish Intercontinental Bank, albeit by Ansbacher Cayman, in respect of the Ansbacher Cayman accounts?

A. Yes, that's slightly more complicated. It's not quite on all fours with the Hamilton Ross payment, because Mr. Barnes gave evidence to the effect that he was able to

say precisely what funds were used to meet the Revenue liability in relation to Hamilton Ross/IIB.

Q. Well, would that

A. There was two amounts.

Q. Without going into too much detail on it, would the Tribunal be correct in understanding that a separate payment would have been made referable to Irish Intercontinental Bank's liability in respect of the Ansbacher Cayman accounts as distinct from the Hamilton Ross accounts?

A. Yes, there was another amount, yeah, correct, yeah.

Q. I presume that amount would have been greater than the $\text{€}200,000$ paid in respect of the Hamilton Ross accounts?

A. No. I don't think so. I can't remember the figure offhand, but I don't think it was greatly different. It was maybe marginally bigger, but because Hamilton Ross sorry, IIB were only operating in relation for a short period of time, yeah.

Q. Again, without going into too much detail on it, would I take it that similar sums were paid either by or on behalf of Guinness & Mahon bank in respect of the period for which the accounts had been held in that bank?

A. That matter is ongoing.

Q. I see. I won't ask you any more about it, then.

Now, in your statement you had indicated that in fact no assessments were raised by the Revenue Commissioners in relation to this matter.

A. Correct.

Q. And that the entire matter was concluded by negotiation with representatives of Ansbacher and with Hamilton Ross?

A. Yeah.

Q. And were they solicitors for Ansbacher and Hamilton Ross within this jurisdiction?

A. In the case of Ansbacher, we dealt with both their an accountancy firm and a senior counsel from within this jurisdiction, and there was also a senior counsel from, I believe, Jersey involved in those discussions as well. In relation to Hamilton Ross, we dealt with an accountancy firm within this country.

Q. I see.

A. Sorry, and a solicitor at an earlier stage.

Q. Now, as you said, no assessments were raised, so it's not clear precisely what the full tax liability would have been, had you been able to collect the entire amount that you were seeking. As you said yourself, both Hamilton Ross and Ansbacher were denying that there was this liability, so that ultimately there was a process of negotiation and a give and take on both sides. But would you be in a position to assist the Tribunal as to what proportion of the full tax theoretically there was, or that might have been collected, and what was paid?

A. Well, I think we take the view that we perhaps collected the full tax in both instances. Because there were valid points to be made by both banks in terms of their

involvement, if you like, in the Irish market, and we argued strongly in the other way. They had different view on the matter. The discounting, as we did for the various elements which I outlined earlier, also brought the bill down. So I mean, our view is that we would have collected what was there to be collected, and it was a fair recovery from the point of view of the Exchequer in both those instances.

Q. I see. I'm not suggesting otherwise.

A. No, I understand.

Q. I am not suggesting otherwise, but just to clarify the position. So the allowances that they were permitted in the course of those negotiations in respect of the double taxation matters, the collection from deposit holders and so forth, they would have been entitled to those anyway, even in an assessment situation?

A. Oh, yes, yeah.

Q. So if you had proceeded down the assessment route, it is unlikely that you would have recovered any more than you actually recovered through the negotiation; would that be fair to say?

A. I think that would be fair to say, yeah. I mean, it was quite it was uncharted waters as far as we were concerned. We had never attempted to do anything like this before. So in terms of trying to effect a recovery in a particular situation where you were dealing with two offshore entities, we weren't sure what way it was going to

jump. And in the heel of the hunt, we were happy to make the recoveries we made.

Q. Very good. Thank you, Mr. Donnelly.

MR. CONNOLLY: I have no questions, sir.

CHAIRMAN: Thank you for your attendance. Thanks again, Mr. Donnelly.

We'll take up, then, the balance of the other business of today's witnesses at 11 o'clock. Thank you.

THE TRIBUNAL THEN ADJOURNED AND RESUMED AS FOLLOWS:

CHAIRMAN: I would apologise in advance to people present that because of an ear infection, I am sufficiently deaf to pass for any musical stereotype of a judge. I'll accordingly be depending to a large extent on the realtime technology that we are lucky enough to have, but perhaps in addition, today's witnesses would be good enough to keep their voices up loud and clear.

Mr. Healy.

MR. HEALY: Mr. Patrick McMahon, please.

PATRICK MCMAHON, HAVING BEEN SWORN, WAS EXAMINED BY

MR. HEALY AS FOLLOWS:

Q. MR. HEALY: Mr. McMahon, the Tribunal, in the books containing the documents of which notice were given to the various parties, set out a memorandum of information sought from you. Unfortunately the narrative information has only just come to hand, and I assume that everybody who was served with the books has received copies of it, but do you have a copy of the draft narrative, do you?

A. Yes, I saw it.

Q. Yes, but do you have a copy of it with you?

A. No, not here, not here.

(Document handed to witness)

A. I beg your pardon, I did have that. I thought you were talking of something else in the book. Yeah, do I have that.

Q. MR. HEALY: What I propose to do, Mr. McMahon, is simply to read this through. If you want to correct anything in it that occurs to you as you are sitting there in the witness box, please don't hesitate to stop me.

A. Okay.

Q. And I may have a question or two afterwards.

A. Okay.

Q. Which you can deal with it once I have read it through. You are now retired from the Chief State Solicitors Office, where you were a solicitor until 1998; is that right?

A. That's right, yes.

Q. You say you joined the Chief State Solicitors Office on the 16th October 1961 and you retired on the 13th April 1998. During the relevant time, when you advised the Department of Energy as it then was on the sale of lands in Glen Ding, you were a principal solicitor?

A. That's so, yes. Maybe I should say I was a principal solicitor. It was a grade; several people had that grade.

Q. PRI and CIPAM?

A. Yes.

Q. You were the solicitor in the Chief State Solicitors Office who represented the Department of Energy, as it then was, in the sale of Glen Ding lands to Roadstone Limited.

A. Yes, that's so.

Q. While you do not remember the meeting with Messrs Sean Fitzgerald and Philip Carroll on the morning of the 13th December 1990 as outlined in Mr. Fitzgerald's memo of the 14th December 1990, you assume that the individuals in question called to see you and showed you a copy of the threat of litigation against the Department made by Mr. Brendan Johnston.

A. Yes, that's so.

Q. You state that do you not recall any particular aspects concerning the file, given the duration of time that has elapsed. You assume that this meeting took place on short notice and that this explained the fact that you had not been given the departmental file or a letter explaining the circumstances on which your advice was being requested in advance of the meeting. You state, however, that it would not have been unusual for you to not have received the departmental file or a covering letter when you were being asked for advice, given the short notice that you had received?

A. Yes, I agree, yes.

Q. And from that do I take it that while you don't recall the event as, needless to say, you could hardly be expected to, having given advice on hundreds if not thousands of

matters since then

A. Right.

Q. from the memo you can see that you were asked for advice on a threat of litigation. And I think you may have seen that letter containing the threat of litigation?

A. Yes, I have, yes.

Q. You were, as indeed any lawyer would have been, concerned to establish whether there had been, in this case, a formal offer and a formal acceptance?

A. That's right.

Q. And quite apart from the fact that the matter hadn't got next or near what we lawyers would call a memorandum sufficient for the Statute of Role, it hadn't even reached a formal offer and an acceptance of that offer by a form of acceptance?

A. That's my recollection of it, yes.

Q. Do I take it that your advice, then, was on that legal issue to see was the Department exposed in any steps they might take?

A. Yes.

Q. And you advised them they were not exposed?

A. Well, that's the substance of the of the Department's memo, yes.

Q. Thank you very much, Mr. McMahon.

CHAIRMAN: Anything arising Mr. Strahan?

MR. STRAHAN: I have no questions.

CHAIRMAN: Mr. Regan?

MR. REGAN: I have no questions.

CHAIRMAN: Thank you very much for your assistance,

Mr. McMahon.

THE WITNESS THEN WITHDREW.

MR. HEALY: Mr. Robert Molloy, please.

ROBERT MOLLOY, HAVING BEEN SWORN, WAS EXAMINED BY MR. HEALY

AS FOLLOWS:

CHAIRMAN: Good morning, Mr. Molloy. Please sit down, and

thank you very much for your assistance and for travelling

to the Tribunal.

Q. MR. HEALY: Mr. Molloy, you have a copy of a Memorandum of

Intended Evidence which has been served on the interested

parties, and what I would propose to do is simply to go

through that memorandum; please stop me if anything occurs

to you as not being accurate, and after we have gone

through it, there will be one or two other matters I'll

want to draw to your attention. Are you happy to proceed

on that basis?

A. Thank you, yes.

Q. You served as Minister for Energy from 12th July 1989 until

the 18th February, 1992.

A. Correct.

Q. While Minister, it was the policy to sell off pockets of

forestry lands that had development potential, and it was

recommended to you to sell the site at Glen Ding in order

to try and realise its assets value. A valuation of the

site was made I think that should have been "had been

made" by Mr. Kieran O'Malley, which you accepted. You were told that it would be very difficult for any interested party other than Roadstone Limited to obtain planning permission for the extraction of minerals from the site, as it would require the opening of a new access from the adjoining road. Roadstone was next door to the site and could avail of an existing access from their land to the adjoining road.

In a memo dated 25th October 1990, Philip Carroll made the following recommendations to the Minister and sought the Minister's that is your approval thereon.

Quote from the memorandum: "Our asking price without planning permission to be set at $\text{€}1.5$ million for the freehold interest in the property, including timber and net of the area reserved for OPW and rejection of any condition linking the Department to obtaining planning approval in any shape or form subject to their response to settle at $\text{€}1.25$ million in total at completion of contract if approved, necessary the phasing of that payment of 1 million on completion of contracts and 250,000 one year later at latest with an appropriate penalty clause.

Signed, Philip Carroll."

On the 14th November 1990 you approved these recommendations and indicated that the Department should proceed with them. In a memo dated 5th December 1990, Philip Carroll recommended to you to approve Roadstone's offer of $\text{€}1.25$ million. In a handwritten note made on the

above memo and dated 10th December, you informed or Mr. John Loughrey informed you that there had been a satisfactory and rapid conclusion of negotiations in line with your directions of the 14th November. Mr. Loughrey recommended that the Department accept Roadstone's offer of $\text{€}1.25$ million and close accordingly.

On the 11th December 1990, you approved the acceptance of Roadstone's offer of $\text{€}1.25$ million. It appears from the Department's file that on the 12th December 1990,

Mr. Kieran Byrne recorded a handwritten note on a document entitled "Message for Minister" in which he described a telephone conversation which he had with Mr. Johnston on the 12th December 1990. The note records that Mr. Johnston wanted to speak urgently with the Minister about the proposed sale of the property to Roadstone. Mr. Johnston expressed dismay that he could not then bid if the Minister had approved the other offer. Mr. Johnston also felt that the wool had been pulled over his eyes and wished to appeal to the Minister. On the foot of this note, under the typed words "Minister's Comments", is a note written by you, dated the 12th December, which asks Mr. Fitzgerald to discuss today. The handwritten note also asks whether a letter had issued to Roadstone.

Mr. Johnston wrote to you on the 13th December 1990, and his letter reads as follows: "Dear Minister,

"Further to my conversations with your Kieran Byrne on the above matter, given the events of the last week in relation

to dealing with your staff in the Department of Energy Forest Service, Leeson Lane, Dublin 2, when I requested an early meeting with Mr. Philip Carroll, assistant principal officer and his senior staff for Friday 7th December 1990 or Monday 10th December 1990. I explained in detail to Mr. Thomas Smart, assistant to Mr. Philip Carroll, who told me that he was taking Mr. Carroll's telephone calls as Mr. Carroll was away and would not be back until the following week. I also explained to Mr. Thomas Smart in detail that I would be bringing my solicitor with me to the meeting and that I would be making a substantial unconditional offer for the freehold of the said land, and I would also be making a conditional offer separately, and that my second offer would be subject to planning permission.

"Mr. Smart's remarks were that the Department was not interested in a conditional offer that was subject to planning permission. I requested that he would have Mr. Philip Carroll and any other senior person necessary present at the meeting in order for them to tell us our offer was acceptable or not. After giving Mr. Smart all of these details, he said that the earliest date he could arrange a meeting was Thursday the 13th September 1990 at 11.30am".

A. December.

Q. December; sorry, I beg your pardon, 13th December 1990 at 11am.

"I accepted that offer, and Mr. T. Smart said he would confirm this date as soon as Mr. P. Carroll returned, which he expected to be either Monday, 10th December or Tuesday 11th December 1990. On Monday, 10th December 1990, I phoned Mr. Philip Carroll's office three times, and my calls were intercepted each time by Mr. Tom Smart who informed me that Mr. Philip Carroll was still away and that he would get Philip Carroll to call me as soon as he got back. Because of the lack of progress, I decided to phone the Principal Officer, Mr. John Gillespie, to make him aware of my proposals. Yet again my telephone call was intercepted by Mr. T. Smart, and I was unable to gain access to the Principal Officer. Because of these events I am unable to rely on your staff at Leeson Lane, and I intend to furnish my offer to you direct today or as soon as you are able to meet me. I can be contacted at all times either by telephone or fax at the above numbers", and he gives the telephone numbers.

"I look forward to hearing from you at your earliest convenience.

"Yours faithfully, Mr. Brendan Johnston."

After the above letter had been received by you and after you had been notified of Mr. Johnston's telephone communication with Mr. Kieran Byrne, and 12th December 1990 you directed Mr. Fitzgerald to meet Mr. Johnston. This is apparent from a memo of Mr. Fitzgerald on the Department's file dated 14th December 1990. This memo is addressed to

both the Secretary General of the Department and the Minister, and sets out Mr. Fitzgerald's record of meetings he had with firstly Mr. Patrick McMahon of the Chief State Solicitors Office, and secondly Mr. Johnston on the previous day.

The memo also compares both the conditional and unconditional offers made by Mr. Johnston with the conditional offer made by Roadstone and recommends rejection of the former and acceptance of the latter to the Minister. Paragraphs 1 to 3 are set out below.

"1. Mr. Carroll and I discussed the implication of Mr. Johnston's representations with Mr. P McMahon, Chief State Solicitors Office, yesterday morning. Mr. McMahon said Mr. Johnston had no legal basis for action if he is precluded from making a bid at this stage, and his solicitor's letter was bluster. Equally the Minister is free to consider an offer as a deal with Roadstone is not legally binding until an unqualified offer is formally accepted by the Minister in terms which have no let-out. He advised seeing Mr. Johnston and taking without comment an offer for consideration by the Minister.

"I saw Mr. Johnston yesterday evening accompanied by Mr. Carroll. Mr. Johnston tabled two offers as attached and a bank draft for 80,000. He refused to take the bank draft back. I told him would I place the offers before the Minister for his decision. Mr. Johnston said he wanted to be able to put his offer on the table. He had made his

best shot and would like an early decision. If he is unsuccessful, he accepts the situation.

You recall that it was your practice to formally note your approval or otherwise of the contents of a document by endorsing it with your signature or initials on the document. At the top of the first page of Mr. Fitzgerald's memo dated 14th December 1990, referred to above, the phrase 'Noted by Minister' appears opposite the typed word 'Minister,' with the initials 'SM' and the date, '14/12/1990', written beneath it. You have informed the Tribunal that this initial is most probably that of a Mr. Seamus Molloy, who was your Private Secretary at the time, and that Mr. Seamus Molloy most probably wrote the phrase in question.

In a letter dated 17th December, 1990, Mr. Conor McGreevy, Mr. Johnston's solicitor, wrote to the Minister expressing his appreciation for the Minister's actions in making possible a meeting between Mr. Johnston and Mr. Carroll and Mr. Fitzgerald which took place on the 13th December, 1990.

From the Department's file, it appears that Mr. Fitzgerald wrote a memo to both the Secretary General of the Department and the Minister on the 19th December, which was entitled "Sale of site at Blessington."

This reads as follows: "Roadstone have now made their offer unconditional for the freehold of the lands. You have two valid offers before you, and it is necessary to make a decision.

"A) Roadstone offer 1.25 million without planning permission.

"B) Mr. Johnston offers .8 million without planning or .715 million plus a further .435 million, total 1.115 million, subject to planning permission.

"The technical advice to us is that the value of the property is less than $\frac{1}{2}$ 0.8 million without permission and $\frac{1}{2}$ 1.3 million with permission. It is recommended that the Roadstone offer be accepted. The Chief State Solicitors Office are preparing appropriate letters.

"Mr. Johnston stated that a meeting on the 13th December" sorry, I think that should read "Mr. Johnston stated that at a meeting on the 13th December, that his offer represented his "best shot." On the telephone to me on the 14th December, he did not change his position, even though I left it open to him to do so, saying that if his offer was not the best, he would accept that position.

"You may also wish to see attached letter from McGreevy & Co. on behalf of Mr. Johnston inferring that his offer has been accepted. Your approval is sought for a decision as in paragraph 2 above" meaning a decision to accept the Roadstone offer and reject the Johnston offer.

Mr. Molloy approved the recommendation just referred to by way of a manuscript note on the memorandum which is dated the 20th December, 1990. Mr. Molloy states that there was no involvement of Charles Haughey in this transaction as far as he is aware, and further states that you further

state that you were not approached by Mr. Haughey or anyone else on his behalf in relation to the sale. You have no recollection of being approached directly or indirectly by CRH plc or any of its subsidiary companies, including Roadstone, in relation to the sale, nor have you any recollection of being approached by any other interested party in the sale.

A. Just for the sake of correctness, could I add to that that I did have the approach from Johnston. What I was answering what I thought I was answering there was no improper approach.

Q. I take your point, and in fact that occurred to me myself, and I'm glad you have corrected it. And in fact that's one of the things that we need to discuss in more detail.

There was an approach to you, and on foot of that approach, you put in train, or you approved a series of steps, presumably, to respond to that approach on behalf of Mr. Johnston?

A. Yes.

Q. There is one other matter which I think hasn't been drawn to your attention before, Mr. Molloy. And in order to put it in context, if we could just have Mr. Fitzgerald's memo of the 14th December. It's in a number of places in the book; it's certainly at 108 in the book, Book 76.

Do you have these books in front of you?

A. No, I just brought the evidence.

Q. We'll provide them to you, but you may prefer to look at

the monitor. Sometimes it's easier.

A. Tab 76.

Q. Yes, if you look at Tab 108.

A. Right.

Q. You will see that that tab contains a note to you and to the Secretary from Mr. Sean Fitzgerald. If you go to the last page of the document, you'll see that it's dated the 14th December 1990. Next to the word "Secretary", the printed word "Secretary" on the first page, is the manuscript note "Discussed with Secretary", and then "S.F.", meaning Sean Fitzgerald.

Then underneath that, "Noted by Minister". And you may recall that in the course of your conversations with the Tribunal, the Tribunal was endeavouring to establish what that initial was, and after some time, it became clear that it was the initials "SM" of Mr. Seamus Molloy, who was then your Private Secretary; is that right?

A. Well, I think it was probably him. I can't be certain.

Q. I think the Tribunal has made a number of other inquiries, and that seems to be the case.

A. Right.

Q. Judging from the other manuscript note signifying your approval by putting your initials on a document, it doesn't appear to be the "RM" that you normally put on documents to signify your approval.

A. I usually wrote a note agreeing or disagreeing, whatever, with the note. That was my practice, certainly at that

stage. I may have changed that practice later on, but at that stage, that was my practice.

Q. Well, looking at the other documents signed by you, and we may come to one or two of them in a moment, they usually have a note, "Agreed", or "Proceed as agreed and approved, RM"?

A. Yes, that's me.

Q. Now, that document doesn't have that type of manuscript, "Approval" or "Agreement" endorsed with your signature, and I think Mr. Fitzgerald, in his evidence, believed that the expression "Noted by the Minister" probably meant that you had been notified of the contents of the document, and that you had signified your approval but nevertheless hadn't an opportunity of examining the document. Now

A. I'd love to help you, but I can't be certain.

Q. I appreciate that. And I think I found a reference in a document to your movements at that time which may assist the Tribunal, and certainly may assist you, in trying to make some sense of it. If you go to Document 126 for a moment, or Tab 126.

Now, this is a note to you from Mr. Fitzgerald concerning another development in relation to this matter. In the first place you will notice on the front page, where all the manuscript notes are at the top of the documents, within a circle, is the note "Agreed, RM". Do you see that?

A. Yes indeed.

Q. "9/1/91." Now, this was a note to you to explain how the Department were proposing to deal with Mr. Johnston's solicitor's continuing correspondence. Specifically what they were suggesting was that their client had turned up at the meeting that you had instructed the officials to arrange, and that he had given his offer to the Department. The Department had opened the offer, and as far as he is concerned, although there is a huge dispute about this, and taken away his offer, and he understood that to mean that he had accepted his offer, that it was the highest.

But leave that aspect of the controversy out of it for the moment and go to just go to the middle of the second paragraph, where Mr. Fitzgerald says: "When he phoned on Friday, the 14th, he did not offer to collect the bank draft that day as now alleged. He had given a bank draft for 80,000 with his offer. Had he done so, I would have been relieved to give it to him. He did express concern about getting a decision urgently as the question of interest on the fund tied up in the bank draft arose, but my recollection is that the matter ended there.

"I told him that I had already forwarded his offer to the Minister for his consideration. The Minister was out of the Department and the country until the 20th". Do you see that?

A. Yeah.

Q. Now, from that, it seems to me that you appear to have been out of the country on either the from either the 13th to

the 20th or from the 14th to the 20th. And if that's the case, that would seem to suggest that you couldn't have put your signature on a note on the 14th, but that if somebody, such as Mr. Molloy, wrote on that document on the 14th, "Noted by Minister", he was noting something that had been communicated to you. And what I want to ask you is: When you were on holiday, how did you use to communicate?

A. I don't think I was on holiday.

Q. All right, out of the country; I should say that. It's December, of course, yes.

If you were out of the country, how would your Department have communicated with you?

A. By telephone.

Q. Would they send you documents by fax, or

A. I wouldn't expect so. You see, I had a meeting with you before, and I wasn't really asked on that specific question. I could have checked back to see possibly where I was and how long was I away and

Q. It does appear that you were away for six days.

A. I could have been at some conference somewhere, or

Q. Assuming you were aware or where you were doesn't seem to be of huge significance.

A. No, it's the length of time.

Q. But assuming that you were away, we have no

A. Right, okay.

Q. Nobody is suggesting that any of this is inaccurate.

Presumably you were away. Obviously if you find out you

weren't, we can look at it again, but presumably you were away from the 6th or from the 13th or 14th to the 20th, and presumably somebody contacted you to enable Mr. Seamus Molloy to write down "Noted by Minister."

What I am simply trying to get at is and you have only got your memory to go on, or your usual practice, and that's as far as you can put it but do you think you would have been faxed documents, or do you think somebody would simply have relayed to you the thrust of a document?

A. As I explained before, I can't really answer that question. I mean, I could guess something, but I mean, I can't be specific that I'd have a clear recollection of such and such.

Q. Of course, you have no I appreciate you have no recollection.

A. I mean, there are faxes, obviously, used at certain times, yeah.

Q. Well, we may be able to jog your memory if we come at it from the chronological sequence of events in a moment.

You became Minister for Energy in July of 1989. That was in a coalition Government; isn't that right?

A. That's correct, yeah.

Q. And was that a new Government at that point?

A. Yes, it was, the Progressive Democrats and Fianna Fail.

Q. Right. And who had been in the previous coalition Government?

A. Labour and Fine Gael.

Q. Mr. Coughlan tells me Fianna Fail had been in a minority Government prior to that.

A. Yes, there was a fair bit of switching around.

Q. And prior to you, I think

A. No, prior to that, '87 to '89, it was a two-year Government of Charlie Haughey.

Q. Yes, and in that Government I think initially Mr. Burke and subsequently Mr. Smith had been the ministers who preceded you?

A. Yes. Sorry, Mr. Smith did. I mean, there was

Q. It was Mr. Burke as well

A. When he left office, I was the next to take up office in Energy.

Q. And by the time you came in to that Department, the process of disposing of these lands to pay off the national debt, or to defray to some extent interest on the national debt, was already in train.

A. Yes, reading through all the papers you have given me, it was going on for quite a while. I hadn't been familiar with any of those documents at that stage.

Q. Yes, because it had all been happening at a level below you in the Department?

A. Yes.

Q. The decisions had been made to take these steps long before you came into the Department; isn't that right?

A. Yes.

Q. And I think the first time that, as it were, it came up to

your level in the Department was in October of 1990, when the officials sought your approval to confine their negotiations exclusively to Roadstone?

A. Yeah.

Q. And you became involved on foot of a paper prepared by Mr. Philip Carroll dated 25th October and contained in Book in Tab 85 of Book 75. I am going to give it up to you now.

A. Yes.

Q. Now, that's the full document from which the quotation contained in the first page of your Memorandum of Intended Evidence is taken. And we have been through this document several times, and if you want me to go through it in full, I will do; but I'll just go through more or less the paragraph headings.

Firstly, the Minister's approval of the recommendation in paragraph 9 to the final paragraph is sought.

The first substantive paragraph, paragraph 2, sets out the land that's on sale and some of the issues connected with OPW, rights of way and so on, I think.

The second the third paragraph, paragraph 3, refers to the survey of the Geological Survey of Ireland setting out the approximate sand and gravel content. Although it's worth noting that that survey actually deals with an area of land much larger than the area of land that you were selling, but I don't think that appears to have been clear to the officials.

The next document, paragraph 4, refers to the consultants' reports, and what they they are summarised as indicating that planning permission is going to be a very serious problem, and it identifies a potential special purchaser; in other words, a purchaser who has special advantages Roadstone because of their existing operation which gave them access onto the Dublin Road, and which obviated the need for them to get independent access for the lands on sale.

You were then given advice on the valuation of the deposit at 1.26 million with planning permission and 825,000 without planning permission. And you were told that the consultants said that in reality, without planning permission, there is no value in the minerals. That is an obvious statement, if you can't extract them, they have no value.

Then underneath that, the Roadstone interest is addressed in more detail, and I think we might read the content of it in detail from here on.

"Roadstone interest.

"Some general interest has been expressed in the acquisition of this property, but only one party Roadstone has made any meaningful approach. Following three separate meetings with the managing director of Roadstone, a formal offer for the property has now been made, and a copy is attached. The offer is as follows:

.7 million to be paid on completion of the contract

.4 million to be payable on obtaining satisfactory

planning permission

"Roadstone have requested a response to this offer by the 4th November".

Then the question of for and against a private sale to

Roadstone is canvassed.

"The offer from Roadstone is considered to be a good basis for reaching agreement on the disposal of the Blessington property to that company. The reasons in favour of dealing privately with Roadstone are as follows:

"For:

" planning permission would be very difficult to obtain for a new operator;

" Roadstone are already working on adjacent deposit and have all the advantages of access, plant and infrastructure in place;

" they have made a firm offer of £700,000 upfront, which represents some element of risk but also some element of optimism that planning permission will be granted to them;

" our consultants advise in favour of continuing to negotiate with Roadstone; they seriously doubt that any remotely close offer will be made from other sources without planning permission;

" Roadstone may be running short on resources in the area and would be anxious to secure this deposit;

" transport and establishment costs for Roadstone in moving to a new location allows scope for a higher offer.

"Against:

" a third party might make a better offer, although the best advice we have suggests not;

" we may wish to retain the property for amenity purposes and to manage the timber resources, which are valued on the DCF basis at $\frac{1}{2}$ 300,000 approximately.

"Conclusion:

"Retaining the property for commercial forestry purposes will give a substantially lower economic return than the first offer of Roadstone. It also involves us in retaining a property for which we have no direct management resources. Roadstone have special advantages insofar as obtaining planning permission is concerned, and on the basis of the best advice we have, there are compelling reasons to confine our negotiations to them. The alternative is to offer the property for sale by restricted tender to second promoters, but if this process fails to produce a better offer, as we believe it will, then we effectively strengthen Roadstone's bargaining position.

"For these reasons, it is concluded that we confine our negotiations to Roadstone exclusively at this stage to see what emerges".

It then goes on to indicate how they felt they should approach the matter, and in the final paragraph, paragraph 9, they seek the Minister's approval to set an asking price of $\frac{1}{2}$ 1.5 million, to reject conditions linking the Department to obtaining planning approval, and

ultimately to settle for not less than $\frac{1}{2}$ 1.25 million with liberty, if necessary, to take that amount of money in installments of 1 million and 250,000.

Now, this was presumably the extent of the information made available to you to enable you to reach a decision on this matter. The Minister doesn't go trawling through the file, obviously. And as you know, you approved this course.

A. Yes.

Q. Now, if you go to paragraph 6, what is being canvassed there is the decisions for and against a private sale to Roadstone with a view to setting out a basis for deciding whether a private sale to Roadstone was preferable then. Presumably the opposite to a private sale, i.e. some class of public sale.

Now, I don't know whether you were alive to this, but would have been alive to the fact that the general practice in Government is to sell land by public tender or public auction?

A. Very much so, yes.

Q. So one may assume, therefore, that the focus on private sale here was as distinct from a public sale?

A. Yeah.

Q. And in the next paragraph, the officials recommended confining the negotiations on a private sale at that stage to Roadstone?

A. I thought that the recommendations set out in the memo offered the best course of action to achieve the best

return for the taxpayer. The Department in this case had to make a commercial consideration, and

Q. Now, one of the things the officials were asked about yesterday was the fact that around this time there had been other expressions of interest in the property, and there was certainly one other individual who was being hadn't made an offer, but who was being perhaps, on one analysis, nearly as active as Roadstone were in pressing the Department for information; that was Mr. Johnston. But Mr. Carroll, who prepared this memorandum, said that he made a judgement that that approach wasn't a meaningful approach, or meaningful enough to put it in detail before you.

What I want to ask you is about something broader than that, and it's this: By this time a number of people had expressed interest in the property, but had been told, "Look, it won't be sold; or if it will be sold, it will be sold only by public tender advertised in the national press."

Now, it would appear that the officials didn't bring those letters to your attention. There are all sorts of explanations as to why they weren't brought to your attention, but what I want to ask you is did you know or had you any knowledge that people who had written in about this property had been told, "Look, this is going to be for sale by public tender"?

A. I didn't have anything specific. Any reference to others

who may have been interested indicated to me it's my recollection, anyway that they were nowhere near Roadstone in regards to all the factors that have been outlined there in favour of Roadstone.

Q. I appreciate all of that, but you have seen the files. We haven't put all the documents in the files, but you have seen letters to people saying "Thank you for your interest we are only going to dispose of this by public tender", or words to that effect.

A. Yes, going back to parliamentary replies, you supplied me with that information.

Q. We'll deal with the parliamentary replies separately, because I'd be particularly interested in your opinion on that. But were you aware that there were letters had been written to people saying, "This will be sold by public tender only"?

A. No, I wasn't, no.

Q. What I'm trying to find out is, would you have been prepared, without going back to those people, to have sold to Roadstone if you were aware of those facts?

A. I would.

Q. You would have been?

A. I would have, yes.

Q. You'd have ignored them?

A. Yes well, I would have taken them into account, but on balance, in view of the more likelihood of the highest price being obtained from Roadstone.

Q. I appreciate that. If you had those letters in front of you when you were asked for this decision, if you were told, "We have told a number of people we won't sell privately; we have told people we will only sell publicly"?

A. If I was aware those letters had been written, I feel we would have been committed to it.

Q. That's what I mean. Well, I suppose, to pass on to the next matter I was going to mention, which was the parliamentary response, I can presumably anticipate your response to that now.

Were you aware that there had been a response to a Parliamentary Question committing the Department to sell by public tender?

A. No, I wasn't. I wasn't aware at any stage that any commitments had been made in regards to this property will be sold by way of public tender.

Q. Had you been aware of a parliamentary commitment to that effect, what impact would that have had on your decision making?

A. Well, I certainly wouldn't have been able to proceed without taking that matter into consideration. If that commitment had been made in public, then I would have felt it was important to comply with it. But I mean, it would depend on the way in which the commitment was made. If it was very clear and specific, and if the people who had been interested were aware that this had been conveyed to them if this had been conveyed to them, I think that

Q. Well, it had been conveyed to the Dail, I suppose; isn't that the important thing?

A. I suppose it was up to them to acquaint themselves with that. Sometimes people unless they had made a request that somebody put down a question. It could easily have been answered in the Dail without them knowing it, but I suspect it wasn't. I mean, I suspect something inspired the question.

Q. Yes, but leaving that aside, whether it's inspired or not, the fact is it's there on the record, isn't it? Or at least that's my impression; you can correct me if I am wrong.

A. Of course we are dealing with this in hindsight.

Q. Of course we are. At the same time I'm trying to establish to what extent a Department is and I am conscious of litigation as well to what extent a Department, having given a parliamentary commitment to proceed in a certain way, gets out of that, if you like?

A. I think my first reaction would be to seek legal advice on the commitments that were made, if I had been aware of them.

Q. I suppose, looking at it with a pure politician's hat, if you had been aware that a question had been raised, and in this case raised by an Opposition spokesman, in which your predecessor in title, as it were, had said, "We'll you know, we intend to sell this by public tender, and if so, it will be advertised in the national press"

A. Yeah, on the face it, I think he wouldn't have had any choice other than to do what had been committed previously.

Q. Is there a way of getting well, one would have thought there must be some way around a parliamentary commitment, is there, by simply saying in the Dail, "Look, the Department is changing its mind on this", or whatever?

A. Well, there is also the question of honour and living up to your word, and

Q. Well, I suppose in your case it wasn't your word; it was your Department's word, wasn't it?

A. Yeah.

Q. What it says

A. If the standard applied I mean, any Minister or any official in local authority, I mean, will tell you in regard to any property

Q. It's the standard reply?

A. Yeah. It would be that we only dispose of property through public tender, and a certain number of tenders are required before it meets the required regulations or the requirements. So...

There is the provision, of course, that if one wants to do otherwise, one can must first get the permission of the Department of Finance.

Q. Oh, I appreciate that. There is a general requirement, if you want to deviate from that, to obtain the sanction of the Department. And in this case, the Department were asked for their sanction, but

A. But you are asking me a hypothetical question. I had no difficulty in making the decision that I made, because I wasn't aware of any of these previous commitments.

Q. You didn't have these hard questions to examine?

A. Yes, but it would have been a hard one to call. It's still obvious to me that the best price was going to be got from Roadstone. I mean, you can only assess the situation and make your best guess on advice, and best guess was that Roadstone were the ones who were going to be able to come up with they would have the greatest need for it, and they were located there; they had another plant there in situ; they had access. And the planning permission as I know from previous experience; I was deciding planning appeals back in the seventies when I was in Local Government I know how sensitive and how difficult it can be to get planning permission and the various factors that are brought into consideration in making a decision. So it was going to be a tough one to get planning permission. As I understand, they didn't get planning permission in the end; Bord Pleanala turned it down.

Q. History has borne that out?

A. They paid big money for the something that they hadn't really got the value of. So all in all that shows that the right approach was taken. But this other issue to me was a question of how legitimate or how strong the commitments were made that were made, because there is a question of honour there. I mean

Q. I suppose you can understand that the Tribunal has to pursue this, where a decision is taken that was supposed to have involved a public sale and ultimately involved a private sale, and

A. With the permission of the Department of Finance.

Q. Yes, but I don't think the Department of Finance knew about any of these letters telling people that this land would be sold privately. Do you understand?

A. Then they were in the same position as I was in.

Q. Yes, looks like it.

I'll just ask you one other question about the advice you were given. One of the matters that was pursued at that stage was the value of the place and the planning situation; you have already outlined that. This was a very, very valuable piece of land, as we know, ultimately sold for $\frac{1}{2}$ 1.25 million. And however little that may seem today, it was a staggering amount of money in 1990, especially in the economic conditions at the time.

No property consultants or estate agents appear to have been brought in on this sale. Were you aware of that?

Experts were brought in in various fields of planning and minerals, but

A. The two experts, the Mr. O'Malley and

Q. Mr. Barnett?

A. Yes, Barnett, his associate in this case, he was brought in to put a value on it.

Q. He was brought in to put a value on the deposit?

A. To assess the volume and to put a value on it.

Q. No, he wasn't; he was brought in simply to put a value on how much sand and gravel you could extract from the area he felt the planners would allow you to extract would be much smaller than the amount of land you were selling and he made it clear

A. Yes, you take out the land that was transferred to OPW.

Q. Yeah well, even less than that. Even a smaller bit of land than that. I am not going to bore you with all those details; they would never have come up to you. What he had was a minerals expert and a planning expert, and from the planning expert you got the advice, "Look, this is going to be fairly hopeless; you are going to have nothing but problems down the road".

You didn't need a planner. The Department themselves were canvassing these issues long before there were canvassing these issues from another file, we know, right back in the fifties and the sixties, especially after '65 when the planning act came in. But were you aware that there was no estate agency expertise, no property consultancy expertise involved here at all, even though you were doing a private sale now, not a public auction or a public tender where the market was going to decide how this was approached?

A. Obviously I was, yes.

Q. Did it occur to you that it might have been a good idea to get a property consultant in?

A. Well, in hindsight, if we knew that this matter was going to become the subject of a Tribunal, it would probably have been advisable.

Q. Can I just take you now to the meeting of the 13th December. What happened in this case was that you gave a decision initially that the Department should proceed with Roadstone to see what would emerge; and ultimately what emerged was a deal with Roadstone. And I use the expression "deal" in a very, very loose way, meaning an agreement on price subject to all sorts of conditions about approval of the Board, and your approval, and the approval of the Department of Finance at $\frac{1}{2}$ 1.25 million.

So it had been a relatively successful exercise. But then you were faced with an approach from a third party who was aggrieved that he had not been given a chance to bid; isn't that right? And you gave an instruction that the Department should meet him, the officials should meet him. Do you recall that issue arising? Do you now recall it, or did you recall it when the Tribunal first made contact with you?

A. Yes, I do, I recall requiring a meeting with Sean Fitzgerald, the Assistant Secretary, and I think the Secretary came in on that discussion as well. And I was concerned anybody would feel so aggrieved as he was expressing. And I asked Sean Fitzgerald to meet with him.

Q. Right. Up to that date you knew, presumably from the information that you had been given and from the file that

you have now seen, you had been told a deal has been done with Roadstone at $\frac{1}{2}$ 1.25 million, subject to their Board confirming it, and you had approved that; you had said, "That's very good; I approve that".

Now, your approval hadn't been communicated to Roadstone, because they hadn't removed the conditionality from their offer. The conditionality, in other words, that required the approval of their Board before it could be removed. When you suggested that the officials, or instructed the officials to meet Mr. Johnston, my understanding of the papers is that you wanted him to get an opportunity to put his best foot forward; would that be right?

A. Yes. You see, I can't be a hundred percent clear on that now. Obviously, I mean, the grounds for his dissatisfaction and his annoyance was that he had not been given the opportunity, and he was stating in his letter that he had a major offer to make. So I thought it was fairly obvious well, let him make the offer, and we'll see where we are. So he made his offer but it wasn't I was assured that it wasn't up to the level of Roadstone's, so...

Q. His complaint now is that he put his offer to the officials, and he says they took it and brought it to you eventually, or told him they'd bring it to you, and that was all he was told. And he wrote a letter the next day saying how delighted he was that he had got this opportunity and how grateful he was to you and the

officials. But the officials have informed the Tribunal that at that meeting they told him that his offer wasn't at the races at all; it was a hopeless offer, a dead duck, or dead in the water. And he said he was never told that at the time.

A. Well, probably from the papers it's clear that Mr. Fitzgerald did not want to accept the draft that was pressed on him.

Q. I appreciate that, but leaving that aside, were you ever aware that the officials said to him at the meeting that "Look, we told him at the meeting that it was a hopeless offer, that he wasn't in the ballpark; it was"

A. I can't recollect, to be quite honest with you, any detail in relation to that. That's not to say he didn't.

Q. Thanks very much.

CHAIRMAN: Anything, Mr. Strahan?

MR. STRAHAN: I have no questions.

CHAIRMAN: Ms. Leyden?

MS. LEYDEN: I have no questions.

CHAIRMAN: Mr. Regan?

MR. REGAN: Yes.

THE WITNESS WAS EXAMINED BY MR. REGAN AS FOLLOWS:

Q. MR. REGAN: Mr. Molloy, may I just point out that the memo from Philip Carroll which Mr. Healy spoke about, of the 25th October 1990, where he referred to the fact that Roadstone

A. Have you a number for this?

Q. Sorry, it's page 85, Tab 85, Book 75.

A. Yes.

Q. At paragraph 5 there, it's on the second page, where there is a reference, and Mr. Healy referred to it: "Only one party, Roadstone, has made any meaningful approach".

And just on that, in relation to Mr. Johnston, there was no offer at that point, and there was actually no commitment to make an offer at that point. It was only in a letter of the 2nd November that Mr. Johnston indicated that he would wish to make an offer. So I think that it's significant in that the advice you were getting, at least in this memo, was accurate.

A. Yes.

Q. I am just pointing that out to you.

Now, in relation to the reference on the memo, the initial by your Private Secretary on the memo, Mr. Healy indicated that Mr. Fitzgerald had indicated

A. What number are we on now?

Q. Well, you don't need to go it was just an initialling by your Private Secretary that Mr. Fitzgerald had said that this meant it was approved. But in fact what and I am just reading from the transcript last Friday, which you don't have in front of you but it simply said

A. Which I have never seen.

Q. Sorry?

A. I haven't seen this.

Q. No, no, but it's only two lines, so I am just reading out

what Mr. Fitzgerald was asked and what he said last Friday.

"What was the status of 'Noted by Minister'?" And the answer that he gave was: "The Minister was aware of the contents of the document, but there is not a formal decision taken by him on foot of it."

Now, this is, I understand, when you were out of the country, and a memo there were two memos in December from Mr. Fitzgerald. There was one on the 14th and there was one on the 19th, and I might just perhaps refer to the one on the 19th, and if that could be it's at Tab 117 of Book 76.

A. What number are we at now?

Q. It's 117, Tab 117.

A. Yeah.

Q. And there is just two points I want to make on this: Is that and you got a lot of memos on this; you got one on the 25th October, the 5th December, the 14th, and this is the last one, but the one on the 14th was initialled by your Private Secretary, but this one is signed off by you, and this was the ultimate decision on approval of this, concluding a contract with Roadstone; isn't that correct?

The reason I ask the question is that the question is whether, when you intervened

A. When

Q. When you intervened and directed that there would be a meeting with Mr. Johnston. The question is whether the Department was just going through the motions or whether

Mr. Johnston got a genuine opportunity to bid for the property and to secure the property. And were you satisfied, in signing off here on the 19th I think it was on the 20th that you signed off that he got that opportunity?

A. I was.

Q. The other question I want to direct you to

A. No, I would have if he had made an offer which was equal to or greater than Roadstone's, I feel that I would have needed to be absolutely assured that there was no legal commitment already, and I had been given that assurance. So if he had come in with a better price, he obviously would have been considered.

Q. But he was so far off

A. There was such a gap.

Q. Such a gap that

A. Yes, it was just really in line if you go back to earlier O'Malley advice, and Barnett, that it was bearing the whole thing out the way in which I had been advised.

Q. And just on that memo, at paragraph 3, you were advised that "Mr. Johnston stated at a meeting on the 13th that his offer represented his best shot. On the telephone to me on the 14th December, he did not change his position, even though I left it open to him to do so, saying that if his offer was not the best, he would accept the position."

A. Yeah.

Q. So you felt, given the gap and given the statements by

Mr. Johnston, that you could take the ultimate decision and approve the Roadstone offer?

A. Yes.

Q. The other issue I have just one or two other questions. Yesterday, Mr. Carroll pointed out the different changes in the Department in relation to the Parliamentary Question, which was in October, which was a question from Gemma Hussey, which Minister Burke responded to and indicated it was the intention that this land would be the subject of a public tender if it was being sold. This was in October 1980, and Mr. Carroll pointed out that 95% or thereabouts of the people who were in the Department, the Forestry Section, would have moved to Coillte on the 1st January 1989. And he says that "So the likelihood is whoever drafted the Parliamentary the response to the Parliamentary Question went into Coillte Teoranta". Then he said, "There was a number of Ministerial changes around the time, so the Minister who replied to the Parliamentary Question was succeeded, I think, by two other Ministers; the Secretary General was not the same Secretary General; the Assistant Secretary was not the same Assistant Secretary; the Principal Officer was not the same Principal Officer," and he also pointed out a change of Government in June of '89. Now, given those changes, would you consider that that might explain why the Parliamentary Question wasn't you weren't briefed on that Parliamentary Question?

A. Yes, I am aware of the Secretary's statement to the Tribunal about corporate memory and to the Oireachtas inquiring into this issue, and I think that there is substance to it. That could have been could have contributed to the reason why there had been better knowledge in the Department about the previous approaches, the statements, the commitments by Ministers.

Q. So, if it's an error, it's to some extent an excusable error in those circumstances, with this whole change?

A. I suppose the files must have shown somewhere where these commitments had been made.

Q. Just on this question, governments change policies; they are entitled to change policies, and Ministers are entitled to change policies within their area of competence. And one could take a decision that something is being done, but circumstances change and the policy will change.

Now, I think, given the Parliamentary Question and the reply to it, and given the facts that were put to you in the memos and the rationale for this sale and securing a price without the planning conditions, etc., it would have been open to you, would it not, to inform the Dail or to make a public statement as to why the change of policy was being made in this instance, notwithstanding the commitment; do you feel that that avenue would have been open, given the need to secure the funds from this sale, the importance of it at the time, the value of it, was that an option that

A. I wouldn't have thought that it would arise at all. Are you putting this to me hypothetically?

Q. I am saying that we have this Parliamentary Question and the response to it.

A. Which I wasn't aware of.

Q. And if you had been aware of it

A. Hypothetical, yes.

Q. If you had been aware of it, and at the same time you had the briefing on the rationale for selling to Roadstone, etc., would you think you might have dealt with this, the deal might have gone ahead, but by informing the Dail or otherwise a public statement as to why the changed circumstances justified the change from the original commitment to sell by public tender?

A. Well, I mean, the regulations do make provisions for exceptions, and the exception being the case where the Department of Finance have given approval to it. So it was always a possibility, but rarely used.

Q. I just explore the possibility of options that would have been open to you had you been informed, but I won't press the point.

A. But I want to be in a position to have looked at all these previous commitments; I said that already.

Q. I appreciate that.

A. And I don't think I can give an answer to that question here hypothetically.

Q. I don't mean to press you on it. I mean, would you accept

that the you had confidence in your officials at the time that it was an oversight on the part of officials to inform you of that Parliamentary Question as distinct from any withholding of information or otherwise?

A. I had the utmost confidence in my officials. They were of the highest quality. And I could never fault them, and I wasn't in any doubt, and I was amazed that there should have been any suggestions made which have led to the holding of this Tribunal, some of the rumours that were put out about it, figures totally inaccurate and allegations made, thrown out here and there, I couldn't see that there would be any substance to any of these things.

So, I mean, you asked me a question. I certainly had the utmost confidence in the officials and received an outstanding service from them. The officials that I dealt with, which would be the Secretary General and the Assistant Secretaries and the Principal Officers and the Assistant Principal Officers, and generally that was the level I dealt with.

Q. Very good. Thank you very much. No further questions.

CHAIRMAN: Very good.

Nothing arising, Mr. Healy?

MR. HEALY: Just one matter, one document that Mr. Molloy mightn't have been aware of.

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

Q. MR. HEALY: I appreciate your last comment, Mr. Molloy, and obviously the Tribunal is trying to get to the bottom of

this. But just so you'll understand and I'm not suggesting for one moment, I think it wasn't suggested to Mr. Carroll yesterday that anyone had deliberately omitted to bring anything to your attention. Far from it; I think we were given various explanations. But just so you'll understand that looking at it from the point of view of somebody who has access to all the documents, as the Tribunal now does, and I suppose the public are entitled to have, you referred to the question of corporate memory. Could I just ask you to look at Document 71 on Book 75.

Have you got that document?

A. Yes.

Q. Tab 71

A. 10th May; what year is it?

Q. Yes, 10th May 1990. Do you see that?

A. Yes.

Q. Go on to the next page. That's a handwritten note of a meeting of the 10th May 1990. Page 1 and page 2 are handwritten notes made by Mr. Philip Carroll. Do you see that?

A. I do, yeah. I am not great at reading other people's handwriting, but...

Q. Yes, all right. Do you see: "It has been suggested that there was a loss of corporate memory, and I agree, and Mr. Carroll has pointed out to us all the enormous changes that took place".

If you look at the bullet points on the left hand side of

that document. Do you see the fifth bullet point: "PQ, 20/10/88, commits us to public tender". Do you see that?

A. "Commits us to public tender", correct, yeah. I read that.

Q. You obviously weren't aware of that document?

A. 1988, no.

Q. That was the date of the response that was the date of the response to the PQ.

A. Oh, sorry, yeah.

Q. And the date of the meeting is 1990; do you understand?

A. Yes.

Q. So it would appear that somebody at the meeting was aware that a PQ had

A. Yeah.

Q. I hasten to add that Mr. Carroll had a view about that, but it's simply in response to the note, in that there had been a complete loss of corporate memory, that I draw that to your attention. Because it might suggest that there wasn't a complete loss, wouldn't it?

A. Mr. Smart would have known of it.

Q. He would.

A. And he was there, yeah.

Q. Thank you.

CHAIRMAN: Thanks very much for your assistance, Mr. Molloy.

A. Thank you, Judge.

THE WITNESS THEN WITHDREW.

MR. COUGHLAN: Mr. Loughrey is here, and we can start him.

JOHN LOUGHREY, PREVIOUSLY SWORN, WAS EXAMINED BY

MR. COUGHLAN AS FOLLOWS:

CHAIRMAN: Good afternoon, Mr. Loughrey. Thank you for your attendance again.

A. Thank you, Chairman.

Q. MR. COUGHLAN: Mr. Loughrey, I'll go through your memorandum to begin with, and we'll come back to a few matters, if that's all right.

I think, Mr. Loughrey, you have informed the Tribunal that you served as Secretary General of the Department of Energy from the 20th December 1988 until the 22nd January 1993; is that correct?

A. That's correct, yes.

Q. And as Secretary General, you had overall responsibility for the management of the Department. Your duties and responsibilities included signing off on proposals and recommendations to the Minister, as well as being personally responsible for the Department's budget and financial statements. It was you, as head of the Department, who recommended that the Glen Ding site be sold to Roadstone (Dublin) Limited, and that the contracts were signed in June of 1991 and the sale was completed in 1992.

A. Correct.

Q. That was in your role as the Secretary General of the Department, you gave that advice?

A. Correct again, yes.

Q. Now, you have informed the Tribunal that you did not have

any direct involvement in the Department's negotiations with Roadstone and that your original concern and first awareness in relation to the sale was whether or not it would adversely affect the Department's budget. Perhaps you'd just explain that.

A. Yes, thank you, Mr. Coughlan. My concern at the time was that for Secretary General's, his appropriations in aid generally bring grief. In other words, is, unless you can predict them exactly, if there is an upside to an appropriation in aid which comes in to us to underpin any department's budget, if there's any upside, it's taken by the Department of Finance; if there is any downside, you have to apply for an excess vote and are in the sin bin for doing that as a civil servant. My concern was that the risk in terms of the amount and the timing would be taken by the Department of Finance as an extra Exchequer receipt. But could I come back to Mr. Healy's point in terms of corporate memory. Had the corporate memory been sufficient, then it would have brought to my attention that the original finance circular sorry, the follow-up letter in 1987 actually specified, I only read this in the last few days actually specified that the receipts would be taken in as an extra Exchequer receipt. So my concern at the time and my interaction with Mr. Paul Cassidy, who was the Assistant Secretary, actually was a waste of time in effect, but that was then and this is now. But that was my concern.

Q. That was your concern, yes. And I think you have informed the Tribunal that an issue that was the subject of comment by the Comptroller & Auditor General in his report of December 1998 was the fact that in 1990, when the sale of the property in question was being effected, the Department did not revert to three local enterprises who had expressed an interest in 1997 and early in 1998. This submission, while regrettable, can be better understood if examined in the context of the times. Historically speaking, there was little or no movement of staff as between Government departments since the foundation of the State. The isolation ensured the continuity of corporate memory. A number of incremental steps in opening up interdepartmental mobility started modestly in the 1960s, culminating in the establishment in the 1980s of the top-level appointments committee, TLAC, whereby all senior posts were opened up to the entire civil service. In addition, a service-wide early retirement scheme was introduced in September 1987. Principal Officers and Assistant Principal Officers in the Forestry Division availed of this over the following year or so. However, the most significant erosion of corporate memory was caused by the transfer on the 1st January 1989 of virtually all of the Department of Energy's Forestry Division to a newly established State company, Coillte Teoranta. This resulted in a virtual clean-out of all the officials, both administrative and professional, both local and those based at headquarters who had dealt with these

early expressions of interest. This meant that the Departmental officials who would have dealt with the Glen Ding file in 1989 and 1988 were no longer in the Department. This lack of continuity might help explain the fact that no reference was made to Mr. Ray Burke's Ministerial commitment in the Dail that the site would be sold by public tender. It might also explain the inadvertent admission to mentioning various submissions to the Minister, the other businesses who had approached the Department two or three years prior to the eventual decision to sell the Glen Ding site to Roadstone.

The fact is that none of the key officials dealing with the transaction had served in the forestry sector prior to 1989, I think.

A. Perhaps I have just one additional comment; sorry to burden with that long explanation.

There might be a temptation, if people weren't familiar with it, that somehow I had composed this as fit-for-purpose retrospective explanation, but that would be far from the real underlying facts. It wasn't on those particular files that the Tribunal had, but I, from vesting day, I conducted a crusade with the Department of Finance to fill the vacuum left by the migration to the new semi-state body, Coillte. There wasn't a realisation and I freely confess I hadn't fully realised myself, because I was only sort of reading myself in at the time that that vacuum would have to be filled by a new

regulatory setup. Once you have a State corporation and you have Ministerial responsibility, there is a new regulatory setup required, and equally the emerging sort of burgeoning private sector plantation crusade that we were undertaking, and over the next 18 months I got new staff, including Philip Carroll, for instance, who took the property portfolio by the scruff of the neck in 1990. I am also indebted to Mr. Healy's very fair and comprehensive and balanced Opening Statement. He I think nominates no less than twelve named individuals at middle to senior management. Now, nothing to do with obviously a change in Ministerial and none of whom were around in 1990 when the transaction took place. So it underlines that this clean sweep out of the Department did contribute to a regrettable lapse in memory, not excusable, but at least it goes some of the way to explain what happened.

Q. I think you have informed the Tribunal that Roadstone was considered by the Department to be the potential purchaser most likely to make the best offer for the Glen Ding site.

This was due to the fact that Roadstone had, in the view of Mr. Kieran O'Malley and subsequently the Department, the best chance of obtaining planning permission to extract minerals from the Glen Ding site. Mr. O'Malley was appointed as an independent outside consultant because of his particular expertise in planning and valuation matters. Furthermore, Roadstone's existing holding, which adjoined the site for sale, ensured access to the site by way of

their existing adjoining operations, and importantly, had a plentiful supply of water, which would have been of paramount importance to their application to the Planning Authority for the extraction of minerals from the site that was eventually sold to them.

It was the view of the Department at the time that Roadstone had the identikit of the only contender that had a sporting chance of making a successful application for planning permission, as any application made by them to the planning authorities could be made on the basis of a continuation of their existing activities on the adjoining site. The Department, therefore, was putting the risk on an entity that the Department felt was best placed to take the risk and get the best price ultimately for the Department. The clear intention of the sale process was that the very evident and significant planning risk would fall on the purchaser rather than on the taxpayer.

Mr. Brendan Johnston was also entertained as a potential purchaser, and although he made his best and final offer, this did not match or exceed the offer that had been made by Roadstone.

You recall that while there was definitely an apparent asymmetry in the process in dealing with the two bidders, there was no bias against Mr. Johnston. We'll come to deal with that, because it was asymmetric

A. I accept that, yes.

Q. You state that Mr. Fitzgerald spoke on the phone to

Mr. Johnston at the end of Mr. Johnston's involvement and obtained from Mr. Johnston his best and final offer for the site. Furthermore, you state that both he and

Mr. Fitzgerald would have supported Mr. Johnston as a purchaser had he come in with a better cash offer than that of Roadstone. And we'll come back just to deal with that.

A. That's fine, yes.

Q. You then say that the steps taken by the Department to identify potential purchaser for the site are outlined in Sections 3 and 6 of the Comptroller & Auditor General report of December 1998, and you would adopt these as being accurate. And you include them in your statement as being a correct statement, so I'll just read through those, so.

A. That's correct.

Q. Section 3, paragraph 3.1: "In July 1987, representations were made to the Minister of State for Forestry by the late Mr. Sean Walsh, TD, on behalf of Hudson Brothers Limited, suppliers of building materials. The representations expressed the company's interest in purchasing or leasing land with sand and gravel deposits in the ownership of the Department in the Blessington area. The Minister of State replied in October 1987 stating that the sand and gravel deposits were required for State afforestation purposes, and as such were not available for sale. The reply also stated that even if the deposits were available for sale, the property could only be offered for sale by public tender competition.

From September 1987 onwards, the disposal of surplus State property was being considered by all Government departments on foot of a Government decision in July 1987 that a programme for the sale of surplus state properties should be devised and the receipts therefrom used to redeem the national debt. It was in this context that the Forest Service of the Department of Energy identified its lands at Glen Ding, Blessington, for possible disposal".

Paragraph 3.2: "Interest shown in the property had alerted the Department to its potential sale value, particularly in the light of the sand and gravel deposits that it was believed that the site contained. In addition to Hudson Brothers Limited, the following expressions of interest were received:

" on the 28th August 1987, Roadstone (Dublin) Limited wrote to the Department stating that they were anxious to purchase the Department's Deerpark lands if they were available for sale.

" an undated letter was received in late 1987 from a Michael Kavanagh, sand and gravel contractor, offering $\text{€}1/250,000$ for 5 acres of the property.

" the papers indicate that interest was also expressed by Treacy Enterprises (Dundrum) Limited in early 1988.

" on the 10th April 1989, Brendan Johnston of Johnston Industries expressed an interest in any sand and gravel bearing lands under the control of the Department, and from December 1989 onwards expressed continuing interest in

specifically acquiring the Glen Ding properties.

"6. Sale process.

"6.1: Following the evaluation report in April 1990, Kiaran O'Malley & Co Limited suggested that the Department of Energy would be best advised in the first instance to invite offers by tender for the sale of the property. On the 10th May 1990, officials of the Department, at the request of Roadstone, met with the company's managing director and production manager. The Department officials stated that the property would be sold, probably by public tender, but that the method of sale was still subject to a number of considerations. They also stated that there was much interest in the property, and the Department would not rule out an offer by Roadstone or anyone else without prejudice to its rights to sell the property by public tender.

"6.2. On the 1st August 1990, a further meeting was held with Roadstone at their request, and they sought clarification of certain matters relating to the sale: i.e., the exact area for sale, value of trees on site, planning permission, tree felling licence.

"6.3. The Department again met Roadstone on the 26th September 1990, who made a firm offer of £1.1 million for the property, 0.4 million of which would be paid when planning permission would be secured. This offer was confirmed in writing on the 4th October 1990.

"6.4. The Department met with Kiaran O'Malley & Co Limited

on the 18th October 1990 to discuss the Roadstone offer and was advised that it would be most unlikely that any other party would be able to match that offer and strongly recommended that the sale to Roadstone be pursued.

"6.5. On the 14th November 1990, the Minister approved the Department's recommendation that the Roadstone offer be pursued with a view to increasing their bid to 1.2 million without planning permission for the sand and gravel extraction. Roadstone concluded its negotiation with the Department at a meeting on the 5th December 1990 with an increased offer of £1.25 million, subject to the approval of the main Board of Cement Roadstone Holdings. At the meeting, Roadstone were informed that the offer would be recommended to the Minister for acceptance and would require the approval of the Minister and the Minister for Finance. The papers were submitted to the Secretary on the 5th December 1990, who recommended to the Minister that the increased offer of £1.25 million be accepted. The Minister approved the sale on the 11th December 1990. On the 18th December 1990, the Department received confirmation that approval of the increased offers were being granted by the main Board of CRH.

"6.6. While negotiations on the sale to Roadstone were in progress, a second company, Johnston Industries, sought to purchase the property also. The history of this company's interest in the property is set out in Appendix B. At a meeting with the Department on the 13th December 1990,

Mr. Brendan Johnston submitted two written offers, dated 10th December 1990, together with a deposit of i½80,000.

" i½800,000 without condition

" i½715,000 with a further i½435,005 and payable when planning permission was secured.

"At the meeting Mr. Johnston indicated that he was making his best offer, and that if his was not the highest offer, he would wish the Minister luck in selling to another party. Department officials undertook to put the offer before the Minister. The papers indicate that on the 14th December 1990, the Minister noted the offer and the recommendation that they be rejected as the revised Roadstone offer was significantly higher. On the same date the Department of Finance sanction was requested for the sale to Roadstone.

"6.7. On the 17th December 1990, a letter from Mr. Johnston's solicitor included a presumption that he was the highest bidder. A reply on the 17th December, faxed on that day, denied the presumption and stated that the Minister was considering the offers. On the 19th December 1990, a further submission was made to the Minister outlining the details of both offers with a recommendation that the Roadstone offer be accepted. The submission also stated that on the telephone to the senior Department negotiator on the 14th December 1990, Mr. Johnston did not change his position (offer) even though it was left open to him to do so, and said that 'If his offer was not the best,

he would accept that position.'

"A) on the 20th December 1990

" the Minister approved the recommendation to sell to Roadstone.

" oral Department of Finance sanction was obtained for the sale, confirmed in writing on the 2nd January 1991

" Roadstone were informed in writing that their offer was accepted, and

" McGreevey Solicitors were informed in writing that their client Brendan Johnston's unconditional offer had been considered and was not successful.

"6.9. On 18th June 1991, a deposit of $\text{i}\frac{1}{2}$ 62,500 was paid, and the sale was finally closed on the 23rd December 1991 when the balance was paid. The price included an amount of $\text{i}\frac{1}{2}$ 250,000 in respect of the commercial timber growing on the lands.

"6.10. As part of the sale, a general felling licence, valid for five years, was granted to Roadstone on the 3rd January 1992, allowing them to clear away approximately 28 hectares of afforested land and to thin a further 28 hectares at Deerpark, Blessington."

And that is the portion of the Comptroller & Auditor General report that you adopt as being a correct statement and your recollection of facts.

A. Absolutely.

Q. I think you then continue in your statement that on the 10th December 1990, you recommended the sale of the Glen

Ding site to the Minister by way of a handwritten note. In the note you indicated to the Minister that there had been a satisfactory and rapid conclusion of negotiations with Roadstone in line with the Minister's direction on the 14th November 1990. More specifically, you recommended that the Department accept the offer of $\text{€}1.25$ million made by Roadstone and that the sale be closed.

I think you would have recommended any offer to the Minister that exceeded Roadstone's offer. It was an inadvertent omission of memory not to include the parliamentary commitment made by Mr. Burke in December of 1998 in the final submission to Minister Robert Molloy in December of 1990. You state that you were aware of the Charles Haughey/Desmond Traynor connection from hearsay and the fact that you grew up in Northeast Dublin.

Furthermore, you recall that when you were an official in the Department of Finance, you dealt with the firm of accountants Haughey Boland in their role of auditors and financial advisers.

A. Correct.

Q. Then you have informed the Tribunal that as regards Mr. Burke's comment in the Oireachtas that the sale would be by public tender after it had been advertised in the local press, you acknowledge this was a declared intention of the Minister. You ask if Mr. Burke could have said anything different at that time. You state that it was an omission of memory, the parliamentary commitment to

Minister Robert Molloy.

I think what you are really saying there is it was an omission not informing Mr. Molloy of what had been said by the Minister in the House in response to a PQ previously.

A. I think that's evident, Mr. Coughlan, yes.

Q. I think you state that the Department of Finance approved the whole sale process and were aware at all times of what was happening. The Department of Finance was the regulatory authority and keeper of conscience as to the appropriateness of any process in the disposal of State property in general and of the process used in the sale of Glen Ding in particular.

And I think we do have a note of Mr. Mullarkey's in relation to the matter that you want to draw attention to.

A. Thank you for that, by the way, Mr. Coughlan.

Q. Just dealing with that last

CHAIRMAN: It's probably a little unrealistic if it was only fifteen minutes, it's likely to be a bit more between Mr. Regan and yourself. It doesn't inconvenience you if we finish

A. Not at all, Chairman.

CHAIRMAN: Two o'clock.

THE TRIBUNAL ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF MR. LOUGHREY BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Your personal involvement in relation to the

disposal of the lands at Glen Ding was fairly limited;

isn't that right?

A. In fact it was very limited relative to the amount of work that had been done over the years. But I mean to say I confess I was involved at the critical issues in the transaction.

Q. The matter came to you?

A. That's correct, Mr. Coughlan, yes.

Q. And I think Mr. Philip Carroll was the official who had the day-to-day task

A. That's right.

Q. in relation to the proposed disposal of the lands?

A. Classically Assistant Principals would be the engine room of any particular policy, and he played that role.

Q. And your Assistant Secretary, Mr. Sean Fitzgerald, was the senior official who got involved when matters appeared to be crystallising, I think, when Mr. O'Malley and Mr. Barnett had become involved in the process for the Department?

A. That's correct. When, what I might call discretionary, senior discretionary level input was required, Mr. Fitzgerald was available.

Q. A very experienced and able civil servant?

A. Oh, absolutely.

Q. Now, Mr. Fitzgerald has told us that he was unaware, he personally was unaware of the PQ and the reply to it.

A. Quite.

Q. We have seen the note of Mr. Carroll, who obviously went to the file in May of 1990 it's a note which combines a preparation for a meeting and a report on a meeting or notes on a meeting, but we can see from the note, you may have seen it this morning

A. I saw it this morning, just to save you time, and I noted that in fact, in an indent, in handwriting, it said "PQ" of whatever the date was, etc.

Q. Yes. So it was known sorry, first of all, it was recorded in the Department, in the file, the PQ and the reply to the PQ; I think that that's clear.

A. That's quite clear, yes.

Q. And also it appears from the papers that on the file was also responses to the various people who had indicated an interest in the property.

A. That's correct.

Q. So the file was there?

A. The file was there, yes.

Q. And it appears to have been examined, at least, in May of 1990 by Mr. Carroll, from his evidence and from the note that we saw?

A. I think that's clear, yes.

Q. Now, Mr. Fitzgerald became involved then and attended a meeting where Mr. Kieran O'Malley and Mr. Barnett, himself, Mr. Carroll and Mr. Gillespie were present. And there is a note and I'm not going to open this note again; it's been opened a number of times Mr. Fitzgerald has told us

that he doesn't accept that the note is accurate to the extent that it attributes everything, say, to Mr. O'Malley or to Mr. Barnett; it was a round-table conversation or discussion that took place. But the note does represent the gist of the meeting and what evolved at the meeting?

A. That sounds very reasonable to me.

Q. He says in his mind now, as the senior civil servant involved in the matter, it began to occur to him and his thinking developed along the lines that he'd like to target Roadstone, from what happened at the meeting?

A. There is no doubt that increasingly Roadstone became the focus of the Department, yeah.

Q. And there is just if I could take you up on one point.

You said that Mr. O'Malley, who was an expert in planning and valuation I think Mr. Kieran O'Malley was an expert in planning; is that right?

A. I'd accept that.

Q. And I think Mr. Barnett was an expert in valuing

A. Mineral valuation.

Q. Mineral values?

A. Yes.

Q. And just to get this out of the way: The Department had never retained an estate agent or a property valuer, if I could use it in its broadest sense?

A. And I noted this morning, Mr. Healy quite correctly raised this point. Could I respond in a generic way, and I don't mean to be in any sense contentious, but over the years,

and increasingly, departments, senior civil servants and the PAC has made this comment more than once, that they are too quick to look out for expertise where their own innate ability or common sense would apply. And there are many controversies; we don't have to open them up.

Now, it's a question of damned if we do and damned if we don't. Now, in this case, the judgement call was made that with the mineral expertise, valuation expertise and with the planning expertise that we were chronically short of, the latter we were chronically short of, that was sufficient to make the judgement calls we ultimately made.

Now, of course, looking back retrospectively, you could say is, might an auctioneer have added value to the process? And that's a matter of opinion. But this is now, and that was done.

Q. I understand that point. But I suppose the and Mr. Healy just brings it to my attention the Department guidelines refer to marketing. I suppose you may view marketing in a number of different ways.

A. Of course.

Q. But according to Mr. Fitzgerald, anyway, his view was that and I suppose you agree with the view there was going to be difficulty in getting planning permission particularly for the Department. He didn't have the staff to give over to the time that that might take, he said, that was Department and you were looking for more staff anyway from the Department of Finance?

A. Quite.

Q. If this got out at all, that the Department was looking for planning permission, very right-thinking people might take a different view and say "No development here at all", and might mount a political campaign or some sort of lobby that would if it didn't forestall any sort of planning, would certainly slow things up. These were all the things he said were acting on his mind.

A. I think, if it would be of help, Mr. Coughlan, that's the very nub of the issue as far as I was concerned at the time. Planning was at the heart of this decision we took.

So, is, if, just to revert to the previous sentence, if it would have had to have been a very subtle marketing campaign not to elicit from the marketplace the sort of wider response you are talking about.

Now, could I say is the Department of Energy had a particular brief, and that brief was the onus the Government decision of 1987 had placed on us to maximise receipts from assets surplus to requirements. It wasn't up to us to look at what I might call a more holistic joined-up approach to Government. For instance, the amenities at Glen Ding Woods would have been a matter initially for Wicklow County Council. The very considerable archaeological inheritance was a matter for the OPW. Once I was apprised of the fact, once I had realised that both Wicklow County Council and the OPW were in the picture, my sole focus would have been to maximise

receipts for the taxpayer.

But I clearly accept the point you are making. Had we gone on a marketing drive, it would have had to have been a very covert marketing drive, if I may say so. Or had we gone on any exercise, notably a planning application, I am absolutely convinced you are correct, it would have evoked a response from what I might call stakeholders with a totally legitimate ambition to stop this project. And of course, I think that's at the very heart of the matter.

Q. Now, so, as it was appreciated in the Department that Roadstone were definitely interested, I think it would always have been appreciated that Roadstone would be interested; that it looked as if there was a good return for the Exchequer in relation to the type of money they were talking about and the views that the Department might have had about the value of the mineral availability.

Could it be the situation that all of the focus was directed that way then?

I am just trying to understand, because we do have the commitments in the correspondence and in the Dail. Is it that that's the focus then, "We are going after Roadstone no matter what", if I could put it that way?

A. No, "We are going after Roadstone", full stop. "No matter what" carries an inference that goes beyond what I would accept.

Q. I take your point. "We are going after Roadstone", full stop. Could that have been what happened in the

Department?

A. Oh, absolutely. But could I say, Mr. Coughlan, is that when the parallel exercise with Mr. Johnston ultimately came to fruition and I have scanned Sean Fitzgerald's evidence, the transcript, but I can say on my own behalf actually is, both of us had a Department of Finance background; for years I was responsible for an area of financing the Exchequer borrowing requirement. And if I may say so, Mr. Johnston's money was just as good as CRH. This was a procurement process, albeit informal, which we were selling. We weren't buying.

Now, as you notice, is in procurement processes the State would be very foolish to tie itself to the lowest tender, because ultimately they were responsible for execution and delivery. But in selling, we had no such inhibitions. So Mr. Johnston's pound was every bit as good as CRH, and that would have been my attitude right up to the final bell.

Q. And I understand that, and I don't think anyone is disputing that particular point. But and I will come to the Mr. Johnston issue in a moment, if you'll just bear with me. But I am just trying to understand, or seeing if we can have some understanding of why the commitments and I know you speak about corporate awareness, you know, sort of loss of memory or I'm just trying to figure out how this happened.

A. Sure.

Q. Or was it that, as you say, it began to emerge that

Roadstone were interested, had serious, serious money, and the focus became Roadstone, full stop?

A. I believe, and I was kept informed by Sean Fitzgerald. You can take it, even though that my initials or my comments on the file are somewhat limited, that Sean Fitzgerald would have kept me informed at all stages. So, I don't resile in any way from the operation, certainly from October onwards. I would have been fully informed. I was equally convinced, from my discussions with Sean Fitzgerald, is that to go back on the phrase, Roadstone had the identikit that could pay a premium over and above the marketplace.

And why was this? Well, there are two reasons. One was the strategic; it was the continuous it was the adjoining developer, and it had the infrastructure there, and we won't go into the I'd be happy to go into them but it had that identikit.

There is another thing that's not coming out very strongly, is the business model. All of the people operating in this area had a very simple business model, in the sense that sand and gravel are commodities, are high-volume low-value commodities; nobody is branding gravel. And in the sort of industrial aggregate we are talking about here, it was a very simple business model. But the cost base for Roadstone would have been lower, so they could bid higher. They had amortized, I am sure, virtually all their capital expenditure on that site already.

So we wanted to capture the premium, the upside that they

could pay. And we were so convinced. Now, the question I think you are raising is: Did that focus blind us, perhaps, to

Q. That's the very issue. That's precisely the point.

A. The answer to that is to the extent of my involvement, and indeed Mr. Fitzgerald's involvement, actually, is the minute I became aware of what I might call the Johnston dilemma created by his late bid, actually, I was in on the discussions and I think Mr. Molloy alluded to this this morning and I would have certainly either suggested, but I would have been fully supportive of Mr. Molloy's common-sense decision to instruct the Department to allow Mr. Johnston make that bid, and I had an awareness of that at the time.

And first of all, it was common sense. I mean to say is, I don't believe for one second that you think of people are litigation planning, but it was good common sense to allow him. But it was also right in equity, because it wasn't a done deal. We only had a conditional offer, and indeed only an oral offer across the table, actually. So it wasn't a done deal, and it was the common sense, and if I may say so, equitable thing to do at the time. And I, as I say, would have been fully supportive of it.

Q. Yes, but I now come to the Mr. Johnston involvement. Agreement in principle had taken place between the Department and Roadstone; isn't that right?

A. Correct, yes.

Q. At a level in the Department of Mr. Sean Fitzgerald, who was the senior civil servant dealing with the matter at that time?

A. Oh, there is no doubt about that.

Q. And at the level of Roadstone, of the

A. Managing Director.

Q. Managing Director and Company Secretary?

A. Quite.

Q. I think it was Mr. Carroll said, or was it Mr. Fitzgerald, people left that meeting believing they had an agreement subject to, we know, all the legal requirements that had to be fulfilled. And of course they might not have been, but I think people would have felt we do have an agreement here?

A. I don't think there was any real doubt that the Board of CRH wouldn't have signed off on it.

Q. Or that the Minister wouldn't have?

A. Or the Minister.

Q. Or the Department of Finance?

A. I think that's incontrovertible.

Q. And was that perhaps in the thinking when and I know legal advice was taken by Mr. Fitzgerald but do you think that might have influenced the Department's thinking to the extent that Roadstone were told the asking price?

There was a negotiating strategy with Roadstone?

A. Quite.

Q. And anyone involved in negotiation would know that we'll

meet somewhere in between, and experienced negotiators like the Managing Director and the Assistant Secretary would have a good idea of where they were going to find themselves at the end of day, perhaps. Now, that same opportunity wasn't afforded to Mr. Johnston, in that he wasn't told an asking price. He found himself in what looked like a tender situation; isn't that right? He had his two envelopes, and he gave them. Do you think that, again, there was the mindset in the Department was, you know, we do have Roadstone.

A. Well, it's a matter of record already that I have said in public that I believed that there was an apparent symmetry between the treatment, and I use the word "apparent" advisedly, obviously, and clearly that is the case. But could I say by way of explanation, Mr. Coughlan, is, if you'll forgive me, Chairman, and it's not reverting to another module here, but we are all aware that even in the most carefully planned procurement process, once there is interaction, once there is chemistry, once one departs from the written word or a sealed bid, by definition asymmetry can creep in. And I am not talking about Orange/Meteor. If you go to the experience in Europe in terms of DG IV competition policy, there are endless complaints. Even the most formally choreography in terms of procurement is that asymmetry, apparent asymmetry can creep in. Here I had in mind apparent asymmetry because the inheritance was different. No doubt and I was quite

aware of the fact, because I was briefed that Mr. Johnston had very considerable experience in the UK, and notably in this area, a very successful track record, so anything I say is not to be taken he was not a serious competitor or a serious businessman. But we are dealing with Roadstone and the CRH Group, which have four decades of astounding success in terms of management of their affairs, and they brought with them a sheer professionalism and persistence that's not given to many industrialists, in fact is not given, perhaps, arguably to any industrial enterprise in Ireland. And that's an asymmetry in terms of inheritance at the starting line. And I would suggest, is, if Mr. Johnston had followed through in quite the same, let's say, speed, as Roadstone had, is we would have had a more apparent parallel bidding between them; let me put it that way.

So when I say "apparent asymmetry", there was, as I say, the difference. Now, if you are running what, in effect, turned out to be parallel private treaties. I suggest even if King Solomon was the process auditor, it would have been hard to avoid apparent asymmetry.

Q. I understand that, and but if we take a situation, and when Mr. Fitzgerald went to the meeting with Mr. Johnston, I suppose if Mr. Johnston, if he had opened the envelope and saw that Mr. Johnston had two offers: One was the unconditional one which excluded the planning, and the other was an offer which was in fact slightly higher than

Roadstone's but included the planning condition, do you think that it might have been suggested to him, because this is what Roadstone were told, "We don't want any conditions", might have been suggested to him there and then: "Look, if you withdraw that planning requirement, you are in the game. I am not saying that you have won, but you are in the game." There may have been all the other matters of how deep the pockets were at the end of the day.

What I am trying to understand is: Was there this a confidence in the Department, "We have Roadstone", full stop. I'm trying to get understand the feeling.

A. I understand it, and the very fact you have mentioned and in fact I was intrigued, and clearly I can't come to it's only the Chairman can come to a determination, but I was intrigued by a line of inquiry Mr. Healy took yesterday with Mr. Carroll. I had the advantage of scanning the transcript, where he suggested that there may have been this perhaps not fully conscious, but at least this idea that Mr. Johnston and his advisers had that they were in some sort of tender process. Because, well, clearly, his solicitors believed so, if you were to take their letter at its face value. But clearly Mr. Johnston did as well.

Because here was a man who worked in the UK with local authorities, because I have read the file, and particularly with the Thames Water Authority, which I had dealings with myself at one stage, who run this kind of tender process

all the time. And he came in with all the trappings of a tender.

Now, this is a double-edged sword. He came in with envelopes; he came in with a bank draft of 80,000. And without taking up anyone's time, let's remind ourselves:

The time value of money is largely discounted now because interest rates are so low. My memory of 1990 was that yield to redemption on Government papers was up as high as 12 percent. Add a couple of hundred basis points to that for a businessman like Mr. Johnston, and you are talking about moving towards 20 percent serious money.

Q. 24 at one point.

A. Thank you, Mr. Healy; 24. Serious money. It's axiomatic that he was either in funds or he wasn't, so the opportunity cost was a deposit, or the actual cost to him were those sort of dizzyingly high interest rates. That, to me, had all the trappings, and by the way, please stop me at any stage, because I am only actually interested in Mr. Healy's line of inquiry yesterday that had all the trappings of a man who believed he was in a tender process.

But if you flip that coin, it was a man I hate to use the jaded colloquialism "you don't get a second chance to make a first impression", but if he did so believe, his best and final offer was genuinely his best and final offer, because he wasn't contemplating an iterative process.

Q. He wasn't afforded an opportunity; isn't that the position?

A. No, Mr. Coughlan, but I would suggest that he put forward genuinely what he thought was worth to him.

Q. Yes I understand, and we must accept of course that Mr. Johnston believed what he believed at the time and how he acted. But I suppose what I am inquiring into is this: The Department left him with that belief, really; isn't that right?

A. I am afraid it may have been the body language on the day, because I wasn't there. But I don't believe that he could be left in any doubt after his solicitor saw Sean Fitzgerald's letter of I can't recall the time; the 17th or thereabouts, I think it was.

Q. Yes, I take that point. But at the time that he was coming in, as you say, the common-sense approach taken by the Minister that there should be had a meeting with this man, the background that we believe that we have a deal with Roadstone subject to just tying up the legal niceties, or the formalities in relation to it. That, I am suggesting to you that it must have affected the mindset in the Department in relation to Mr. Johnston, in that when he came in, as you say, coming from his background, he approached it absolutely pure tender: the envelopes, the deposit, the bank draft, the whole lot.

Now, nobody seems to have said to him then, and there is a dispute as to what was said as to whether his offer was good, bad or indifferent, or he wasn't but nobody seems

to have said to him then, "Look, we are looking for

1.5 million."

A. I accept entirely what you say, Mr. Coughlan. If we had been running, as I say, a pre-planned procurement type process. Now, there were no websites at the time, but we would have put every response to Roadstone on the website for everybody else to see. We weren't. We were running what eventually turned out to be, as I say, parallel treaty negotiations. But I would and I am still convinced that this is the case, Mr. Coughlan. I understand the point you are making, but I am still convinced the case is Mr. Johnston ultimately got his chance to put his best foot forward. Clearly you'll be talking to Mr. Johnston, I presume, I don't know, but I accept Sean Fitzgerald, and because he told me at the time since, obviously, verified here in your own inquiry, in the Tribunal's inquiry is that he gave every opportunity to Mr. Johnston to put his best foot forward. What we are saying now is, should he have been prompted to ask in some way what the Department might be looking for, and because CRH, from memory, or sorry, Roadstone, from memory, forgive me, Roadstone, from memory, were astute enough to seek that themselves, and we then have to we are getting into applying what I might call formal procurement rules retrospectively to what was an informal parallel treaty negotiation.

And I don't think, Mr. Coughlan, we were required to do so.

In other words, is, if Roadstone had the business acumen to position themselves in the negotiations in a better way than Mr. Johnston did, I ask the question rhetorically:

Was it up to us to prompt him to come up to the standard of negotiation that Roadstone had applied? I'm not sure what the answer is.

Q. I see. I take your point that all dealings will be asymmetrical, but this wasn't two private individuals or two private companies engaged in business. This was the Irish Government acting on behalf of the Irish people engaging in business for the purpose of raising funds to reduce Exchequer borrowings.

A. Correct.

Q. And whilst I take your point about all dealings being asymmetrical, might I suggest to you that the impression is out there that Roadstone got favourable treatment compared to Mr. Johnston, in that they knew what you wanted, or they knew your asking price, so they were in a position to deal with it. And that, perhaps, in fairness, when the Government is dealing with people, that somebody else who was looking for the same asset or whatever should at least have had things levelled to the extent that they at least knew your asking price.

A. I see the point you are making, Mr. Coughlan. But if I may say so, is that I do not believe it was incumbent on us to prompt an experienced businessman how to negotiate, because these were negotiations.

Q. Well, I suppose, if I could just take you up on a point that you made yourself, he seemed to be very used to the tender process?

A. Quite.

Q. The Thames Water Authority and matters like that, he came in that's exactly how he was armed; isn't that right?

A. Yes.

Q. And it wasn't even said to him, "It's not a tender situation"; you'd accept that, that wasn't even said to him?

A. Just in case I lost concentration for the moment, could you repeat the last sentence.

Q. In fact it wasn't even said to him, "It's not a tender situation"?

A. No it wasn't, because presumably, and once again is I am only trying to help out, Chairman, here, because I wasn't at any of these meetings, but presumably Mr. Fitzgerald and Mr. Carroll would have been astonished that they would have had to so inform him, because, from their point of view, it had none of the trappings of a Government tender process, absolutely none, and that's at the heart of the matter we are discussing, clearly.

Q. Now, turning now to and I'll come back in a moment to the Parliamentary Question and the responses to the various people who had indicated an interest.

A. Sure.

Q. But leaving those aside for a moment, nevertheless the

usual way of disposing of a State property would have been by way of tender or auction; isn't that right?

A. Oh, absolutely.

Q. And the guidelines were directed that way?

A. Absolutely.

Q. Now, of course, one can and there was the exception provided that you can deviate subject to the I suppose everything is subject to the approval of the Department of Finance at the end of the day, but you could deviate subject to the views of the Department of Finance?

A. That's a very fair summary, yes.

Q. And a paper was prepared for the Department of Finance, and the Department of Finance, I suppose, were there were people in the Department of Finance who were quite happy with the money that was coming in as well, and they approved, or whatever they do on it, they signed off on it?

A. The old-fashioned term is they sanctioned it.

Q. They sanctioned it, yes, that's right, they sanctioned it, yes. But of course the Department of Finance, in the paper that we have seen that went to the Department of Finance, were not informed of the reply to the PQ and were not informed of the fact that previous interested parties had been informed that if and when the lands were being disposed of or the asset was being disposed of, it would be by way of tender, the usual sort of

A. Correct. But it would have been let me put it this way,

is that the drive the Department of Finance would have had would have been to maximise receipts. If there had been an awareness, a full awareness of the inheritance that was on the file, and had it been put to the Department of Finance, is or specifically to Mr. Gerry Hickey I have little doubt that a way would have been found to ensure that the fine offer we had from Roadstone could have been harvested, let me put it that way. I listened very carefully to what Mr. Molloy said this morning, and I totally respect what he said; but nonetheless I do not believe that a standard, off-the-shelf PQ reply to a very if I may say so, Chairman, you made the comment yourself, to a very pointed question, and by the way, good luck to the pointed question. And Mr. Healy was right; regardless of the inspiration, it elicited a response that should have been addressed and should have been brought to the attention.

Q. Therein lies the danger: It was a very pointed question?

A. Quite, it was a very specific question.

Q. A very pointed question. And the reply was there, and a standard sorry, not deviating from the guidelines was the response, really; wasn't that right?

A. Not only that is, but once again, and I am not an expert on the total sort of timing choreography of the file, but at that time, even though the GSI report had put in what I call in mid-1988 a premonition of things to come in its final sentence, but the Department, per se, was not alive to the potential planning difficulties. There was a

general realisation that a site with planning permission was more valuable. They were going down the road, as they thought at the time, of planning permission; and for God's sake, if you are going for planning permission, why not go for a public tender? Because the cat is out of the bag, so to speak.

So it was the only reply that they could give in terms of Government requirements, and it's certainly the only reply they could give in logic at the time.

Q. But it was Ministerial policy as stated in the House?

A. It was a stated intention by the Minister of the day.

Q. And it was a Ministerial policy. It was the departmental policy.

A. I think policy I would apply to the generic stance by the Department of Finance, that in general, assets, or indeed procurements, should go to transparent bidding. Of course I accept that as policy. But for the individual tract of land that was in question, it was more a statement of intention rather than Ministerial policy.

Q. I saw you made that you drew that distinction before the Public Accounts Committee as well, and I read it with interest. It evoked response from parliamentarians which was

A. It sure did.

Q. sceptical; is that a fair way of putting it?

A. I think that's fair.

Q. And people who had held Ministerial office were sitting on

that committee as well, would that be fair?

A. Yes, they were.

Q. I won't put it any further so. But what I am interested in is again, it's a question of, I suppose, us looking at public administration in Ireland. The $\text{€}1.25$ million was a huge carrot; isn't that right? And you used the expression yourself that the Department of Finance would have considered the matter carefully to ensure that they didn't lose this fine

A. Yes, they would have.

Q. You see, the other side of it, of course, is from the public's point of view and policy point of view, that and stated position that the lands would be disposed of in the normal way, by tender. I was just interested in your own statement where you described the Department of Finance not just as our usual keepers of the euros now and ensure that there is good housekeeping, but you say that not only are they the regulatory authority but they are the keeper of the conscience of the appropriateness of any process in the disposal of State property.

So, using that as the measurement, if we had a situation where the Department of Finance was aware of what had been replied in a Parliamentary Question and if they had been made aware of what had been said to people who had expressed an interest in the property, do you feel that, notwithstanding them being the keeper of the conscience as to the appropriateness of any process in the disposal of

State property, that in your view, they would still have found a way to hold onto the $\frac{1}{2}$ 1.25 million without reverting to the other people who had been told certain things?

A. I believed the Department of Finance had indeed, had I myself got that knowledge in terms of the '87, '88 inquiries, which I hadn't I believe clearly it wouldn't have been swept under the carpet. But I believe ultimately we would have found ways to capture the premium that Roadstone were prepared to pay.

Because let me put it this way, is and I don't mean to be in any way cavalier about process, but the ultimate prize was to get best value for the taxpayer. Now, clearly that doesn't give anybody carte blanche to ignore what would be seen as a decent way for the State to do business.

But if I may say so, I hope we were, and it was our intention to be, fearlessly on the side of the taxpayer and to capture that premium Roadstone self-evidently were prepared to pay. That was the objective.

Q. So, to use an expression you used yourself earlier, there was a certain blindness in relation to all other matters when this money was available from Roadstone; would that be a fair way to put it?

A. It's a phrase I used to rephrase your question, Mr. Coughlan. I didn't admit to it myself, clearly.

Q. Would you accept that is what seems to have happened?

A. Oh, no, no, I would not, certainly not, Mr. Coughlan. I

would not at all, because I believe, in the end game, that

Mr. Johnston was very fairly treated, in the end game.

Admittedly it was an end game that had to have the assistance of an appeal to the Minister, but ultimately he was fairly treated.

Q. Might I phrase it this way, and ask you, notwithstanding your response there, do you think that the Department had bought into or accepted the Roadstone deal, and the effect of that was to blunt the appetite of the Department in its engaging with Mr. Johnston?

A. I believe nothing would have blunted our appetite for a higher bid from Mr. Johnston. If Mr. Johnston had come in with a tad, a scintilla more than Roadstone, the prize was his.

Q. No, I wasn't talking about a bid; I was talking about engaging, engaging with Mr. Johnston.

A. I believe from what Sean Fitzgerald explained to me that there was a continuous discussion over this period between myself and Sean Fitzgerald, that the engagement the intent of the engagement was to be absolutely fair.

Clearly, as I wasn't a direct participant, I couldn't opine any further.

Q. Looking at all of these matters now and bearing in mind your long experience as a public servant in the senior position you attained, do you think that there was any deviation or departing from high standards in Ireland's public administration in relation to this particular

transaction?

A. I believe

Q. Or lapse, I suppose?

A. It was regrettable, first of all, that the early indications of interest somehow fell through the cracks; they certainly did. I don't believe, Mr. Coughlan, ultimately but we can never know, of course I don't believe ultimately it would have made any difference, in the long run, on the disposal of the property. But nonetheless, in terms of the standards you mentioned, actually, I think it's regrettable that they weren't picked up. I don't offer an excuse for it other than to say that I think uniquely, since the history since the foundation of the State, I can't think of any situation where the operation of the Department was cleaned out so thoroughly and, at the same time, encountered by coincidence the early, the special early retirement scheme of Ray MacSharry and a situation where there was not one person in the line, or even in the whole service, that had direct dealings with these people earlier.

Of course there are examples of clean-out. When the Department of Posts and Telegraphs, for instance, went to An Post and Telecom Eireann, I would say that equally was a comparable clean-out. But the hierarchy in the Department of Posts and Telegraphs stayed exactly the same at the time, and please take my word for that because I was around, I was involved in that at the time. And I could

gift-cite you other examples, but there was a unique treble whammy which left no person now it didn't excuse the fact that the file may not have been kept correctly or brought to the attention of people, but nonetheless, is

Q. Neither of those two things happened. The file was kept correctly and it was worked on by the official who was dealing with this transaction, Mr. Carroll; we have seen from his note.

A. I accept what you are saying in the sense is I use "the was file kept correctly" in the sort of in a broad sense.

Of course I am sure the file was kept correctly, but the information that comes from the file is only a proportion of people's sensibility. There is a form of osmosis, I think, that comes with having dealt directly with the people concerned. That was lacking; but as I say is, I accept your general point.

Q. Thank you very much indeed, Mr. Loughrey.

CHAIRMAN: On the economic end of things, Mr. Loughrey, in essence what you are saying is to the effect that any imperfections in the process were brought about by this aspect of loss of corporate memory from change of turnover, and perhaps by a paramount concentration on the sumon bonum of maximising State Revenue for this asset?

A. That's exactly correct, Chairman.

CHAIRMAN: There is also, as you have indicated in agreeing with my remark about the barbed nature of the question in the Dail, there also was a political element, apart from

the form of the question, I think its author had been the holder of three ministerial portfolios in the mid-eighties coalition Government; she was a front bench local Opposition spokesman of some stature and seniority.

A. In fact, the person in mind, Deputy Hussey, or then Deputy Hussey had a very distinguished record and would have been very conscious of the way she framed her questioning, and she was quite correct to do so.

CHAIRMAN: Yes. She obviously had people coming to her constituency clinic expressing concerns about a perceived proximity between the State and Roadstone.

A. It's part of the way our democratic process works.

CHAIRMAN: Could it be that a sizable factor in the equation was the want of continuity in ministers? If you had had the same minister or the same political adviser, I suggest to you, it would have been hard to forget that this was a political banana skin that had been flagged in the Oireachtas.

A. If I might note on that, in agreeing to you, that Mr. Burke would have delegated, obviously, to his then Minister of State, Michael Smith. Now, Michael Smith, an extremely able Minister, was intimately involved with these earlier expressions of interest; and had he remained on, for instance, as Minister for Energy and Forestry, I have little doubt that he would have been fully aware of what the earlier history was. And I think you are right in that.

CHAIRMAN: Thanks.

Anything to raise, Mr. Strahan?

MR. STRAHAN: I have no questions.

MS. LEYDEN: I have no questions.

MR. REGAN: Thank you.

THE WITNESS WAS EXAMINED BY MR. REGAN AS FOLLOWS:

Q. MR. REGAN: Mr. Loughrey, can I just ask, in this period, your preoccupation is in the Department; you asked Mr. Fitzgerald for his help on this file, so your involvement was, as I say, at the critical moments involved, but you were preoccupied, presumably, with a lot of other things at that time, were you?

A. I suppose, Mr. Regan, I am no different from any other civil servant in that position, you had a full range of preoccupations from the bread-and-butter issues of legislation or secondary legislation to administration in its widest sense. But there would have been major preoccupations at the time which would have been let's just take forestry alone, for the fact that we were trying to reposition ourselves in such a way that the EU would support the growing private sector for afforestation and at the same time, if I may say so, it was a neat trick, to keep Coillte in the same grant system which we did in the second half of 1990. But there would have been wider energy considerations like the refinancing of Bord Na Mona, the gas pipeline to the UK, our attempts they to, though they didn't come to fruition until much later, to sell

INPC, I don't want to take up too much time of the Tribunal, but there would have been a full range of issues at the time, yes.

Q. Now, despite that, at the critical times you were able to focus on this issue and the final decision; that's your

A. In the nature of things, that comes with the territory, yes.

Q. Now, I just want to ask a few questions on a few themes.

The first is the Department of Finance guidelines. What guidelines were you working to?

A. I was working to the July 1986 guidelines. And I wouldn't like to Mr. Coughlan summed them up absolutely perfectly, and I don't think we have to rehearse the arguments any longer. The normal way of doing business was by way of open competitive tendering with the let-out clause which we invoked. But I don't think there is anything left to be said.

Q. But the let-out clause is part of the guidelines?

A. Oh, absolutely. Guidelines are guidelines. They are not prescriptive or mandatory, and by definition the State would be very imprudent to paint itself into a corner where in all instances, whether by way of procurement, if EU directives would allow it, or whether by way of their own, in terms of sale of assets, whether they would paint themselves into a corner prescriptively. But in general, you are right, yes.

Q. So within the guidelines, in exceptional circumstances, you

can have a sale by private treaty?

A. Oh, absolutely, yes.

Q. Is that the situation today with the existing guidelines?

A. Yes, it is still the situation. Now, there has been over the years, governance in both public and private sector has been intensified and enhanced, if I may say so, and there is increasing emphasis on process, quite correctly, but the basic let-out clause is still there. It was in the revision in 1994, once again for State companies, '95, again in guidelines I think, from memory, '98, but it continues to be the case in terms of disposal, to the best of my recollection.

Q. Because I am just referring to Tab 132; there is a note, a letter or a note from the Department of Finance official, Frank Griffin; Mr. Healy mentioned this in his Opening Statement. I just wonder if that could be do you have

A. Could you give me the reference? I am conscious of having read that quickly, but I'd just like to

Q. I'll just read it for you. Book 76, Tab 132, but perhaps I'll just read the conclusion

A. Okay.

Q. from that.

This is dated 1999, so it is 1st February 1999, so it is a long time after the event. But Mr. Griffin reviews this whole process, and he concludes and again he is dealing with the sale of property by private treaty and the general

standard of competitive tendering, and he is dealing with the Glen Ding case.

But under the last paragraph, "Future Procedures", he says:

"In the light of the soundly based exceptions to open competition described above, a blanket imposition of an open process would not seem to be called for. However, there may be a case on transparency grounds for amending practice to provide for cases where it is sought to dispense with open competition to be referred to the Government Contracts Committee."

And so even at that remove from the Glen Ding story and the questions that were raised, the Department of Finance would still want to have a proviso for private treaty sale.

A. I think it's quite clear from this conclusion, and I wouldn't disagree with him. But that's not new, if I may say so, Mr. Regan. It was open to the Department of Finance in general, or indeed Mr. Hickey in general or in particular, to ask us to, if needs be, I believe, to refer to the Government Contracts Committee. I would have no problem with that, because it would have kept deliberations in-house within the public sector, number one, and we would have had the added imprimatur of the Government Contracts Committee. So had that been suggested by the Department of Finance at the time, I would have had no problem whatsoever.

Q. There is also a letter on the file from Mr. Mullarkey, Secretary General of the Department of Finance. This is

subsequent to that note. I don't know what the connection is, but it's the 3rd March 1999. And I just wonder if you recall that note.

A. I believe I am familiar with that letter, yes.

Q. Again, I'll just read the concluding paragraph.

"The approval of this Department is required where departments propose, for justified reasons, to depart from standard procedures for disposals in a particular instance.

The Department of Energy in their minute of the 14 December 1990 made a detailed case why the normal procedures should not be followed in the case of Glen Ding sale. Having considered the arguments put forward, this Department accepted the recommendation of the Department of Energy and issued the approval sought."

Now, do you feel that adds anything to

A. Well, it was in very particular circumstances. Here was the primus inter pares, the Secretary General of the Department of Finance, writing formally to the Public Accounts Committee, for which he has a very particular reporting, and he stands over the decision the Department of Finance made at that time. So, I think it's not just a casual letter. It's a very measured letter by the then Secretary General of the Department of Finance.

Q. So, on the issue of the guidelines, is it your position that the Department your Department actually followed the guidelines, and the variation within those guidelines of a sale by private treaty?

A. Oh, absolutely. As on the books, I was a member of that Department, the Department of Finance, for nearly 20 years, and in the public expenditure area, control area as well.

And I don't think either myself or Sean Fitzgerald would have deliberately strayed from Government guidelines in any set of circumstances.

Q. And you had the approval of the Department of Finance?

A. And we had the clear approval of the Department of Finance.

Q. The question that was raised, did they have all the necessary information; and while they had ultimately the information about the Roadstone price and the Johnston offer, etc., but the issue of some other possible interests. Is it your case that the Department would have still approved this deal, or what is your view? I mean, one would need to ask the Department of Finance this question first, but perhaps you could

A. This is certainly a retrospective assessment in many ways, but one thing is, we made a business case to the Department of Finance. They accepted that business case. But equally I accept what Mr. Coughlan put to me is, had the issue of the stated intention of the then Minister in 1988 been part and parcel of that submission, quite frankly, I would have come to them with a solution rather than a problem. I would have arranged to have that I believe have that solved.

Now, I listened very carefully to Mr. Molloy this morning, and you know, here is a man who, if I may say so, whose

probity is palpable; and he referred that it would have he would have had to consider in honour what to do in the circumstances. But I believe it could have been rectified, because I believe, if I may say so, the imperative of getting the best deal for the taxpayer ultimately would have applied. So a solution would have been found, but I do cede to Mr. Coughlan that had it been put to the Department of Finance, I frankly, as a Secretary General, I wouldn't have put a problem to the Department of Finance, I would have put a solution.

Q. And in relation to the had you been aware of the Parliamentary Question, what would your advice have been to the Minister?

A. My advice

Q. With the other information that was

A. To some extent, this would have been a contest of unequals, because Mr. Molloy's experience as a parliamentarian would have he would have out-pecked me, obviously, by definition, that I was the public servant and he was the Minister. But his experience would have greatly out-pecked, and I am quite sure we would have found a way.

There are several ways to think in terms, but I don't want to delay, obviously, the Tribunal. One of them would have been to make a statement with the Ceann Comhairle's position to make a short statement to the house; one would have been and I don't mean this in a Machiavellian way to prompt another Parliamentary Question which could

have then tied back to the original one. It equally would have been incumbent on us, Mr. Chairman, just to refer to what you said, to revert to Deputy Hussey. But I have little doubt that a solution would have been found.

Q. Can I ask you, the Public Accounts Committee and the Comptroller & Auditor General concluded that the manner in which the sale was conducted was inappropriate. What is your view on that?

A. I want to be very careful here, in the sense that I am not here to cause contentiousness between myself and the esteemed Comptroller & Auditor General. I mean to say, he has a constitutional position under Article 33 of the Constitution. But ultimately I don't think any matter like this, where he is offering an opinion, that necessarily carries total infallibility.

Now, that's not to say he makes a strong, compelling case. Equally I am on record as disagreeing with him. So, might I let the matter rest there, that the matter of my disagreeing with the Comptroller & Auditor General's report at that time is a matter of public record, but I greatly respect the sterling work that he does. And can I say, in general, is, I could have no complaint about the, let me say, the authority he brings to his role as Comptroller & Auditor General.

Q. He does also, if I may stick with the Comptroller & Auditor General for a moment, I think his findings essentially are quite favourable in terms of getting value for money, etc.,

etc. But there is one question about Mr. Johnston in relation to it says at paragraph 8.4, "Mr. Johnston's bid for the property was considered before the sale to Roadstone was formally concluded, and was not successful because it was lower than Roadstone's."

Then he goes on, and he refers to the fact that it was the best shot, but he goes on to state that he is speaking about the series of meetings and the fact that "To all intents and purposes, the sale had been agreed to Roadstone subject to CRH and Board approval and approved by the Minister on the 11th December 1990, two days before the meeting with Mr. Johnston at which he tabled his offers."

Now, this goes to the heart of questions that have been raised here today as well: that the reality, when the Minister intervened, that Mr. Johnston was given a fair and open opportunity to bid and secure this property. And it really is to ask you to just comment on that.

A. Well, first of all, I think the Minister should get every credit for that decision, because it was a good decision; it was one which I supported at the time.

However the end game arrived at is, there is no doubt in my mind that Mr. Johnston got a fair hearing and a fair chance to put forward his best and so-called BAFO, his best and final offer. And given the business model that he would have to contend with, that he had none of the advantages that CRH had, he couldn't have paid that premium and made what is basically a commodity business pay as well as

Roadstone would have done. So I am quite happy that regardless of, if I may use your term, Chairman, of any imperfection in the process, ultimately, justice was done.

Q. And those advantages that you refer to, I mean, there was the excess from the road network that Roadstone had; there was, for that reason, less likely to face objections in relation to increased traffic in the planning process.

There was the phasing and remove of sand and gravel allowing a phased planning application over the years; plant and equipment on site; own water supply; and the increased complications of the planning process in terms of Environmental Impact Statement, etc., and the very complex process that had been introduced. These were the advantages that allowed Roadstone, in your view, to pay that premium price?

A. Oh, absolutely. They had the commanding heights of this site, in effect. Whether minerals are there by geology or by God, they happened to be there next door, and they had a major operation next door. There were other operations nearby, but not of the scale of Roadstone. So Roadstone had those built-in advantages before any competitive process even began.

Q. There is a term that has been used by Mr. Coughlan and Mr. Healy, I believe, of a benefit being conferred on Roadstone. Now, you know, a benefit, advantage, State aid, you know, and we know, you know from your EU rules on State aid, you know there is, if there is an advantage conferred,

effect on trade or a distortion of competition. Now, in that sense, do you consider that, first of all, if there was a benefit or an advantage conferred on Roadstone?

A. No, I don't accept for one moment that a case of State aid would stand up to any scrutiny of any kind. It would fall by the wayside straightaway on the basis of that even on the soundings of even on the parallel private treaty negotiations we spoke about, that a very experienced operator who had operated in the highly competitive London area market was only prepared to go to $\pounds 800,000$, which by chance, pure coincidence, but it's not perhaps I'm not trying to infer anything other than that the calculations would be broadly the same was that our mineral expert came to the same conclusion, that $\pounds 800,000$ would be the max that we could expect without planning permission.

Now, the fact that we got over 50% more than that, it's hard to believe that DG Competition policy would entertain a State aid case for more than five minutes, frankly.

Q. Can I just ask, in conclusion, I mean, the rationale or objective justification for the approach you've adopted in all of this, you are still convinced by the process that was adopted and by the decisions you made?

A. Oh, absolutely. Come back to, once again is, and I don't want to put the Department on the side of the angels, but we had a preoccupation of getting the most for the taxpayer, and we adhered to that right through the process. But it did not exclude us, exclude anybody else who would

come in on the sort of, if I may say so, low-key process that we had, informal process we had.

And I come back to the ultimately, if Mr. Johnston had come in with even a tad over CRH or Roadstone; forgive me, Roadstone he would have unquestionably been granted the lands in question.

Q. Just the last question of because in a way this is perhaps why we are here political interference in the process. Have you any comment to make on any suggestion that there was interference or I mean, the Minister, the former Minister spoke about it this morning, but in terms of any hint of any suggestion that Roadstone should get favourable treatment in this?

A. No, I can be quite clear on this, actually. I have worked closely with politicians perhaps over two decades, and I can recognise not just an explicit request, but I can recognise any indirect prompting that somehow the political process would like a particular result. I can say categorically that there was no question of any kind arising. In fact, it slightly puzzles me in the sense that we never put as a Department either a memorandum to Government or an aide-memoire to Government, so it never got to the Department of the Taoiseach from the Department of Energy. And I very much doubt if an awareness of this particular transaction was ever came to the Department of the Taoiseach at all, and not mind the then Taoiseach, for the simple reason is, the scale of it would have been

below the radar of the sort of things that would go to central Government. So either by way of a form of logic or by way of I can assure you, Mr. Regan, there was no question of any interference of any kind in this process.

Q. Thank you very much. I have no further questions.

CHAIRMAN: Anything in conclusion, Mr. Coughlan?

MR. COUGHLAN: No, sir.

CHAIRMAN: Thanks very much, Mr. Loughrey. I think I can safely say you won't be troubled during the limited remaining days of public sittings.

A. Thank you, Chairman.

CHAIRMAN: 11 o'clock.

THE TRIBUNAL ADJOURNED UNTIL THE 4TH MAY 2006.