

MORIARTY TRIBUNAL - DAY 351

THE TRIBUNAL RESUMED ON THE 11TH OF MARCH, 2008,

AS FOLLOWS:

MR. COUGHLAN: Mr. Collins has to make some application.

MR. COLLINS: I represent Barry Collins, I represent Peter Bacon, I am a solicitor. I am merely here keeping a watching brief. I don't intend to participate, as my client is, as we understand it, here to answer questions in relation to his report, but I would like to reserve the right, in the event that the cross-examination takes a certain course, to be allowed to, or my client, to seek formal legal representation.

CHAIRMAN: That seems entirely in order, Mr. Collins. We will proceed on that basis.

MR. COUGHLAN: May it please you, sir.

These sittings have been convened by the Tribunal for one reason and one reason only; namely, to make Mr. Peter Bacon, who is an economist and who rendered technical assistance to the Tribunal in the course of its private inquiries, available to be cross-examined on behalf of Mr. O'Brien. The Tribunal, having ruled on the 17th of July last that it did not intend to hear expert evidence from Mr. Bacon. Mr. O'Brien's entitlement to cross-examine Mr. Bacon in relation to information which he provided to the Tribunal in the course of the private investigative phase of its work arises from the judgement of the High Court in proceedings brought by Mr. O'Brien against the

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

Tribunal which were dismissed by both the High Court and the Supreme Court. The Tribunal has not altered its view regarding Mr. Bacon's evidence and, accordingly, the making of an Opening Statement outlining the evidence to be heard does not arise. However, in order to put the matter in context, it is necessary to review what has occurred in relation to Mr. Bacon.

Much of the relevant material has already been adverted to in rulings of the Tribunal and, in particular, to those of the 29th of September, 2005, and the 17th of July, 2007, and, at this juncture, will be summarised briefly.

By November 2002, the Tribunal's private investigative work into the second GSM licence was at an advanced stage. The private phase of its work enables the Tribunal to arrange and to configure material for presentation at the Tribunal's public sittings in a way which is best suited to achieving the end set out in the Tribunal's Terms of Reference. In the course of its investigations into the second GSM licence, the Tribunal had developed a number of lines of inquiry concerning aspects of the evaluation process. These were based on a common-sense approach to the evaluation process and on the contents of documentation provided by the Department, including the draft evaluation reports and the final evaluation report. They were informed by a very close scrutiny of the draft evaluation

reports and the final report and the computations upon which they were based. During this process, the Tribunal's grasp of technical matters, that is technical aspects of the Court Reporters Ltd.

#### IARTY TRIBUNAL - DAY 351

the evaluation process as opposed to the technical aspects of cell phone technology, was founded on assistance and guidance provided by the officials involved in the Project Group which had been established within the Department to conduct the evaluation and to make a recommendation to the Minister, and by Mr. Michael Andersen of Andersen Management International, the specialist consultants who had been appointed to assist the process, and from one of his colleagues.

The Tribunal was anxious to ensure the approach being adopted by the Tribunal was not based on a simplistic appreciation of the technical aspects of the evaluation.

It was for this reason that the services of Mr. Bacon were retained.

Mr. Bacon is an economist by training and, like Mr. Andersen, also has a background in government service.

Whilst Mr. Bacon had not conducted a competition of the second GSM type, that is a competition to identify a private enterprise competitor to a semi-state organisation in a particular communications arena, he had experience of competition processes, including a number in the telecoms and IT area.

the Tribunal's first contact with Mr. Bacon was at the very end of November 2002, which was shortly prior to the commencement of its public sittings to hear evidence into the second GSM process, which sitting commenced on the 3rd of December, 2002. By that time, the Tribunal's  
le Court Reporters Ltd.

#### IARTY TRIBUNAL - DAY 351

appreciation of the technicalities of the evaluation was quite highly developed. Mr. Bacon was not asked to conduct an audit of the second GSM process, nor was he requested to examine the evaluation with a view to concluding whether the correct result was reached by the evaluators. Rather, he was asked to examine aspects of the evaluation methodology and the way in which that methodology was applied.

Mr. Bacon provided the Tribunal with a report at the end of March 2003, by which time the Tribunal had already sat for 48 days to hear evidence. Whilst the Tribunal gave consideration at that point to the question of whether it would be necessary to introduce expert evidence from Mr. Bacon, a decision on the matter was deferred. Having concluded the bulk of the technical evidence in relation to the GSM process, the Tribunal revisited this matter and in mid-2004 requested Mr. Bacon to provide a second report for the purpose of consideration by the Tribunal of whether the contents of that report should be led as expert testimony.

I should add that, by that time, the Tribunal had largely

concluded its sittings in relation to the second GSM licence and that all that remained, subject to the possibility of Mr. Michael Andersen attending as a voluntary witness, was to hear some further limited evidence from two departmental witnesses and to hear the evidence of Mr. Michael Lowry.

The Tribunal, at that time, was principally engaged in the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

preparing to hear evidence relating to inquiries of the Tribunal pursuant to paragraphs (a) to (d) of its Terms of Reference, on which the Tribunal reported in December 2006.

Following receipt of Mr. Bacon's second report, the Tribunal, on the 16th of March, 2005, circulated all affected persons with a copy of the report and notified them that the Tribunal had not, as yet, conclusively determined whether to adduce the contents of the report in evidence, and invited their comments. Messrs. William Fry, Mr. O'Brien's solicitors, replied on the 12th of April, 2005, indicating that, in their view, the report did not constitute evidence and could not be admissible before the Tribunal and that, as such, they did not feel it appropriate that their client provide any comment.

In the context of a separate matter, namely submissions that the Tribunal had invited on the consequence of the Tribunal's inquiry of Mr. Michael Andersen's refusal to attend as a witness, Messrs. William Fry sought access to

all expert reports which had been received by the Tribunal.

On the 1st of September, 2005, the Tribunal furnished Messrs. William Fry and all other affected persons with a copy of Mr. Bacon's earlier report of March 2003. On the 27th of September, 2005, the Tribunal also provided Mr. O'Brien's solicitors and all other affected persons with copies of all documents relating to the Tribunal's dealing with Mr. Bacon. The Tribunal sat to hear oral submissions on the 13th of September, 2005, regarding the consequence of Mr. Andersen's refusal to attend as a le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

witness to the Tribunal. Submissions were heard on behalf of affected persons, and although the Tribunal had not invited submissions regarding Mr. Bacon, submissions were nonetheless addressed to and received by the Tribunal in relation to his involvement.

In the course of its ruling on the 29th of September, 2005, which was primarily directed to the matters of Mr. Andersen, the Tribunal took the opportunity to address the submission which had been made regarding Mr. Bacon. In October 2005, Mr. O'Brien issued proceedings against the Tribunal, which were dismissed by the High Court in December of 2005 and by the Supreme Court, on appeal by Mr. O'Brien, on the 30th of May, 2006. In those proceedings, Mr. O'Brien challenged the Tribunal's action, both in relation to its determination not to pursue the

evidence of Mr. Andersen through proceedings before the Danish courts and in relation to the assistance which had been provided to the Tribunal by Mr. Bacon. As regards Mr. Bacon's involvement with the Tribunal, Mr. O'Brien asserted as follows:

Firstly, that by retaining Mr. Bacon as an expert witness, the Tribunal acted unlawfully and ultra vires.

Secondly, that the failure to disclose Mr. Bacon's report and advice to Mr. O'Brien comprised a breach by the Tribunal of Mr. O'Brien's constitutionally-protected right to fair procedures.

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

Thirdly, that the doctrine of *nemo iudex in sua causa* precluded the Tribunal from hearing evidence from Mr. Bacon in that Mr. Bacon had been influenced by the instructions which he had received by the Tribunal and the advices which he had given to the Tribunal, and vice versa.

Mr. O'Brien's proceedings were dismissed on all three grounds by the High Court. He appealed to the Supreme Court, which dismissed his appeal and affirmed the judgement of the High Court. According to the reporter's note on page 506 of the reported judgement, which is to be found in the second volume of the Irish Reports for 2006, commencing at page 474, and I now quote:

"The Order of the High Court, Quirke J, was perfected on the 25th of January, 2006, and by notice of appeal dated

the 27th of January, 2006, the applicant appealed the decision to the Supreme Court. On the 30th of May, 2006, the Supreme Court, Denham, McGuinness, Geoghegan, Fennelly and McCracken judges, heard and dismissed the appeal by the applicant. Denham J, in an extemporary decision, stated, inter alia:

"Having considered the applicant's submissions and the respondent's written submissions, the decision of the High Court and the considered ruling of the respondent, the Court is of the view that there is no case to answer for the reasons given by the High Court, and is satisfied that the application should be dismissed and the judgement of the High Court affirmed."

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

It is clear from the judgement of the High Court, which was affirmed by the Supreme Court, that the court, firstly, rejected Mr. O'Brien's contention that by retaining Mr. Bacon as an expert witness, the Tribunal acted unlawfully or ultra vires. In that regard, the Court accepted that the assistance required from Mr. Bacon was discrete and technical in nature and could see no immediate reason why the Tribunal was not empowered, during its preliminary private investigations, to interview persons having particular technical competence or skills for the purpose of acquiring greater understanding of the technical matters relevant to the Tribunal's investigations.



Further, the Court could see no reason why the Tribunal should not be entitled to pay the reasonable expenses and professional fees associated with the provision of such professional information and advice. In addition, the Court could see no reason why the respondent should not be entitled to call such professional witnesses to testify at public sittings, provided that the advice and information was disclosed to affected persons. Furthermore, the Court noted that by retaining the service of an expert witness and making that expert witness available for cross-examination, the Tribunal had provided Mr. O'Brien with far greater and wider rights than would have been available to him had an assessor been appointed to assist the Tribunal.

Secondly, the Court rejected Mr. O'Brien's contention that the Court Reporters Ltd.

PARTY TRIBUNAL - DAY 351

the failure to disclose until the 1st of September, 2005, the fact that the Tribunal had retained the services of an expert advisor in November 2002 and received his first report in March 2003, comprised a breach by the Tribunal of the applicant's constitutionally-protected right to fair procedures. In that regard, the Court noted that no decision had been made by the Tribunal to hear Mr. Bacon's evidence in March 2003 and the Court also recognised that the Tribunal was a fact-finding inquiry. It had not reached final conclusions, and if it harboured suspicions,

it was not obliged to divulge to Mr. O'Brien the nature and extent of such suspicions.

The Court, whilst acknowledging that there was a duty of disclosure on the Tribunal, accepted that the Tribunal had disclosed to Mr. O'Brien all of the advice and material which it had received from Mr. Bacon.

Thirdly, the Court rejected Mr. O'Brien's contention that the doctrine of *nemo iudex in sua causa* precluded the Tribunal from hearing evidence from Mr. Bacon. In that regard, it had been asserted on behalf of Mr. O'Brien that Mr. Bacon had been influenced by the instructions which he had received from the Tribunal and the advice he had given to the Tribunal, and vice versa. In rejecting that contention, the Court saw no reason why it should conclude that the expert advice received from Mr. Bacon in private would affect the independence and impartiality which the Tribunal would bring to its findings and decisions which it would take arising out of the evidence adduced at public  
le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

hearings of the Tribunal. The Court acknowledged that the Tribunal will be confined to the evidence adduced at public sitting to support its findings and decisions. Noting that it was contended on behalf of Mr. O'Brien that the advice provided by Mr. Bacon to the Tribunal created a relationship between the Tribunal and Mr. Bacon sufficiently proximate to give rise to the perception of a

bias, the Court was satisfied that the inquisitorial nature of the Tribunal's inquiry gave rise to greater proximity between witness and decision-maker than would occur in court proceedings.

In the course of its judgement in the High Court,

Mr. Justice Quirke recognised that Mr. O'Brien, having been furnished with all reports and documentation submitted by Mr. Bacon to the Tribunal, would be entitled "to require that Mr. Bacon and/or his associates are called by the respondent so that they can be cross-examined in respect of the information which they had provided to the respondent."

At page 491 of the judgement, he further observed as follows:

"Provided that the advice and information is disclosed to the parties having an interest in the Tribunal's work, I can see no reason why the respondent should not be entitled to call such professional witness to testify at public sittings. Should the respondent opt not to call such an expert witness to give evidence at public sittings, it should, upon request, make the witness available in order to be subject to cross-examination."

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

Following the dismissal of Mr. O'Brien's proceedings by the Supreme Court, the Tribunal wrote to all affected persons, including Mr. O'Brien, and reiterated its request for the furnishing of written submissions regarding the attendance

of Mr. Bacon to give evidence as an expert witness.

Submissions were received on behalf of all affected persons, and those submissions were unanimous in their opposition to the proposal that Mr. Bacon be called to give expert testimony.

On behalf of Mr. O'Brien, it was submitted that the Tribunal should not waste any further time or money in seeking to introduce, through Mr. Bacon, evidence that merely sought to second-guess Mr. Michael Andersen, and further, that as Mr. Bacon had no actual involvement in the process, he could only testify as an expert and had neither the requisite qualifications nor independence to warrant him giving such evidence.

On behalf of Esat Digifone, now known as O2, it was submitted that whilst Mr. Bacon may have been of assistance to the Tribunal in relation to technical matters, that, on the recognised and established authorities, the evidence which it was proposed that he would give was not expert testimony. It was contended that the subject matter of his proposed evidence was not so technically complex that a person without instruction or experience in that area would not be able to form a sound judgement on the matter without the evidence of a witness such as Mr. Bacon possessing  
le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

specialist knowledge or experience. It was submitted that Mr. Bacon's report did not constitute expert evidence

because his views merely reflected the application of ordinary tests of rationality to the conduct of the process and the reason given by the participants in the process for their having acted in one way or another.

The Tribunal, having duly considered all of the submissions which it had received, accepted the submission made by Esat Digifone, now known as O2, and concluded that it would not call Mr. Bacon to give expert testimony. This was not because the Tribunal had any doubts surrounding Mr. Bacon's qualifications as an expert in the field to which his report was addressed, but because the Tribunal accepted the Esat Digifone submission that the area in question, which related primarily to the methodology adopted in evaluating the application in the course of the competitive process, although complex, is not impenetrable.

The Tribunal was satisfied that the area is not so complex that it could not be understood by an ordinary intelligent lay person not possessed of specialist skills applying their own common sense, and that, in those circumstances, it was appropriate to accede to the reasoning advanced by Esat Digifone. The Tribunal so ruled on the 17th of July, 2007.

On the 25th of July, Messrs. William Fry wrote to the Tribunal in relation to Mr. Bacon. A series of matters were raised in that letter, many of which pertained to the Court Reporters Ltd.

issues which had already been authoritatively determined in the litigation. In that letter, Mr. O'Brien's solicitor also asked the Tribunal to inquire from Mr. Bacon whether he had any notes of his first meeting with members of the Tribunal's legal team on the 28th of November, 2002.

Whilst the Tribunal was unclear as to how such note might impact on Mr. O'Brien's determination as to whether he would or would not exercise his right to cross-examine Mr. Bacon on the information which he had provided to the Tribunal, it was, nonetheless, anxious to assist Mr. O'Brien insofar as it could. By letter dated 30th July, 2007, the Tribunal responded to Mr. O'Brien's solicitors and confirmed that it would make inquiries of Mr. Bacon. By further letter of the 17th August, 2007, Messrs. William Fry expanded their request to encompass copies of all documentation in Mr. Bacon's possession regarding his interaction with the Tribunal.

The Tribunal had, meanwhile, taken the matter up with Mr. Bacon, and, having ascertained the position, the Tribunal, by letter dated 1st October, 2007, confirmed to Messrs. William Fry that Mr. Bacon had informed the Tribunal that he did not have any documents they had requested. Thereafter, the Tribunal heard nothing from Messrs. William Fry in relation to Mr. Bacon for some four months, save that the Tribunal received a courtesy copy of a letter dated 26th October, 2007, sent by Messrs. William Fry directly to Mr. Bacon in which they requested him to

provide them with a narrative statement in order to assist their client in determining whether he would or would not call the Court Reporters Ltd.

JUDICIAL TRIBUNAL - DAY 351

exercise his right of cross-examination.

On the 1st of February last, some six-and-a-half months after the Tribunal's ruling that it did not intend to call Mr. Bacon to give expert testimony, Messrs. William Fry notified the Tribunal that Mr. O'Brien wished to have Mr. Bacon made available for cross-examination as contemplated in the judgement of the High Court. In that letter, Messrs. William Fry stated that Mr. O'Brien had no desire to unduly protract the Tribunal's proceedings and they trusted that the necessary arrangements would be made speedily. The Tribunal used its best endeavours to expedite Mr. Bacon's attendance and arrange the sittings for the first available date.

Mr. Bacon is accordingly being made available for the sole purpose of cross-examination by Mr. O'Brien in relation to the information which he made available to the Tribunal.

As the inquiry is that of the Tribunal, Mr. Bacon is, in common with all other witnesses, attending public sittings as the Tribunal's witness. His status is, however, distinguishable, and this distinction arises from the Tribunal's ruling, from which it has not resiled, that it would not call Mr. Bacon to give expert testimony, a course urged by all affected persons, including Mr. O'Brien.

Unlike all other witnesses who have been called to give evidence, Mr. Bacon will not be examined initially by counsel for the Tribunal. Rather, in accordance with the judgement of the High Court, he will be made available in the first instance for cross-examination by counsel on the Court Reporters Ltd.

PARTY TRIBUNAL - DAY 351

behalf of Mr. O'Brien and for counsel on behalf of other affected persons on the self same footing. If anything arises from its cross-examination, it may be necessary to afford an opportunity to other persons to examine him.

And in those circumstances, sir, I would ask Mr. Peter Bacon to come to the witness box.

MR. McGONIGAL: Before Mr. Bacon goes to the witness box, if I could just indicate the position of Mr. O'Brien in relation to this matter.

There are, Mr. Chairman, a number of matters that need to be immediately and urgently addressed before Mr. Bacon gives evidence.

On Friday evening last, Mr. O'Brien's solicitors were furnished with what we believe to be two crucial documents relating to the Tribunal's dealings with Mr. Bacon. These documents, which I will open at a later stage, were being provided to Mr. O'Brien for the very first time. The information contained in these documents is alarming, to put it mildly. The disclosure of this information and the manner in which it has been disclosed suggests deliberate



concealment of that document from the parties for almost four years by this Tribunal, and, in our view, calls into question both the integrity and the credibility of this Tribunal and the manner in which it has dealt with the GSM process.

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

To be absolutely precise as to how Mr. Bacon comes to be here today, Mr. Coughlan has skated over, in as quick a way as is possible, important correspondence which reflects the attempts made by Mr. O'Brien to try and get answers to questions that he has been asking for a very long time. In his letter on the 26th of October of 2007 to Mr. Bacon, Mr. O'Brien's solicitors wrote that,

"We are writing to you in the context of your own dealings with the Tribunal and specifically in relation to an entitlement granted to our client by Mr. Justice Quirke of the High Court in a decision delivered by him in respect of Judicial Review proceedings taken by our client against the Tribunal. Mr. Justice Quirke ruled that our client has a legal entitlement to call you, if he so requires, to give evidence at public sittings regarding your interaction with the Tribunal.

"Our client is presently deciding whether or not he will exercise that right. However, this decision is being hampered by the lack of material documenting your interaction with the Tribunal, particularly insofar as it

relates to the genesis of your involvement with the Tribunal. There have been several exchanges between ourselves and the Tribunal in which we sought copies of all documents relevant to your interaction with the Tribunal. In summary, the Tribunal have confirmed that they have no further documentation in their possession over and above the limited materials already provided to us. This is a matter of some concern to our client, particularly as it is the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

It is clear that the Tribunal has not retained any documentary evidence regarding its initial contacts with you. This critical stage of introduction and instruction appears either to have been undocumented or those documents have been lost or destroyed. For instance, we understand that you met with counsel for the Tribunal, Jerry Healy, SC, on the 28th of November, 2002, a short number of days before the commencement of the delivery of the Tribunal's Opening Statement into the GSM2 licence module.

"It strikes our client as unusual, particularly in light of the Tribunal's generally fastidious approach to note-taking, that no notes of this important meeting were retained by the Tribunal. It is also unclear whether such notes existed and were subsequently destroyed or whether they ever existed at all.

"Pursuant to our receiving this confirmation from the Tribunal regarding the complete absence of such further

material within its possession, we requested that the Tribunal contact you to inquire whether you had any documentation in your possession personally, or in the context of Peter Bacon & Associates generally, relating to your interaction with the Tribunal. The Tribunal has informed us that it did so contact you, but that you have informed them that you have none of this type of documentation requested by us in your possession presently. It is unclear, however, whether you took any notes of your meetings with the Tribunal or whether they were made but subsequently destroyed by you.

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

"In light of those unusual circumstances, in order to enable our client to make a fully-informed decision whether or not to call you for examination in public in accordance with his legal rights, we hereby request that you prepare a detailed narrative of your interaction with the Tribunal.

Doubtless, the Tribunal will provide whatever documents that they have retained to assist you in the preparation of this narrative. We would ask that you deal with the following issues in the course of this narrative. These are merely points of importance deserving of emphasis and not intended to be exhaustive or exclusive.

"1. Please provide full details of how you came to be engaged by the Tribunal.

This response should include details of the identity of the

individuals that initially approached you, the date of same, what was explained to you as being the purpose of the proposed engagement, etc.

"2. Please provide full details of your initial meetings with the Tribunal. This response shall include the date and location of same, the identities of those persons present, the instructions that were given to you during the course of this meeting, the materials that were furnished to you during or subsequent to this meeting, the information imparted to you verbally during the meeting, etc.

"Of particular importance to our client is the question of the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

regarding the direction given to you by the Tribunal in terms of how you would prepare your report. You should include any comments that were made to you by the Tribunal in respect of the course of its private inquiries, any tentative conclusions that they had reached in respect of same, previous work done on behalf of interaction with losing consortia involved in the competition leading to the awarding of the second mobile phone licence.

"We do appreciate that the preparation of such a narrative is perhaps an imposition on you. However, it is wholly necessitated by virtue of the fact that no notes of these critical meetings were retained either by you or by the Tribunal. It is quite unfortunate that you seem to have

retained absolutely no documents in respect of your interaction with the Tribunal, notwithstanding the fact that you were clearly being prepared to give evidence publicly and that your role became the subject of some considerable public controversy at the time of the institution of proceedings by our client and indeed subsequently.

"It is the bizarre absence of such documentary material, both on your part and on the part of the Tribunal, that has required our client to instruct us to write to you in these terms such as to allow him avail of his legal rights as articulated by Mr. Justice Quirke.

"We have copied this letter to the Tribunal and will assume that any expense or outlay incurred by you in the le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

preparation of this detailed narrative will be met by the Tribunal as per your arrangements with them. Please note that this request includes any other persons or associates, including Mr. Hannigan, who were involved in this matter under the banner of Peter Bacon & Associates.

"Our client has no desire to delay the conclusion of the Tribunal. However, this is a matter that must be disposed of in advance of any findings, draft or otherwise, being made by the Tribunal. As such, we await hearing from you as a matter of some urgency."

That letter was sent to Mr. Bacon, and was copied to

Mr. Stuart Brady of the Moriarty Tribunal, and no response was received to that letter and no comment was received from the Tribunal in relation to it. It was followed up on the 7th of November, 2007, with another letter to Mr. Bacon.

"We refer to our letter of the 26th of October, 2007, to which we have not yet received a response. You will appreciate that this is a matter of importance for our client. Therefore, we should be grateful to hear from you as a matter of urgency."

This letter was also copied to Mr. Brady of the Moriarty Tribunal, and again, no response was received from either Mr. Bacon or from the Tribunal.

On the 26th of November, 2007, we wrote again:  
le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

"We refer to our letters of the 26th October and 7th November to which we have not yet received a response. As you may be aware, the Tribunal intend to issue their final report before Christmas. Therefore, we will be grateful to hear from you as a matter of urgency to enable us to consider your response before the final report issues."

Again, a copy of that was sent to Mr. Brady of the Moriarty Tribunal, and again, no reply was received from either Mr. Bacon or Mr. Brady.

On the 13th of December, 2007, we wrote again to Mr. Bacon.

"We refer to our letters of the 26th October, the 7th

November and the 26th of November and are surprised that we have not yet received a response from you, despite numerous reminders.

"As you are aware, the Tribunal is anxious to conclude its inquiries and deliver its findings as expeditiously as possible. Accordingly, we would be grateful for a response to the issues raised in our letter of the 26th October as a matter of urgency to enable our client to consider your response before the final report issues. We await hearing from you."

Again, that letter was copied to Mr. Brady of the Moriarty Tribunal. Again, no response was received from either Mr. Bacon or Mr. Brady.

Again, on the 20th of December, 2007, we wrote to the Court Reporters Ltd.

MORIARTY TRIBUNAL - DAY 351

Mr. Bacon:

"We refer to our various previous letters, all of which remain unanswered. We are surprised not to have had the courtesy of a response and should be grateful to hear from you early in the new year."

Again, that was copied to Mr. Brady, and again, no response was received.

Ultimately, on the 1st of February, 2008, we wrote to Mr. Brady.

"We refer to previous correspondence on the issue of Peter Bacon being called/not being called as a witness, in

particular to our exchange of correspondence in late July of this year and to more recent correspondence from this office directly to Mr. Bacon which has been copied to the Tribunal.

"Having regard to our client's longstanding concerns regarding Mr. Bacon and his interaction with the Tribunal and in the absence of any response from Mr. Bacon to any of our correspondence, our client has instructed us that he wishes to avail of his right to have Mr. Bacon called by the Tribunal, which right was expressly adverted to by Mr. Justice Quirke in the High Court in Judicial Review proceedings and which is also adverted to by the Tribunal in its ruling of the 29th of September.

"As our client has no desire to unduly protract the le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

Tribunal's proceedings, we trust that the necessary arrangements can be made speedily and we await hearing further from you."

It's clear from that correspondence and that particular letter, the course that Mr. O'Brien had no alternative but to take, by reason of the deafening silence from Mr. Bacon, supported by the equally deafening silence from the Tribunal.

On the 6th of February, 2007, the Tribunal wrote to 2008, that should be 2008:

"I refer to recent correspondence regarding your request



that Mr. Bacon be made available for cross-examination.

"It is extremely regrettable that you should have taken so long to make this request, having regard to the fact that Mr. Bacon's position seems to have been made clear to your client as far back as the start of October 2007. You were, at that time, made aware of Mr. Bacon's position, namely that he had no documents, and you might have indicated at that stage, regardless of the position, as to the documents you would have received as you now require his attendance. The Tribunal will endeavour..."

It seems quite extraordinary in that letter that there is no reference at all to the previous correspondence that I have just alluded to and sets out precisely what it was that Mr. O'Brien was trying to get from Mr. Bacon to enable him to continue and deal with the inquiries and the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

investigations which he was carrying out at the time prior to a final report being issued, which had been anticipated in December of 2007.

Mr. O'Brien, through his solicitors, replied on the 11th of February, 2008, indicating that,

"We refer to your letter of the 6th and note that Mr. Bacon will be made available for cross-examination. We take issue, however, with the comment in your letter that it is extremely regrettable that it should have taken so long to make this request, having regard to the fact that

Mr. Bacon's position seems having been made clear to your client as far back as the start of October 2007.

"The Tribunal is aware that we wrote to Mr. Bacon on the 26th last, a copy of which we sent to the Tribunal. We had previously been informed by the Tribunal that Mr. Bacon had no documentation in his possession, which was of some concern to our client. Therefore, in order to enable our client to make an informed decision on whether or not to call Mr. Bacon for cross-examination, we requested Mr. Bacon to prepare a detailed narrative of his dealings with the Tribunal. Numerous reminders were sent to Mr. Bacon and the Tribunal. However, despite this, we have never received a response or assistance from either Mr. Bacon or the Tribunal, and, for this reason, our client had no option but to request that Mr. Bacon be called for examination.

"We should point out that our client would not have had a le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

need to cross-examine Mr. Bacon had he been informed from day one that the Tribunal had employed the assistance of Mr. Bacon to report on the evaluation process. The fact that his involvement was concealed from our client and ourselves for so long is a cause of serious concern to our client. We understand that Mr. Bacon was initially retained by the Tribunal in November 2002 at a meeting between your counsel, Mr. Healy, and Mr. Bacon. We have

been informed by the Tribunal that there are no notes of this meeting, which seems extremely unusual in the circumstances.

"Further to this meeting, we understand that Mr. Bacon was requested to prepare a report in the evaluation process.

However, at no stage during the course of the GSM inquiry did the Tribunal identify that it was relying upon and availing of the assistance of Mr. Bacon. In fact, Mr. Bacon's report of March 2003 was relied upon by the Tribunal during the course of its cross-examination of witnesses giving evidence in the GSM module. The first occasion upon which we became aware of Mr. Bacon's involvement was in March 2005, when we were furnished with a report from Mr. Bacon dated January 2005. At that stage, we had no knowledge of any prior involvement of Mr. Bacon in the GSM module and had no knowledge of his early report, which had only been made available in September 2005, together with documentation which we received from the Tribunal. It subsequently became apparent that the reason a second report was furnished to us was because the Tribunal wished to introduce Mr. Bacon as an expert witness  
le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

and it was proposed to call Mr. Bacon to give evidence in September 2005, but they subsequently decided not to call him.

"Our client has a number of causes of concern with regard

to the Tribunal's dealings with Mr. Bacon and the fact that they concealed this from us for so long. Our client is also concerned about the lack of documentation and notes of meetings between Mr. Bacon and the Tribunal. In the absence of any documentation, our client has sought a detailed narrative from Mr. Bacon, but due to the lack of assistance received, he feels he has no option but to cross-examine Mr. Bacon.

"The Tribunal was kept fully abreast of all correspondence between ourselves and Mr. Bacon and has been aware from the beginning that our client was considering his position as to whether or not he would call Mr. Bacon for cross-examination. As the Tribunal has now agreed to call Mr. Bacon, in law he becomes the Tribunal witness and must be processed as such. We would, therefore, request that the Tribunal furnish us with all statements, documents, reports and/or notes or memoranda in their possession concerning Mr. Bacon from the time of his first involvement with the Tribunal, or any member of its legal team, to the present time, including, but without prejudice,

- (a) his statement of evidence;
- (b) any documents, reports or material furnished to him prior to him concluding his reports;
- (c) copies of all drafts or final reports;

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

- (d) copies of all communications notes and/or memoranda

between Mr. Bacon and the Tribunal or its legal team or any member of the Department of Transport, Energy and Communications.

Yours faithfully."

Very little of that has been served. We have not received a statement of evidence. We have been told to rely on material which was served in September 2005 and has not been updated. We have been furnished with the draft and final reports only and we have not been furnished with communications between Mr. Bacon and the Tribunal and its legal team.

On the 22nd of February, 2008, the Tribunal wrote to Mr. O'Sullivan:

"I refer to recent correspondence regarding the attendance of Mr. Peter Bacon for the purposes of cross-examination by our client as contemplated by Quirke J in the course of his judgement in O'Brien v. Moriarty. The Tribunal has arranged for Mr. Bacon to attend public sittings of the Tribunal to commence at 11am on Tuesday the 11th of March. The Tribunal has already furnished all documentation in its possession relating to requests made by the Tribunal for information and the provision of information by Mr. Bacon. It is anticipated that a subset of these documents will be circulated in advance of the 11th of March for the purposes of the Tribunal sittings."

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

On the 22nd of February, 2008, we wrote to at least the Tribunal wrote to us.

"I refer to recent correspondence regarding the attendance of Peter Bacon for the purposes" sorry, that's the letter I have just opened.

The next letter in sequence is a letter from us to the Tribunal on the 22nd of February, 2008, where we said that, "We refer to your fax of today's date and note that it has been arranged for Mr. Bacon to attend public sittings. We will confirm with our client and legal team that this date is suitable and revert to you on Monday."

On the 25th, we wrote and "Refer to correspondence regarding the proposed sitting date for Mr. Peter Bacon's evidence. Unfortunately, both Eoin McGonigal and Jim O'Callaghan have foreign and travel commitments around that time, Mr. McGonigal due to return from a professional trip abroad on Tuesday and with preexisting commitments that week. Mr. O'Callaghan is due to go to Australia until March 22nd. In the circumstances, we request that the Tribunal might refix the matter for sometime in early April and await hearing from you."

On the 27th of February, the Tribunal wrote:

"The Tribunal has noted that while its proposal to move the scheduled attendance of Mr. Bacon for the purpose of cross-examination by your client from Tuesday to Wednesday  
le Court Reporters Ltd.

the 12th in response to your notification that Mr. McGonigal will not be returning until Tuesday, would create more difficulties than it might resolve. The Tribunal is unclear as to what those particular difficulties might be. We requested that as Mr. Bacon is unavailable on the 8th, that a date after that might be convenient for both Tribunal and Mr. Bacon would be preferable for many parties. The Tribunal of course recognises there have been no public sittings for some months. This is no other reason than that subject to being necessary for the Tribunal to hear further evidence which has not, to date, arisen.

"The Tribunal has not foreseen that any further public sittings will be held and it's been focused on finalising outstanding aspects of his work with a view to publishing Part 2 of its report.

"The Tribunal believes that it is unfortunate that your client and certain of his counsel have made other arrangements and have other commitments for the 11th and 12th. However, the Tribunal cannot, however, accept that notice of two-and-a-half weeks of the attendance of a single witness is anything short of reasonable and is entirely consistent with the duration of notice of public sittings which was heretofore being given by the Tribunal."

That was responded to on the 27th:

"I refer to your letter of the 27th in offering to move the le Court Reporters Ltd.

## IARTY TRIBUNAL - DAY 351

Bacon sitting from the 11th to the 12th. While the possibility of a move from the start date is appreciated, a start of the 12th would, in fact, create more difficulties than it might resolve. While I accept that it is our client's request that has given rise to the sitting, the Tribunal will appreciate there have been no sittings for a long time and other commitments have been made by our client who wishes to attend the sittings, and by various members of our client's legal team. Two-and-a-half weeks is a very tight time frame with which to try and arrange some long prearranged commitments. Noting that the 8th of April creates difficulties, if a date after the 8th of April suitable to the Tribunal and Mr. Bacon could be agreed, that would be preferable."

On the 29th, we wrote that the Tribunal has not sat in public since June 2007 and no one was sorry, "We refer to your letter of the 27th regarding the sitting, and while we note what you say, we believe that the notice given by the Tribunal is unreasonable.

"The Tribunal has not sat in public since June 2007. No one was given any warning other than the two-and-a-half weeks to sit in the week of the current legal term. As you are already aware, members of the legal team have made various personal and professional arrangements well before the Tribunal decided to sit and our client also has longstanding commitments which can not be broken at this



time. It is unfortunate, given the overall time frame of the Tribunal and the number of interested parties to the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

affected, that there could not have been some consultation to the proposed dates in advance, and we await a response."

On the 7th of March, 2008, the Tribunal initially wrote to us, saying that

"We refer to previous correspondence and acknowledge receipt of Tribunal" sorry, Mr. William Fry wrote to Mr. Brady on the 7th:

"We refer to previous correspondence and acknowledge receipt of Tribunal Book Number 85 surprisingly containing just the Peter Bacon & Associates draft reports of March 2003 and the report of January 2005.

"As it will be necessary for us to put considerably more documentation to the witness, we now have to prepare books of documents to be made available to all interested parties, including Peter Bacon. These are contained in five leverarch folders. We are in the process of trying to condense that material at present. That exercise and the subsequent copying is going to take considerable time and it is clear at this stage that they will not be available for circulation in advance of Tuesday next. Confusion and inconvenience of this sort was utterly avoidable and it is regrettable that some level of consultation was not engaged in by the Tribunal in advance.

"As it would be far preferable for an orderly running of the sittings that everyone, in particular Peter Bacon, le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

would have a chance to digest the relevant materials in advance, the only sensible course at this stage that we suggest is to engage the Tribunal to agree a timetable for the production and circulation of the books which, in the circumstances, will necessitate a postponement of the sittings."

On the 7th, the Tribunal wrote to us two letters, the first of which was:

"I refer to the above and, in particular, to your letter of today's date received by fax at 11.29 this morning in relation to the public sitting books circulated by the Tribunal yesterday afternoon. The documentation to which your client may wish to refer in the course of Mr. Bacon's cross-examination is a matter in which the Tribunal will hear submissions on Tuesday next. You need not, however, have any concern regarding the preparation of books as all of the documentation relating to Mr. Bacon has already been collated by the Tribunal and circulated to all affected persons, including your client, in September 2005. You have, no doubt, retained those files, as has the Tribunal. The Tribunal will now advise other affected parties that they may wish to consider having those documents with them on Tuesday next.

"I am instructed to inform you that the Tribunal is surprised that you should raise the matter of documentation at this late stage, you being aware of scheduling of Mr. Bacon's attendance since the 22nd of February, could le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

easily have consulted with the Tribunal for the purposes of agreeing the format of documentation over the last two weeks. In particular, it might have been helpful had the matter been adverted to in your letter of the 29th of February, this day last week, in which you indicated that you await receipt of the Tribunal's books for the sitting of the 11th of March."

That was the first letter which was received on the 11th March 7th of March, 2008. And if I could just stop there for a second. Part of my reason for outlining the full correspondence in relation to the manner in which the Tribunal has forced the sitting today, without any consultation with the legal teams involved, is because I think that it is appropriate that it is understood by everyone that, unusually in a tribunal, it was Mr. O'Brien who called for Mr. Bacon to be called to come and give evidence in circumstances where no cooperation of any kind had been offered either by Mr. Bacon or the Tribunal in relation to dealing with queries and proper queries which were made by Mr. O'Brien in relation to his trying to understand the relationship that had existed between

Mr. Bacon and the Tribunal from early 2002 right up to the present time. He had, through correspondence on many occasions, and verbally, been trying to find out from notes, from memoranda, from statements, what this relationship had been, how it had come about, because he was deeply concerned at the way in which Mr. Bacon appeared to have been engaged by the Tribunal. There appeared to him to be an attempt by the Tribunal to create a situation like Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

within itself whereby the GSM process was going to be criticised by the Tribunal in its final report; that there was going to be a damaging report made about Mr. O'Brien. And what concerned him was, if this was to happen, he was being given no opportunity whatsoever to try and be made to understand to enable him to reply and show how it was completely untrue and false.

He has maintained throughout this Tribunal, and it has always been his position, that he properly won the competition, that the licence was properly issued to him, and that if all the documentation which had been collected by the Tribunal was presented fairly and squarely, that would become obvious to every single person who followed this Tribunal and is still following it.

So it was with absolute amazement that Mr. O'Brien received or became aware of a second letter of the 7th of March of 2008 from the Tribunal:

"I refer to recent correspondence regarding Peter Bacon.

In this regard, I am instructed to write to you and to do so in the following terms:

"In the course of a recent review of all correspondence in this matter, the Tribunal noted from the chronology comprised in your letter of the 25th of June, 2007, a reference to meetings between the Tribunal legal team and Mr. Bacon on the 8th and 22nd, respectively, of November 2004. Whilst there is no doubt that the Tribunal legal le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

team met with Mr. Bacon on the 8th of November, 2004, the Tribunal was puzzled by your reference to a meeting of the 22nd, and, accordingly, the Tribunal instituted yet a further search of its files and documentation. This search did not disclose any record of any meeting on the 22nd of November, 2004, but did bring to light a record of a meeting of the 18th November, together, also, with a handwritten attendance of Mr. Michael Heneghan, former Solicitor to the Tribunal, of the meeting of the 8th of November. I am enclosing copies of these documents for your assistance, together with transcription of Mr. Heneghan's manuscript attendance of the meeting of the 8th November and the record of the meeting of the 18th November.

The attendance note confirmed that, as appears from that note of the 1st of November, 2004, the meeting of the 8th

of November was the one that was arranged at Mr. Bacon's request itself. The purpose of the meeting, as also appears from the note of the 1st of November, 2004 and the attendance note of the 8th November, was to assist Mr. Bacon with clarification of the Tribunal's letter of the 30th August of 2004. The consequence of the meeting was that Mr. Bacon wrote to the Tribunal on the 22nd November, 2004 confirming his understanding of the clarification and on foot of which he requested his report of January 2005.

"The note of the 18th of November appears merely to record the occurrence of a meeting on that date and the production of the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

by Mr. Bacon of a draft of the letter ultimately sent on the 22nd of November, 2004, setting out his understanding of what he believed his report should address.

"These documents came to light yesterday afternoon in the course of the Tribunal's examination of the personal notebooks of its former solicitor, Mr. Michael Heneghan.

The Tribunal's examination of the matter discloses that, although the pages of the notebook were identified as relevant, they were overlooked by the photocopying process.

This has been confirmed by Mr. Stephen McCullough, BL, who was responsible for overseeing the compilation and photocopy of documentation for all disclosure purposes.

The Tribunal apologises for the fact that these pages of

Mr. Heneghan's notebook were not brought to your attention before now."

CHAIRMAN: Let's cut to the chase momentarily,

Mr. McGonigal. You are putting in issue the integrity of your young barrister colleague?

MR. McGONIGAL: On the contrary. I don't accept for one moment that Mr. McCullough should be held responsible for this. The people who should be held responsible for this are the people who are running this Tribunal. That's cutting to the chase. Mr. McCullough is not in charge of this Tribunal. Mr. McCullough is not running this Tribunal. It is quite improper for you, sir, to suggest that I am trying to blame him. It is you who are trying to use him as an excuse for something that should not have le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

happened. Mr. O'Brien has peppered this Tribunal for requests of documentation, has peppered Mr. Bacon for a statement/narrative/outlining. An affidavit was sworn by Mr. Michael Heneghan, in paragraph 75 of which he says, inter alia, "Neither the respondent nor any member of the Tribunal legal team influenced, prepared or finalised any part of any of Mr. Bacon's reports."

In paragraph 7 of a letter of the 27th of September, 2005, the solicitor's attendance note of the 1st of November, 2004, records an appointment to meet with Peter Bacon & Associates on the 8th of November, 2004. There is no

attendance of that meeting.

"Members of the Tribunal legal team who attended the meeting have confirmed that Peter Bacon & Associates indicated the approach they intended to adopt to the Tribunal request of 30th August, 2004, and it was agreed that the proposals would be confirmed in writing, and the written proposals were duly received by letter dated 22nd November, 2004."

Members of the legal team attended those meetings, and indeed, it is obvious that they attended those meetings and it is difficult to understand how they could, in such a short period of time, have forgotten that Mr. Michael Heneghan was there taking notes. That is cutting to the chase, Mr. Chairman. I hesitate to suggest that if one reviews the transcripts of cross-examination in this Tribunal by your lead counsels, the number of times that the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

they have queried people about forgetting things for much longer periods of time than a year. One also cannot help but ask, had it not been for Mr. O'Brien requesting Mr. Bacon being called, as to whether these documents would ever have seen the light of day. The answer has to be a resounding no.

It also has to be borne in mind that what Mr. Justice Quirke said in his judgement, at page 495: "In the instant case, the respondent has now disclosed to the applicant all



of the advice and material which it has received from Mr. Bacon. Documents recording virtually every contact made between Mr. Bacon and the respondent have now been furnished to the parties interested in the Tribunal. The Tribunal is still conducting its inquiries. No findings have been made. The applicant may challenge evidence in whatever manner he deems appropriate. He can do so with the benefit of full disclosure."

We did not have full disclosure when Mr. Justice Quirke wrote that judgement. These documents, quite plainly, are relevant to every single issue that Mr. O'Brien has raised in relation to the relationship that existed between Mr. Bacon and the Tribunal. It is for that purpose that he has been trying to understand what was going on. And if we turn to the printed note of the 8th November, and perhaps it could be put on the screen, please.

Now, the first page, which is the meeting of the 8th of November, is:

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

"Peter Bacon with legal team

JH, JOB and SMcC

"difficulties

"Topics:

Para 4 evaluation process.

8 the decision to abandon.

9 + 12.

10, 11, validity of certain comment of M. Andersen.

13 Financial.

PB

Our belief we have dealt with everything."

He may be referring to the 2003 report.

Para 9

No difficulty with para 4.

The other issues requires us to make judgement.

we didn't have empirical evidence.

Para B in substance, asking us to go into Brennan and

Towey's evidence.

JH

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

A process quantitative and qualitative done a different

way, mainly qualitative.

PB

They caused it to wither.

PB

A choice interpretation or conspiracy.

How would we draw up judgement."

What does that mean, I ask myself.

"Paragraph 8 abandon... requires a judgement.

"PB

Were they justified I don't think there is an answer.

PB

Can't say as subjective. Was not an imperative

But decision made to abandon.

PB

Was there an alternative to wither 'the black box'?

PB

9 + 12 The validity was a qualitative process...

Valued asking us to make a judgement.

Asking us to consider a DIRECT CRITICISM of the process.

Asking us to criticise.

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

"Maybe" could be the answer.

JH

As a general principle, do people design in weighting after scoring...

PB

I am not aware...

JH

Example are we right as non professional ... thinking

it was unusual or unstatable...

PB

Paragraph 11 ... on valuation

JH

How could he weigh a qual ... he never weighted

Sub criteria sub weightings...

PB

He attempts to incorporate the other...

Try to reconstruct a qual formula to replace...

JH

Are you aware that a qual could be evaluated in tables ex  
post facto rationalisation

PB

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

Going back...

Some

Reasonably good practice

can he reply to our letter..."

Now, I have absolutely no doubt that both Mr. Bacon and  
Mr. Healy can give a full explanation as to what those  
writings mean. It seems to me quite unreasonable and  
unrealistic to expect any person to cross-examine a person  
about a document that is, in itself, difficult to  
understand but raises issues and words which one would not  
expect to find of an expert in a discussion with legal  
people, such as "conspiracy," such as "direct criticism of  
the process". Part of the reason for that is because if  
one relates it back to an earlier meeting which Mr. Bacon  
had with the Tribunal legal team on either the 31st or the  
1st of February, depending on which date is correct, where  
he said, inter alia, "Aware his report could be used in a  
subsequent action."

When one begins to put all of these things together, one  
begins to see a potential attempt by the Tribunal to pursue  
an action against the correctness of the carrying out of

the competition by the GSM officials. And it is because of those concerns that Mr. O'Brien not only wanted to get all of the documentation, not only wanted to get a full statement in relation to these matters from the persons who were best in a position to give them before the necessity to cross-examine, and because he also wanted to be present at the time of this cross-examination, that the letters  
le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

which he wrote, prior to you, sir, sitting today without any consultation of any of the parties here, setting out what he wanted to enable the process to be properly dealt with and complied with, and they are set out in that letter.

It is of concern, when one reads that document, that you actually see that neither the respondent nor any member of the Tribunal legal team influenced, prepared or finalised any part of any of Mr. Bacon's reports. "Influenced" is a word that has many meanings or connotations, but there certainly seems to have been a conversation between Mr. Healy and Mr. Bacon, one interpretation of which is that they were trying to influence a person who was to do a final report in relation to the way in which that report might finish up or be drafted.

Now, I have already drawn your attention to the fact that Mr. Justice Quirke, at page 495 of his judgement, indicated that we, at that stage, had full disclosure, and I have

indicated that we had not.

Mr. O'Brien's view in relation to these notes which I have now opened to you indicate that he believes clearly and emphatically demonstrate the nature of the Tribunal's dealings with Mr. Bacon. On their face, they appear to confirm that the Tribunal may have directed Mr. Bacon to prepare a report that would completely undermine the external expert consultants. This is despite what appears to be reservations and concerns expressed by Mr. Bacon  
le Court Reporters Ltd.

#### IARTY TRIBUNAL - DAY 351

within those notes regarding many aspects of what he had been asked to do by the Tribunal. What is clear is that the Tribunal appear to have a deliberate agenda to damn the competition process and those persons involved. We say that there is no other conclusion can fairly be drawn from those notes, particularly when viewed in the overall context of Mr. Bacon's dealings with the Tribunal and, ultimately, the expert conclusions that he furnished at the Tribunal's behest.

The numerous assurances provided by the Tribunal to Mr. O'Brien and to the courts that every relevant document had been provided, ring completely hollow, in our respectful submission. The single most relevant and significant document was not provided, despite the extremely detailed and incredibly extensive exchanges of correspondence regarding disclosure of relevant

information.

Mr. Chairman, the Tribunal fought a set of Judicial Review proceedings before the High Court and the Supreme Court relating to Mr. Bacon. The very matters addressed in those notes were in sharp focus before those courts over a number of days. This document was not available to Mr. O'Brien's legal team during the High Court and the Supreme Court and they are presently reviewing those proceedings with a view to determining what, if any, steps should be taken, or may be taken, having regard to this new disclosure and the effect it might have on those proceedings.

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

We say, in the strongest possible terms, that this Tribunal has breached its disclosure obligations to Mr. O'Brien and also to the Superior Courts. We believe that this is wrong and we believe that it should not have withheld what, in a sense, may have been a most significant and important document in those proceedings.

What this document does is possibly help us in trying to understand why the Tribunal appear to do a complete U-turn in relation to calling Mr. Bacon. No matter what way one reads the correspondence, it is absolutely clear that it was the intention of this Tribunal to call Mr. Bacon. It is equally absolutely clear from the correspondence at a later stage that they changed their mind. What was not at any stage clear in relation to Mr. O'Brien was why this was

happening. We couldn't make up our minds as to whether the Tribunal was trying to protect Mr. Bacon, or whether the Tribunal was trying to protect itself from Mr. Bacon being allowed to answer queries in relation to the relationship which existed between the Tribunal and its legal team. But what is abundantly clear is that that relationship should now be properly inquired into so that clarity and transparency, which has not existed in relation to any of these issues, is now for all to see.

The relationship between the Tribunal and Mr. Bacon has been unhappy, so far as we are concerned, in that it started in 2002. It is not unfair to remember that part of the concerns of Mr. O'Brien related to the involvement of Persona in these proceedings and the involvement of le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

Persona's solicitor in obtaining information adverse to Mr. O'Brien. It is equally not unfair to remember that Mr. Healy was, at one stage, involved with those Persona proceedings. There is, so far as Mr. O'Brien is concerned, and his team, a visual perception that the relationship between the Tribunal and Mr. Bacon and others has coloured the way in which this GSM process has developed.

So far as Mr. Bacon and Mr. O'Brien is concerned, he is not, at this time, prepared to cross-examine Mr. Bacon unless or until a statement of evidence is provided in the first place by Mr. Bacon in relation to all his dealings,



potentially a statement from Mr. Healy dealing with his relationship with Mr. Bacon, an assurance of some kind, however achieved, that all of the documentation relating to the GSM process and in relation to Mr. Bacon's involvement with it has been furnished to Mr. O'Brien's team, and, at that stage, in consultation, hopefully, between the legal people, a date, a new date can be fixed when Mr. O'Brien's team can properly examine Mr. Bacon, or cross-examine at that stage when matters have properly been dealt with.

Until that happens, Mr. O'Brien is not going to cross-examine Mr. Bacon at this time.

If the Tribunal refuses the postponement of this examination, then Mr. O'Brien will take such other steps as may be necessary in the circumstances.

MR. COUGHLAN: If I might just correct the record a little, sir, on a few matters.

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

My Friend didn't open the complete correspondence that existed between the Tribunal and Messrs. William Fry. My Friend did not open a letter dated the 19th of February, 2008, which was in response to their letter of the 11th of February, 2008, which he did open. So I just should perhaps complete the record in relation to that.

Now, the first part of the letter is to do with a matter which I am not going to open at all. The second part of the letter deals with Mr. O'Brien's or Messrs. William

Fry's letter of the 11th of February.

"With regard to your letter of the 11th February last, I refer, in the first instance, to the third paragraph in which you state that in seeking information from the Tribunal on Mr. Bacon, and despite numerous reminders to Mr. Bacon and the Tribunal, you never received a response or assistance from either Mr. Bacon or the Tribunal and that it was for that reason that your client had no option but to request that Mr. Bacon be called for examination.

This statement is incorrect.

"The Tribunal responded to your request for assistance on the 23rd of August, 2007, and again on the 1st of October, 2007, at which date the Tribunal made it clear that it had been in touch with Mr. Bacon and that he had informed the Tribunal that he did not have any of the documents requested by your client. The Tribunal's assistance was never sought in relation to the provision of a narrative by the Court Reporters Ltd.

PARTY TRIBUNAL - DAY 351

Mr. Bacon.

"It is on the basis that the Tribunal has now stated that I am instructed to point out now repeats that you were aware of the situation since the 1st of October, 2007, of the Tribunal's position."

Now, My Friend has made an assertion, and

I beg your pardon, I should continue the balance of that letter at the moment.



will comprise the reports referred to in the judgement of the High Court and Supreme Court, namely;

"1. The report of March 2003.

"2. The report of January 2005.

"With regard to the information which the Tribunal has sought from you, you will appreciate that the Tribunal is anxious to proceed with and conclude its inquiries into the matter, and accordingly, the Tribunal would ask you to let it have your response within seven days from today's date."

Now, My Friend did not open the letter of the 27th of February in the correct sequence, and omitted one letter, and I should open them in the correct sequence, perhaps.

A letter dated the 25th of February, 2008, from Messrs.

William Fry to the Solicitor to the Tribunal:

"Dear Mr. Brady,

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

"We refer to correspondence last Friday, the 22nd of February, regarding the proposed sitting date for Peter Bacon's evidence. Unfortunately, both Eoin McGonigal, SC, and Jim O'Callaghan, barrister, have foreign travel commitments around that time. Mr. McGonigal is due to return from a professional trip abroad on Tuesday the 11th of March and with preexisting commitments that week, with Mr. O'Callaghan due to go to Australia on the 11th to the 22nd of March. In the circumstances, we request that the Tribunal might refix the matter for sometime in early April

and await hearing from you.

then there is a P.S.

"We understand that Mr. McGonigal and Mr. Coughlan are in telephone contact also."

Now, what was not opened was a response from the Tribunal dated the 27th of February, 2008.

"Dear Mr. O'Sullivan,

"I refer to your letter of yesterday's date regarding the scheduling of the Tribunal's forthcoming sittings to enable your client to cross-examine Mr. Peter Bacon.

"On receipt of your letter on the 1st of February last notifying the Tribunal of your client's intention to cross-examine Mr. Bacon, the Tribunal made contact with Mr. Bacon to ascertain whether he would be available to the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

attend public sittings for that purpose, and Mr. Bacon confirmed that he would be in a position to attend on the 11th March next.

"The Tribunal has noted that two of your counsel have prior commitments during the week of Tuesday, the 11th March next. As recorded in the postscript to your letter, Mr. McGonigal telephoned Mr. Coughlan regarding the matter yesterday. Following that contact, the Tribunal reverted to Mr. Bacon to ascertain whether he would be available on the 8th of April, the date requested by Mr. McGonigal, but Mr. Bacon is unable to vary his arrangements that have

already been put in place. The position was confirmed directly to Mr. McGonigal by Mr. Coughlan late yesterday afternoon. It appears that Mr. McGonigal is not due to return from a professional trip abroad until Tuesday the 11th of March and it may be possible for the Tribunal to convenience him to the extent of deferring the sittings to Wednesday the 12th of March, if that is of assistance.

"In that regard, I would be grateful to hear from you as soon as possible, as you will appreciate that any such change in the scheduling of the Tribunal's sittings will also be notified to other affected persons."

Now, that was not opened.

So the Tribunal did attempt to meet the needs that were first indicated to the Tribunal, namely a difficulty in relation to counsel. Other matters arose and were the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

indicated to the Tribunal as being different difficulties as matters proceeded. I just wanted to keep that aspect of the record straight.

Now, My Friend has suggested that there was a deliberate concealment by the Tribunal of an attendance of a meeting dated the 8th of November, 2004, between Mr. Peter Bacon and members of the Tribunal legal team. Now, it was the Tribunal, of its own initiative, which furnished this document when the matter came to light last Thursday afternoon/Friday morning. Any suggestion of a deliberate

concealment is utterly rejected. If My Friend's suggestion bears any credibility, the document would not have been furnished at all last Friday, if the Tribunal was engaged in deliberate concealment. It was an error. It was an error which came to light and which I immediately made full inquiries about, informed you of the matter, sir, and you directed me that the matter should immediately be brought to the attention of Messrs. William Fry.

That is the position.

Turning to the document itself, it is a note of a meeting which was always known to have taken place. Mr. O'Brien's legal advisors were well aware that a meeting had taken place on the 8th of November, and had also always known that the purpose of that meeting which had been noted in a document which had been disclosed to them was for the purpose of Mr. Bacon, who had sought the meeting, seeking clarification of matters which were comprised in a very long letter dated the 30th of August, 2004, written to the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

Mr. Bacon, informing him of the matters which the Tribunal would wish him to address in furnishing a report to the Tribunal to enable the Tribunal to form a view whether or not he should be adduced to give expert evidence.

My Friend always had a copy of that letter of the 30th of August raising all these matters, and any proper or reasonable reading of that note is clear, that it is

referring to various paragraphs in that letter and clarification is being sought. That note ends with a note made by the solicitor "can he" Mr. Bacon "now reply to our letter," which is the letter of the 30th of August, 2004. Mr. Bacon did reply in a letter dated the 22nd of November, 2004, which My Friend always had, which sets out clearly his understanding of the matters which the Tribunal raised with him and sets out clearly how he was going to approach it when he furnished his report. And that was always in My Friend's possession.

Now, it's a matter for you, sir, of course, but when My Friend commenced his proceedings, his complaint was, and continues to be, that the Tribunal and/or Mr. Bacon were influenced by instructions given by the Tribunal and information received from Mr. Bacon, and vice versa. The High Court and the Supreme Court have made it abundantly clear that you, sir, are entitled to inform yourself in any manner which you consider appropriate, but that it is only on the evidence which you hear in public before the Tribunal that you can base your report and your views.

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

It was clearly and explicitly stated in your ruling, sir, the reason why Mr. Bacon was not being called to give expert evidence; that you accepted the rationality of the argument made by the current licence holder Esat Digifone, that is



CHAIRMAN: Mr. David Clarke.

MR. COUGHLAN: Mr. David Clarke of Messrs. McCann Fitzgerald, that you were always entitled to inform yourself, but that it was inappropriate to elevate that to the status of expert evidence because, by reason of common sense and rationality, one could get through these reasonably complex matters and form your own view. In that regard, I think I perhaps should briefly encapsulate for the public what an expert is.

An expert witness is a witness who is unique in that his opinion, if accepted, is allowed by a court, but in order for his opinion to be accepted by a court or a fact-finder, that expert must set out a criteria or basis for the judge, jury or fact-finder whereby he forms that opinion. The fact-finder does not have to accept that opinion once that fact-finder is educated in the criteria which has been brought to his attention by the expert in how he arrived at it.

The suggestion, sir, that the Tribunal has been involved with Mr. Bacon for the purpose of doing down anyone, is one which the Tribunal, and I, as leading counsel for the le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

Tribunal, utterly reject.

CHAIRMAN: Very good.

MR. McGONIGAL: I just want to say, Mr. Chairman, a couple of things. I note what Mr. Coughlan says in reply, and it

does a lot of what he says is in reply in relation to the document which he has recently produced, is matters which will be dealt with by way of evidence in a statement. But I do have some difficulty in trying to understand how normal parlance in relation to a report of any kind with a person who may or may not be an expert, the interpretation or conspiracy or direct criticism, those words jump out from these documents and require statements of clarification.

I also want to draw your attention to two other facts.

First of all, that in a ruling in Book 277, when a similar issue of this kind arose in respect of Mr. Arve Johansen, you said that you understood our concerns and

"Mr. McGonigal, you put the matter fairly and reasonably and in so far as there may have been any oversight on the administrative side, that is something I would not wish and regret, and I think I have already commented in recent weeks on the somewhat limited man power resources as opposed to certain other comparable tribunals that this institution has. It's something that I may, on foot of this, take up with somewhat more vigour, but I will bear in mind fully what you say. I fully accept that procedural fairness does require that unexpected surprises should not be Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

should, if all possible, be avoided for material witnesses such as Mr. O'Brien. I'll certainly make it my

business to do whatever is necessary to ensure that Mr. O'Brien isn't insofar as he may have been potentially disadvantaged to a degree on this occasion, that this contingency does not occur again. I'll have regard to what you say."

Now, whether the Tribunal sees Mr. Bacon as, in your words there, as a material witness, what is clear is that

Mr. O'Brien sees Mr. Bacon as a material witness, and this should not have happened and would not have happened, and you will also bear in mind, Chairman, that Mr. O'Brien, in his evidence to this Tribunal, in his statement, instanced nine or ten occasions where he believed there had been omissions by the Tribunal in relation to documentation and follow-up procedures. At that time, when he gave his statement and his criticism by way of evidence, there was no response whatsoever in relation to any of those nine or ten identified issues. This is another one, a new one, and every criticism which Mr. O'Brien made at that time is repeated in relation to this omission. If he is to be treated fairly, and he expects to be, then the only fair way to deal with this is to postpone this event.

CHAIRMAN: Taking, first of all, the issue of the time or the period allowed for the hearing of Mr. Bacon's evidence, I think it appears from the correspondence that has been opened that Mr. O'Sullivan of Messrs. William Fry intimated to the Tribunal that it was no wish of Mr. O'Brien to delay the Court Reporters Ltd.

the Tribunal's final report and that he hoped the hearing of Mr. Bacon's evidence could be taken as soon as possible.

The Tribunal immediately busied itself towards finding a time that was convenient to Mr. Bacon, and circulated all interested persons.

As has appeared, some responses, both of a formal and informal nature, were made and efforts were made to facilitate those, and, in due course, the date of today fixed upon. It is to be borne in mind that there is very considerable pressure on this Tribunal towards presenting its final report on the GSM issue and associated matters that come within its Terms of Reference, and the Tribunal has been working very hard and is at quite an advanced stage in the preparation of that final report.

On the more general matters of a suggested conspiracy on the part of the Tribunal, I do not intend, having declined invitations towards what might be termed shouting matches from Mr. McGonigal over much of the past decade, to be goaded into any intemperate response. Matters such as the general approach to certain aspects of representation and other matters are best kept to be coolly deliberated upon and addressed in the course of the Tribunal's final report, but addressed they will be.

On the matter that has arisen in the context of the document that was furnished to Messrs. Fry last Friday, I have heard what Mr. McGonigal has stated. I have heard the

response of Mr. Coughlan. I do note the rather obvious  
le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

point that if there were some monolithic organised  
conspiracy on the part of the Tribunal, it would scarcely  
have been the case that the document was made available  
last Friday.

I have momentarily contemplated the rather invidious  
procedure of calling the younger barrister who, in fact,  
had dealt with the matter, but it appears to be intimidated  
by Mr. McGonigal that he is not alleging particular fault  
in that regard. It was a mistake on the part of the  
Tribunal, for which I take responsibility, that this did  
not come to light, that it appeared to be earmarked for  
production, but, in fact, was only uncovered, due to error,  
in the course of a final trawl last Friday. This was  
regrettable. It should not have happened, but it did.

Mistakes do happen. In the course, even, of the last  
sitting of the Tribunal, Mr. McGonigal will recall that he  
and Mr. Garvey were unable to attend the Tribunal's sitting  
in London until halfway through the morning session. No  
exception or fuss was made about that.

Having heard what has been stated on both sides, I can see  
no realistic basis upon which I should regard the  
substantive position of dealings with Mr. Bacon as having  
changed in any material way. It is to be borne in mind  
that this is in no sense the first occasion on which

Mr. O'Brien has had an opportunity to challenge these matters. They were challenged, in the first instance, at the taking of submissions in this place and in the course of correspondence, and it was advanced in general terms to the Court Reporters Ltd.

THE JUDICIAL TRIBUNAL - DAY 351

that the Tribunal had behaved unfairly and improperly and had infringed the maximum against any person being a judge in their own cause by the manner in which they have dealt with Mr. Bacon. The Tribunal did not accede to what was submitted in that regard. The matter was taken to the High Court, and, in a lengthy and considered judgement, Mr. Justice Quirke indicated that the matters of complaint in regard to the procedures adopted by the Tribunal were, in his view, groundless, but, in the course of his observations, he indicated that there would remain, in the first instance, if Mr. Bacon was called as a witness, an entitlement to cross-examine him in relation to the information that he had provided to the Tribunal. It was again, later in the judgement, reiterated that even if Mr. Bacon was not called as a witness, that that entitlement to examine him on information he had furnished to the Tribunal would subsist, and that is what has been invoked by Mr. O'Brien.

But it is to be borne in mind that following upon that judgement in the High Court, a substantive appeal was brought to the Supreme Court, and having heard

Mr. O'Brien's submissions, the Supreme Court took the unusual stage of holding that there was no case to answer, did not call upon the Tribunal's retained senior counsel to address them and affirmed the decision of Mr. Justice Quirke.

I do not see, having regard to the fact that the belatedly-emerging document related to a meeting of which the Court Reporters Ltd.

JUDICIAL TRIBUNAL - DAY 351

all persons were fully aware and having regard to its content, how it can, realistically, be concluded by me that any substantively-changed situation has arisen, and it appears to me that the matter is such that what subsists is the entitlement provided for in the judgement of the High Court. This is one that relates to an entitlement to cross-examine Mr. Bacon in relation to information that he provided to the Tribunal. It is not to be neglected that, ultimately, and to some not insubstantial degree in the exercise of what I felt to be fair procedures, I took the view that it was not in the ultimate, having considered submissions, and in particular that of O2, formerly Esat Digifone, it was, in the evaluation of the various considerations it was, in my view, preferable that Dr. Bacon be not, in the ultimate, called. I took the view that his interaction with the Tribunal had enhanced its capacity to act responsibly and fairly as fact finders and had provided a degree of background assistance; a view that

was upheld by Mr. Justice Quirke.

Nor is it to be ignored that certain of the sequelae from interaction with Mr. Bacon was very much to the advantage of Mr. O'Brien, having regard to the matters in his report in relation to IRR and to certain cautionary observations he made in relation to the use of numbers as opposed to alphabetical letters in scoring techniques. But in the ultimate, the view was taken by me that, having received some assistance in a way that was held to be proper, it was sufficient for the Tribunal to proceed to go to report on the matters, having had that assistance, without hearing the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

his evidence.

It is to be borne in mind that a very substantial part of the proceedings in the High Court and Supreme Court related not just to technical issues, but to matters of professed unfairness on the part of the Tribunal. These were rejected. And it is, accordingly, the position, since I have taken the view that what transpired last Friday does not in any sense introduce a sea change, it is, accordingly, the position that all that is by way of an entitlement to Mr. O'Brien, or any other potential person, is to cross-examine on the information supplied by Mr. Bacon to the Tribunal.

It is the case that in this Tribunal, in the High Court and in the Supreme Court, the contentions that there was an



unfair, unhealthy and excessively close relationship with Mr. Bacon on the part of the Tribunal has been rejected, and I certainly do not intend to allow any cross-examination to proceed on matters that seem to me abundantly res judicata. They have been heard by the Tribunal. They have been heard by the High Court and by the Supreme Court, and they have been determined, and it would, in my view, be amounting to some juristic variant of Groundhog Day if, at this particular vantage point, these matters were yet again to be put having been rejected in the Tribunal, the High and the Supreme Court and there having been made a decision not to call Mr. Bacon as a witness.

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

As I stated, I have considered the rather unpleasant expedience of seeking the evidence of Mr. McCullough, but I have noted that it is not contended by Mr. McGonigal that he has acted wrongly or unfairly in the context of what was put in the correspondence. Accordingly, I am not going to put upon him that rather unfortunate situation. What, accordingly, appears before me is a situation in which there is an entitlement on the part of Mr. McGonigal and to other persons who may have intimated an interest in that regard to cross-examine, but it will be solely related to the matters of information imparted by Mr. Bacon to the Tribunal and will not extend to matters that already have

been conclusively determined elsewhere.

I have no intention of seeking statements from Mr. Bacon, who is under no obligation and has cooperated as much as could reasonably have been expected from him by his attendance here at a very early stage. Still less do I have an intention of seeking a statement from Mr. Healy, whose role has, from time to time, been questioned, in my view, pejoratively, unfairly and for nakedly partisan advantage. Accordingly, I do not support the observations that have been made by Mr. McGonigal and I emphatically reject any suggestion that there has been any conspiracy on the part of the Tribunal to suppress evidence or on the part of any person within it.

Accordingly, if any person present wants to cross-examine Mr. Bacon in the context of the matters that he imparted to the Tribunal in the light of the documentation that has the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

long been made available, they may proceed with that now.

Otherwise, this hearing will be at an end.

MR. NESBITT: I appear for the Department, as you are aware, Chairman, and I am troubled that a decision that seems to be suggesting my clients must now proceed with cross-examining Dr. Bacon could be made without us giving being given some opportunity to say what we feel to be the position. I am also greatly troubled by the fact that so much difficulty and vitriol appears to have

surrounded what could have been an easily-organised event, Mr. Bacon being available at a time that suited everybody to be examined on matters that were dealt with many years ago.

The chronology of events, so far as my clients are concerned, effectively start with a letter of the 22nd of February of this year when, contrary to all rulings heretofore, we were told that Mr. Bacon would be giving evidence and he'd be giving it today. And in the course of that letter, we were told that following the examination to be done by persons acting on behalf of Mr. O'Brien, we'd be given an opportunity to follow on and deal with anything that arose at that point in time.

We wrote a letter on the 4th of March, indicating we noted what was happening, which was, if there was a cross-examination of Dr. Bacon, we would follow on on that, and we asked nine questions.

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

The Tribunal replied to those promptly on the 5th of March, and of importance to us are, firstly, question 4, which was: "What documentation was going to be relevant to the sittings?" And secondly, question 7: "Would it only be Mr. Bacon, or Dr. Bacon?" And finally: "Would the Tribunal be making inquiries of Dr. Bacon in the same manner as every other witness has given evidence to this Tribunal?"

The answer to the first question was it would be only sorry, the documentation answer was dealt with in the body of the letter, which said that, "It will be limited to his reports of March 2003 and January 2005." And it was again reiterated, "If any evidence emerges from the cross-examination mentioned" which was that by Mr. O'Brien "which affects your clients, you will, of course, be entitled to examine Mr. Bacon." So that appeared to be a further corralling of what we were going to be allowed to do.

In relation to what then occurred, on the 6th March, out of the blue, a booklet of documentation arrived which was well beyond the two reports we had been told about earlier. And the 6th of March was Thursday. And, today, further documentation arrived which does go to the gravamen of what we respectfully think Dr. Bacon should be giving evidence about before this Tribunal, and that is what he was able to say that is of any relevance to your deliberation for the purposes of allegedly arriving at a decision as to what occurred in relation to the matters you are investigating.

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

And we weren't party to the proceedings that have been taken by Mr. O'Brien to the High Court and that interplay between the Tribunal and Mr. O'Brien's counsel. But we have been steadfast in our attitude to Mr. Bacon's role, or Dr. Bacon's role in informing, to use the phrase that

appears to be best descriptive of the way he's dealt with in evidence. He is not an expert witness, but he had something to say which people should take account of. It's hard to see how that can be if he is not an expert witness. Today, he is being presented for cross-examination, and as far as I understand, and I've attempted to read the rules of a long presentation to the Tribunal effectively looking for an adjournment, I get the impression there is not going to be a cross-examination if there isn't an adjournment, and I am very troubled by that.

If the Tribunal has brought back Dr. Bacon, it's because it understood it was appropriate to have a cross-examination, and that should take place. And it does seem, with respect, that the picking of this date was done without any consultation with the parties. My clients have attempted to be helpful. We have come here, we are waiting for the cross-examination, and we were going to raise questions that would be relevant to at that point in time. It now seems Hamlet has left the stage, or is going to leave the stage, and that is very troubling, to leave us in that position. If the answer is we are meant to now try and do our own cross-examination on the basis that Mr. O'Brien isn't going to do it, the mess just gets bigger and bigger, and I think that has to be taken into account in attempting the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

to balance how this can be done in a simple, fair and

effective way. And I'd ask the Tribunal to consider carefully attempting to reach some form of agreement between the parties as to when Dr. Bacon could interrupt his schedule to be here to give evidence. Every other witness, who isn't outside the jurisdiction, has had to do that for this Tribunal, and I am sure Dr. Bacon won't be found wanting. And on behalf of my clients, I'd be asking that this be defused by a date being picked that suits the person who is being given the opportunity to cross-examine. We'll play our part in that and appear to do whatever we need to do after that, but, at the moment, the whole system seems to be broken, and I'd implore the Tribunal to try and come back from the brink of, I don't know what, I don't know why it's got to where it has got to now. An adjournment doesn't seem much of a complicated thing. I can't understand why it can't happen. I am not sure that's been addressed at all, but I have to admit I wasn't here in the first opening minutes of the hearing today and maybe there was something that was said there, but Mr. O'Donnell hasn't suggested that's been said.

CHAIRMAN: Well, the time wasn't huge, Mr. Nesbitt, but it was two-and-a-half weeks that was notified, and, I mean, previous occasions we have been shorter than that because, plainly, dispatch has to be made.

MR. NESBITT: I am sort of arguing for somebody else's position. I know what I have had to do. I thought it was two reports. I then got a lever-arch file and I got more

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

stuff today, and the lever-arch file brings it way outside the two reports. It's got transcript extracts, it's got all sorts of things that may or may not be the subject of cross-examination by Mr. O'Brien, and, with the greatest of respect, Mr. Chairman, it seems so close to the finishing line, for the want of the few days or the few weeks, or whatever it is, to get this done properly, as opposed to more litigation, which, the one thing we definitely know about, takes a long time, an adjournment would be of huge assistance to everybody. And we all get criticised for doing it the wrong way, wasting time, this is all taking too long, but this appears to be one time when the common-sense approach would be to find out what date suits everybody and do it then, and I'd implore the Tribunal to do that, because I think otherwise my clients aren't going to get an answer. People's memories are getting dimmed and dimmed with the passage of time. And it is my clients, and they are civil servants, who are criticised, whether it be indirectly, and I now tribunals have to criticise people in a way they can't always defend themselves, but they are being criticised today and before for running a process that maybe wasn't done properly. We won't agree with that. Hopefully, this will become clear in the report. Or maybe there is meant to be some sort of dishonesty. Again, we don't agree with that and we hope this will become clear in

the report. But the thing that is clear is the individual civil servants are entitled to have it done properly, and the only thing that appears to be in issue today is, is it reasonable to adjourn it for some weeks or some days, or whatever the period is, to get it done the way it was  
le Court Reporters Ltd.

#### LIBERTY TRIBUNAL - DAY 351

intended to be done to comply with the Order of the High Court. And in those circumstances, I am really at a loss to know what to do because this thing is not about to happen the way it's meant to happen for the purpose of my client's rights being vindicated, and it's not good to suggest that we should try and take over and imagine what Mr. O'Brien was going to say. He is here, he knows what he wants to say, but he is looking for an adjournment and I'd ask that he be given that adjournment so then my clients can get ahead quickly and get to the end and live with the result of the report.

CHAIRMAN: Well, I have no wish to shut you out, Mr. Nesbitt. You are here and you have an interest in the matter. Mr. Shipsey?

MR. SHIPSEY: I'd just like to associate myself with Mr. Nesbitt's remarks there, Chairman. We are here and I am here on behalf of Mr. Desmond and was intending to cross-examine Mr. Bacon, but I was intending to cross-examine him in the light of such cross-examination that was done by and on behalf of Mr. O'Brien, and it does



seem unsatisfactory that we would be, in that sense, bounced into cross-examining Mr. Bacon when the main the person who requested cross-examination is not, or has indicated they are not in a position to conduct that cross-examination today. Insofar as the preparedness for the cross-examination, I appreciate, Chairman, that there was not much by way of new documentation furnished, but we were notified, I think it's some two weeks ago, that the le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

cross-examination was to take place, and then a very substantial body of documentation, which had been previously furnished, I accept, was brought to our attention as being the documentation that we should consider, and there was a very short time to do that.

I would also, perhaps, just avail of the opportunity to raise one other matter. I appreciate what you have said in relation to the additional document that was furnished for the first time, I think, on last Friday, but amongst the documentation that was originally furnished, there is reference to a meeting taking place, or at least a conversation between Mr. Bacon and Mr. Healy back in February of 2003 for which there doesn't appear to be any written record. Now, it may well be that no written record exists, but it's in Tab 5 of a booklet, I think it's called Booklet A, and it's a record of the 10th of February of 2003, and it records Mr. Bacon as saying "You JH" I

assume to be Mr. Healy "said last week you were not interested in scoring."

Now, insofar as the task that Mr. Bacon was to perform was involved intimately with the scoring and how the scoring was arrived at, it would seem surprising that if there had been a previous discussion between Mr. Healy and Mr. Bacon in relation to the scoring, that no note or memorandum exists of that in the week of the beginning of February of 2003. It may be, and I accept that we may be informed that no such memorandum exists. But I would ask, Chairman, whether this matter is adjourned today or not, that further  
le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

inquiries would be made as to whether such a memorandum does, in fact, exist. But I would just endorse what and adopt what Mr. Nesbitt has said in relation to the undesirability of us having to be called upon to cross-examine. We can do it, certainly, but it does not seem, in view of the length of the Tribunal and the situation in which we now all find ourselves, that it is desirable that we be forced to do so without hearing what Mr. O'Brien's counsel wishes to ask Mr. Bacon.

CHAIRMAN: Thanks. Mr. Kelly, on behalf of Mr. Lowry, who I think has also indicated in correspondence an interest in the matter. I think, also, Telenor were notified, and indicated they did not wish to take any part in today's events, and likewise, Mr. Clarke of O2, formerly Esat

Digifone.

MR. KELLY: Chairman, Mr. Fanning will be here at 2 o'clock, if it's not to inconvenience the Tribunal too much. He couldn't be here this morning.

CHAIRMAN: I wonder is there much to be gained sitting solely for that, Mr. Kelly? You are probably a great deal closer to Mr. Lowry, as his solicitor, for some considerable time.

MR. KELLY: Yes, Chairman, but if you are acceding to the request for an adjournment, I have no problem. I am just informing the Tribunal that, as a courtesy, he can't be here until 2 o'clock.

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

CHAIRMAN: Well, I'll note that, Mr. Kelly. Well, Mr. Coughlan, I have something of a conundrum here. I have indicated a view on the substantive matters, but obviously I have some regard to other persons who have attended.

MR. COUGHLAN: I am somewhat perplexed by My Friend, Mr. Nesbitt, seemingly indicating that he is supporting an application for an adjournment and that he has indicated that he wishes to cross-examine Mr. Bacon. We wrote to the State and told them what we were doing. They wrote and they asked us specific questions, and we responded. They have never indicated that they intended cross-examining Mr. Bacon.

Now, the entitlement which arose was one which

Mr. O'Brien's entitlement arose by virtue of the judgement of the Court. If all parties represented here today make submissions to you that Mr. Bacon should not be called to give evidence, including the State, Mr. Lowry and Mr. Desmond, and of course Mr. O'Brien himself at the time, Mr. O'Brien exercised an entitlement arising out of the High Court ruling. If, as with the exception of Mr. Shipsey who has said he is in a position to proceed but he'd prefer not to, but I do not understand the State's position is that I would have thought that if it's only if something arose in the course of the cross-examination of Mr. Bacon by Mr. O'Brien's counsel that was adverse to the interests of Mr. Nesbitt's clients, that he would intervene at that stage. I am just perplexed at the position of the le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

State. I am unsure.

MR. NESBITT: This issue was dealt with, actually, on the 21st July of 2006, and we indicated our clear position as to what would happen if Mr. Bacon gave evidence.

It said in a letter dated of that date

MR. COUGHLAN: He is not giving evidence. I think perhaps My Friend is somewhat confused in relation to this. The Tribunal has not called Mr. Bacon.

MR. NESBITT: It's a distinction with no difference

MR. COUGHLAN: Sorry, it's a distinction with a great difference, sir.

MR. NESBITT: And I have opened the correspondence, I'd just like to indicate what the position is. We say, "Further, if the Tribunal decides to call Mr. Bacon to give evidence, the Department reserves the right to cross-examine to adduce additional or other evidence as may be deemed appropriate in order to rebut or challenge or otherwise deal with the testimony of Mr. Bacon."

Now, as I said in my original submission, how he has got here appears to be a little bit of a trip around the houses, but he is about to get into that witness box, take the oath and give his evidence under cross-examination, but it's going to be evidence, nevertheless, and if he is

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

giving evidence and he is here at the request of the Tribunal, I want to ask him questions, if it's relevant. So I don't understand My Friend's objection. And, more importantly, I had no idea there was going to be an application for an adjournment until I arrived here this morning and heard the application effectively in the course. And it would have been great if we had known that in advance, but we didn't, and it just adds to the conundrum and this difficulty

CHAIRMAN: Well, were you proposing, Mr. Nesbitt, had Mr. McGonigal proceeded to cross-examine, to then effectively assess your position as that unfolded and decide whether or not you needed to?

MR. NESBITT: Yes. Mr. Bacon may say nothing that I need to trouble you further with in the course of that examination, or he may say something that I want to ask him about, and I am awaiting for that. Because we have said he is not an expert and we were of the view, following the rulings, he would not be giving evidence, so nothing he had said to anybody was going to play any hand, act or part in the determination of the Tribunal, as we understood it. But, now, he is going to get into the witness box and give evidence, as I understand it. There seems to be an argument about an adjournment, which looks like it's going to complicate things hugely. But assuming he does give evidence, I'd like to hear his examination and I'd like to ask questions, if we consider it appropriate, as we have said before.

le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

And in the Tribunal's letter of the 5th of March, it indicated: "If any evidence emerges from the cross-examination mentioned which affects your clients you will of course be entitled to examine Mr. Bacon."

So we were told what we could do. We have turned up to do it and things have gone a little bit awry since then. But if we get that back on track, we are just standing exactly where we have always stood, being straightforward and indicating what we are trying to do. So I don't understand My Friend's misunderstanding or concern.

MR. COUGHLAN: I understand the position now. Thank you.

And as I understand My Friend's position, he wishes, if required, to intervene if anything arises during the course of the cross-examination of Mr. Bacon. If Mr. Bacon is not going to be cross-examined, his position is he doesn't have to ask any questions. That seems to be clearly the as I understand it.

MR. NESBITT: What I don't think is satisfactory, that Mr. McGonigal be invited to leave here to do whatever he has to do elsewhere, when a consortia judgement would appear to obviate all that.

CHAIRMAN: What I will do is this: I have held that, effectively, I am not in favour of the substantive submissions made on behalf of Mr. O'Brien. I have held that if examination or cross-examination is to proceed, it will be limited to the matters that I have stipulated in accordance with the judgement of the High Court and Supreme le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 351

Court, and, on that basis, it seems that Mr. McGonigal is not disposed to proceed today. Obviously, it is no wish on the part of the Tribunal that a yet-further invocation of remedies elsewhere be taken. If it is unavoidable, then it must be, but it would always be my anxiety that some sort of realistic accommodation be reached.

All I feel I can do is provide that I will make an order that I will deem the provision of Mr. Bacon today as having

satisfied the requirements of the decisions of the High and Supreme Court, but I will put a stay on it for a very short period, for only one week, in the perhaps not particularly sanguine prospect that the parties may contrive to reach some form of accommodation. If that is not the case, then matters must proceed. If nothing can be resolved between the respective legal advisors within the next seven days, my order will have effect in the context that I will deem what has transpired today to satisfy the Tribunal's requirement to make Dr. Bacon available for cross-examination. A one week's stay from today on that.

Thank you.

THE TRIBUNAL THEN ADJOURNED.

le Court Reporters Ltd.