

THE TRIBUNAL RESUMED ON THE 2ND MAY, 2008, AS FOLLOWS:

CHAIRMAN: Because I am anxious to proceed with the cross-examination of Dr. Bacon by Mr. McGonigal as expeditiously as possible, I do not propose either to have either an opening statement or to recite the quite lengthy exchange of correspondence that has taken place since the last listing here in March in relation to the circumstances attending Dr. Bacon's involvement with the Tribunal.

I will, accordingly, simply mention four quite brief matters:

It will be recalled that on the last occasion, at its conclusion, I indicated that I was disposed to put a stay of seven days upon any order that the Tribunal had fulfilled its requirement by making Dr. Bacon available. I did that in an anxiety to give effect to the order of the High Court, as approved by the Supreme Court, from the decision in the High Court of Mr. Justice Quirke enabling Mr. O'Brien's advisors to cross-examine Dr. Bacon, whether or not he was actually called as a witness or not, and it will, of course, be recalled that in a subsequent ruling I ruled that I would not be disposed to call Dr. Bacon as a witness in the substantive hearings because of the reasons then advanced in that ruling.

On foot of that stay, a considerable measure of further correspondence took place, in particular between Messrs. William Fry, on behalf of Mr. O'Brien, and the

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IARTY TRIBUNAL - DAY 352

Tribunal. It remained my anxiety if possible, to accommodate an entitlement to give an effect to the decision of Mr. Justice Quirke, provided this was done upon terms that appeared to me to accord with the view of the High Court, as approved by the Supreme Court.

After an exchange of correspondence, that I do not propose to go through, it was accepted on behalf of Mr. O'Brien that the view advanced by the Tribunal, and expressed in the decision of Mr. Justice Quirke, would govern what took place, namely to the effect that the cross-examination of Dr. Bacon would be confined to information provided by Mr. Bacon to the Tribunal.

In a letter from Messrs. William Fry, of the 4th April last, to the Tribunal's solicitor, reference was made to recent correspondence, and it was stated that: "While we would have thought it apparent from our previous correspondence, our client does accept that cross-examination will be confined to information provided by Mr. Bacon to the Tribunal."

That is the effect of my ruling, and it applies to any other persons who may seek to exercise an entitlement to ask questions of Dr. Bacon on foot of the correspondence that has taken place with representatives of other persons. It seems to me untenable that any such other persons should have any greater or more excessive entitlements than have

been conferred by the High and Supreme Court upon Mr. O'Brien, particularly having regard to the number of the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

matters that were heard exhaustively and ruled upon in the High and Supreme Court in the substantive proceedings heard sometime ago.

The third matter that I wish to very briefly address is to state that whilst I am anxious to afford all due entitlements on foot of the High Court expression of judgement to Mr. O'Brien or to such other persons as may wish to be heard, I am also conscious that fair procedures and due courtesy must equally be extended to Dr. Bacon. It was a not particularly pleasant experience for him and for his solicitor to have to attend on the last occasion in circumstances of some controversy and argument. I appreciate his position and that of his solicitor, and I am grateful that they have made themselves available to attend today.

Accordingly, I do not intend to address further preliminary matters at this stage. It is my wish that we proceed with this remaining aspect of public hearings in as expeditious and workman-like fashion as possible. And I propose to embark upon it now.

I will, of course, give all due consideration, as Chairman of this Tribunal, to whatever may transpire in the course of that cross-examination, but it remains, in my view, my

primary and pre-eminent task to proceed with preparation and finalisation of my draft report, which is the task which I at present am extending reasonably extensive daily hours to.

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Very good, we will proceed with Mr. Bacon. If you'd be kind enough to come up, Dr. Bacon.

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IARTY TRIBUNAL - DAY 352

DR. PETER BACON, HAVING BEEN SWORN, WAS CROSS-EXAMINED BY

MR. McGONIGAL AS FOLLOWS:

CHAIRMAN: Just before we take up evidence. On a slightly lighter note, whilst I see no particular danger of my casting myself in any darling of the media situation, it has been drawn to my attention that this is the last occasion on which Mr. Jim Morahan of The Examiner will be attending these sittings, which he has covered meticulously during its several years prior to his retirement, and I would merely take the opportunity on my own behalf and on behalf of those involved in the Tribunal, of acknowledging his courteous and professional coverage and wishing him every good fortune, health and happiness in his retirement.

MR. McGONIGAL: Good morning, Chairman. Could I just join with you in those words, Mr. Chairman, to The Examiner, and I hope that we will be able to provide some meat for this, one of his last days in reporting for the Cork Examiner.

THE WITNESS WAS CROSS-EXAMINED BY MR. McGONIGAL AS FOLLOWS

Q. MR. McGONIGAL: Good morning, Dr. Bacon.

A. And to you.

Q. Thank you very much for coming. What I want to do first, Dr. Bacon, is just give you an outline of why it is you are here and indicate some of the areas that I am hoping to discuss with you through the documents that we supplied recently, and I want to make it absolutely clear from the beginning that so far as Mr. O'Brien is concerned, the le Court Reporters Ltd.

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purpose of you being here today is not in any way to try and criticise or attack your credibility, your reputation or your standing. We recognise your ability, your reputation and your credibility as a professional. We will argue over whether or not you are an appropriate expert in relation to the particular field, but the purpose of today is not to attack.

Mr. O'Brien is here today on a fact-finding mission, and he wants to try and ascertain these facts in an inquisitorial way and not in an adversarial way. I am hoping that we will be able to go through these documents and discuss what they may mean, what they contain, how they were arrived at, what inputs there was or was not into them, and in that way, learn about the relationship that existed between you and the Tribunal.

Part of our reason for wanting to do this is that it's

often forgotten that this Tribunal, which was established to inquire into matters of urgent public importance, was set up in September of 1997, over ten and a half years ago. It has to be remembered, and the Tribunal has reminded us, that so far as the GSM is concerned, it really only began its inquiries in 2002. However, that's six and a half years ago. Regrettably, it has not yet reported and is not in a position to report. In a sense, the clock is still ticking, public money is still being spent, although we are closer to finality.

My new Junior, Mr. Lehane, has reminded me that the length of the Court Reporters Ltd.

ARTY TRIBUNAL - DAY 352

of time of this Tribunal exceeds the combined period of the two World Wars.

CHAIRMAN: I think we had that at an earlier stage too, Mr. McGonigal, before Mr. Lehane.

Q. MR. MCGONIGAL: Unfortunately, he didn't get to that transcript yet, Chairman, so he thought it was worth mentioning again. As Judge Susan Denham said in the Supreme Court, a Tribunal which sits for ten years is the antithesis of an urgent public inquiry. But nevertheless, it is a public inquiry, even though the urgency may appear to have gone out of it.

What we are hoping to do, as I indicated, Mr. Bacon, is to throw some light on the internal workings of the Tribunal insofar as the process concerning the award of the second

GSM licence is concerned. The Chairman has convened this sitting to allow us to cross-examine you but, in effect, to inquire of you about your involvement with the Tribunal and its legal team since 2002, since when two reports have been produced; a draft report in 2003 and a final report in 2005.

It is true to say that the world outside Tribunal-land only became aware of your involvement in 2005, some three years after you first became involved with the Tribunal.

Mr. O'Brien's concerns are that he doesn't understand the relationship that existed between the Tribunal and you. It appears to him from looking at the documents that an le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

attempt was being created whereby the GSM process would be criticised by the Tribunal in its final report without you having been "exposed" to the public gaze at all.

It appears, and I am going to track this through with you later, it appears that you may have been involved in different guises and that your initial involvement between 2002-2004 was as a consultant who was advising and educating the Tribunal into the way in which the evaluation process had been carried out. It is possible to interpret that period of time as a time when it was not anticipated by you, or indeed, by the Tribunal, that you would ever be a witness in these proceedings. One of the disturbing things, so far as Mr. O'Brien was concerned, was the

failure on the part of the Tribunal at the earliest opportunity to indicate that you had been brought on board, and it seems possible to date that as December '02, when the Chairman and Mr. Coughlan had an opportunity in the public sittings to identify that you had been brought on board to assist them. It does appear from the documentation that without your assistance, the Tribunal would not have been able to fully understand or at all the way in which the assessment and evaluation had been carried out.

It's clear, Dr. Bacon, and I will again be talking to you about this, that there were a number of meetings or phone calls with the Tribunal, some of which were recorded, some of which were not recorded, and some of which the Tribunal thought were not recorded but subsequently discovered were the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

recorded. Mr. O'Brien echoes the sentiments of Mr. Healy during cross-examination of Mr. Lowry on Day 155, when he said: "It's just that I can't understand, and I am sure there are many other people who share my bemusement at how there can be a three-hour long meeting that you have to learn so much and no one takes a single note. I just find that strange."

During the course of his introductory comments on the 11th March, Mr. Coughlan was careful to point out that he wasn't delivering an opening statement, although it took 15 pages



of a transcript. He appeared to suggest that there was something curious in Mr. O'Brien wanting to cross-examine Dr. Bacon, having sought, through the courts, to prevent you from giving expert evidence to the Tribunal, and the Tribunal having acceded to that request. There is nothing strange about this position. The decision by the Tribunal not to call you was, in fact, a vindication of the position adopted by him in his court proceedings, despite the fact that he was fought tooth and nail in the courts. He simply wants to inquire of you to find out what went on between you and the Tribunal, and he has that right because he went to court. If he had not gone to court, we wouldn't be here today, we would not have got the crucial documents that the Tribunal disclosed after close of business on Friday the 7th March, being the meetings of the 8th and 18th November, and we would not have had the opportunity to probe, test and inquire the information and assistance given by you, Dr. Bacon, to the Tribunal.

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IARTY TRIBUNAL - DAY 352

A lot of this highlights a number of principal concerns which Mr. O'Brien has expressed during the course of the Tribunal, both in evidence and elsewhere, and it hinges around the relationship between a Tribunal having its own legal team, being advised and adjudicating between them and individuals as to rulings to make on a course of action or a remedy, and the only remedy left to individuals is to go

to the courts, which is expensive and time-consuming.

The principal concern must now be the fact that by reason of the way in which the Tribunal of Inquiry Acts are structured, is that the legal team no longer has the independence or objectivity which one would have thought was a necessary requirement for the objective presentation of material in a fact-finding mission, and I say that,

Dr. Bacon, because the Tribunal counsel have become inquirers and investigators within the private investigation stage, and presenters of what they deem to be appropriate in the public section of the Inquiry. Whether one likes it or not, there are three jobs in one being performed. The strength of the Irish Bar has been its independence when it is representing a client. You can not confuse investigators and presenters and turn it into one.

The other concern of Mr. O'Brien's is the failure or the perception that sitting judges, particularly High Court judges, should not in fact be Chairmen of Tribunal. Now, I know that this issue has been raised several times since the 1990s, and the Supreme Court has deemed that it is all right, but it has never meaningfully debated it, and it is

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IARTY TRIBUNAL - DAY 352

clear, as night follows day, that it was never intended that High Court judges should be the subject matter of Judicial Review, which is what actually happens when they become Chairmen, and there is a closeness and perception

which needs to be further debated and argued.

The final and obvious main concern of Mr. O'Brien's relates to the private investigation. It seems almost a contradiction that you would have a private investigation in a public inquiry. A public inquiry is set up originally under the English 1921 Act to lance a crisis of confidence that had arisen because things had not been transparent and were carried out in a private way. To, therefore, have a private investigation within a public inquiry is, in fact, creating or adding to the crisis which already exists. It is not something that was ever envisaged by the 1921 Act, and it is not something that is practised by the English Tribunals under that Act, and was something that was created purely under Irish legislation, and has not added in any way to the necessity or perception of a good inquiry. It has resulted in a lack of transparency and the necessity for people to try and find a way to expose the private side of the Inquiry to the public gaze, because that is where a lot of the damage to people is being done. As I said at the beginning, Dr. Bacon, and forgive me for being so long, Mr. O'Brien is today on a fact-finding mission in relation to all of those matters. He highlights those main points because he believes, and I agree with him, that they are relevant for further debate and

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IARTY TRIBUNAL - DAY 352

discussion, and that can only happen on foot of material

which shows that they require debate and discussion, and hopefully some of that will arise as a result of what happens here today.

Dr. Bacon, we sent you a couple of books the other day, and I don't know whether you had a chance of going through them, or have them there with you?

A. I didn't have a chance to go through them. I got them this morning.

Q. I see. And do you have them there with you?

A. Well, I have the copies, yeah.

Q. Because what I want to try and do is take you we can give you another set, but what I want to try and do is take you through some of those documents.

A. Okay.

Q. And they are set out in chronological form, and we might try and discuss what's in them.

MR. COUGHLAN: I am sorry to interrupt My Friend. Just so that I understand what's going on with the long pre-amble to the first question to Dr. Bacon. I just wonder is My Friend accepting or resiling from the letter sent by his client's solicitor to the Tribunal in respect of the nature and scope of cross-examination?

CHAIRMAN: There is a letter, Mr. McGonigal, that I did read out

MR. MCGONIGAL: Oh yes, I am quite happy

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IARTY TRIBUNAL - DAY 352

CHAIRMAN: "In which our client does accept that cross-examination will be confined to information provided by Mr. Bacon to the Tribunal." I think other correspondence indicated that you could explore the document that emerged in the course of the last hearing, but there was to be some constraints on it, and whilst I did not get through all of the documents in your two rather large green lever-arch files, some at least of them appear to relate to matters that have been dealt with in the High and Supreme Court.

MR. MCGONIGAL: No, no, but none of the matters have been dealt with in evidence, Mr. Chairman, and the matters which we have in this book all relate, as far as I can see, to the information which Dr. Bacon may have furnished to the Tribunal, because they all deal with either documents which were given by the Tribunal to Dr. Bacon or refer to meetings which Dr. Bacon had with Tribunal counsel, which is the place where information was swapped. So, I'm not going behind the letter at all, as far as I can see, on the book of documents that I have furnished, but I have no doubt that if I appear to stray into areas where you have a concern, that everyone will leap to their feet and tell me.

CHAIRMAN: We'll proceed.

MR. COUGHLAN: I accept that if he says he is not going outside I accept.

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IARTY TRIBUNAL - DAY 352

Q. MR. MCGONIGAL: Dr. Bacon, the first document is actually the Terms of Reference. And can I ask you, was this a document that was ever given to you before?

A. I don't recall it.

Q. The document, what the document does is, the empowering document setting out the terms of the Terms of Reference that the Tribunal has been set up to inquire into, and can I take it from your answer that in 2002, when you were first being supplied with material from the Tribunal, that the Terms of Reference was not amongst them?

A. Yeah.

Q. In particular, I just want to draw your attention to paragraph (g) on page 2 of 5: "Whether Mr. Lowry did any act or made any decision in the course of any ministerial office held by him to confer any benefit on any person making a payment referred to in paragraph (e), or any person who was the source of any money referred to in paragraph (f), or any other person in return for such payments, or procured or directed any other person."

Now, one of the things that I noted throughout all of the documentation was that you made no reference to Mr. Lowry or anyone having interfered with the process. Can I take it from that, that throughout the work that you did, that there was no evidence at all to indicate that Mr. Lowry had in any way infiltrated the process?

A. Yeah, that's correct. I mean, look, can I perhaps you said you wanted to get clarity and your client wants to get

clarity. Let me try and answer the question, and I hope it delivers the clarity. I received a telephone call from the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

Mr. Jerry Healy sometime in November, saying that there was work that the Tribunal, assistance that the Tribunal were going to be seeking and would I be interested in coming in and discussing that, which I did. And out of that meeting, there were four areas where the Tribunal were seeking assistance, technical assistance: The matter of quantitative and qualitative evaluation; the matter of the scoring system that was used in this process; IRR, that's to say internal rate of return; and a notion of bankability. And they made it very clear to me that what they were looking for was technical assistance that the assignment was to provide technical assistance to them in relation to those areas where they were evolving their views. On that basis, it seemed to me to be an interesting assignment and I said, "Can you provide a briefing document or a Terms of Reference." They provided a briefing document and documents on foot of which I prepared a proposal of the work that I would undertake, and that proposal was submitted in January, I believe the end of January of 2003. And that set the basis on which I was working. There wasn't a Terms of Reference from the Tribunal, there was a briefing material and an indication of where they were looking for assistance in technical

areas, that to my mind they were seeking guidance and information on. So, the proposal which I prepared was the basis upon which me and my team undertook that assignment in those four areas.

Q. No, I understand that, and I'm not surprised at anything you said, because in fact that appears to come through, that your initial involvement on behalf of the Tribunal was le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

effectively as an assistant consultant. Is that not correct?

A. Yeah.

Q. And it was never envisaged in your first involvement that you would ever be giving evidence as an expert?

A. Well, I'm not sure about that. To be perfectly frank with you, in 15 years of carrying out independent economic consultancy work, I have always proceeded on the basis that the work you do is going to finish up in the public domain in some shape or form, and experience has shown me that that judgement has been, by and large, correct. So, in going into this, which is a public inquiry, I always had the belief that the material that I supplied, you know, would or could form part of the Tribunal's deliberations.

Q. No, I understand that, what you say in relation to the probability of giving evidence in some forum or other. It appears from other documentation which has been supplied in relation to one of the meetings, that you did anticipate



that you might have to give evidence in another proceeding, but not in the Tribunal, which is one of the questions that I'll be asking you, because it may be that it's a misinterpretation on my part. But, you see, what's puzzling me, Dr. Bacon, in many ways, is that the initial approach to you to become involved, in itself, is unusual. Normally when one normally if a Tribunal is engaging a consultant, the initial contact would come through the Tribunal's solicitor to try and engage, and the fact that this initial contact seems to have come from counsel is unusual, and added to other matters, was of concern to us. But so far as you are concerned, the initial contact was a le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

telephone call from Mr. Healy?

A. Yeah.

Q. And it was following that then, that you had a meeting in the Tribunal offices?

A. Yes.

Q. And who was that meeting with, as a matter of interest?

A. Mr. Healy, Mr. Coughlan and their lady colleague, and as far as I know, Kevin Hannigan, my own colleague.

Q. And was Mr. Davis there, the solicitor?

A. He could well have been.

Q. The only reason I'm asking, Dr. Bacon

A. Simon Davis, is it?

Q. John Davis. The only reason I am curious is there doesn't

appear to be any notes of that meeting, and I am surprised at that.

A. Well, I think it was very much by way of an oral briefing of what the job was or what the assignment envisaged. The follow-up to that, as best as I can recall, was that the Tribunal sent out a briefing note and a lot of documents.

Q. No, I understand that.

A. And we sifted through that and made a proposal out of that.

You should note that the proposal envisaged that we would provide a draft report and a final report on foot of comments that we would have received. So that's what was envisaged in the assignment: A draft report and a final report prepared by us on foot of which would have been my normal practice in engaging a report, that you have supplied a client with a draft report, the client would have an opportunity to look at the draft report, to comment on it and to raise queries on it and, you know, the  
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IARTY TRIBUNAL - DAY 352

consultants would consider those comments and then prepare and submit a final report.

Q. No, I understand that. But part of the problem that arose, really, when you tried to concertina it like that, is that although the draft report was furnished in March and you were anxious to have a meeting with the Tribunal by Easter, there was no suggestion at that stage that you might have to give evidence, and that didn't arise until 2004, 5 at

the earliest?

A. That's right.

Q. And at that stage, rather than finalise the report, what you appear to have done was something new, in the sense that you were given a number of questions to answer and you answered them in the form of a report?

A. Well, you are quite right. The draft report was submitted in March of 2003. There was, I think, the next meeting was in the middle of 2004, and then I received a letter from the Tribunal in August of 2004, saying that they wanted a new report in, as you say, in the form of an interrogative rather than a narrative report.

Q. Well, we'll come to that because it isn't I'm not sure that it's quite like that, but that may have been the way it was, we'll see when we come to the documentation. You see, one of the things that I understand where you are, Dr. Bacon, in the sense that there is I want to make it clear, there is nothing wrong with anything that you did.

You were engaged in an unusual way to assist the Tribunal.

A. Well, it may appear unusual to you. It would be I would think in a third of my business, it would arise from somebody making a telephone contact with me saying, look, le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

there is a piece of work that we have an interest in having done, would you be interested in doing it? So, I didn't find anything unusual. I would normally find as well that,

you know, that that phone call would have been made to several other people.

Q. No, but I think that you must understand, Dr. Bacon, that so far as the Tribunal is concerned, it's a slightly different category to most of the other things, to some of the other things that you may have been involved in, because a public inquiry is something that is open to scrutiny all the time by the public and they are concerned as to how things happen and what is happening and why it's happening and what they are paying for. So, when I say it's unusual in the way that you appear to have been engaged, it was unusual in the terms in which one expects or understands a Tribunal to work. What is also confusing is that it doesn't seem to us to have been necessary to keep your involvement silent, and yet, your involvement with the Tribunal was silent up until 2005 before it became public, and during that time the Department witnesses and many others were being cross-examined, examined, inquired into by Tribunal counsel on information and basis upon material which you had furnished to them, and in a sense that put all of those witnesses at a disadvantage, as they saw it, and there would be no problem

MR. COUGHLAN: I don't want to interrupt My Friend making a speech, Sir, but I think it has been averred to and has been litigated in the High Court and the Supreme Court, that Dr. Bacon was retained to advise the Tribunal on its *le Court Reporters Ltd.*

evolving views and questions which the Tribunal was raising with witnesses. For My Friend to suggest - and Dr. Bacon I think has already, in the course of this cross-examination, said that he was retained to advise on evolving views which the Tribunal had - for My Friend to suggest that examination was taking place on the basis of concealed information furnished by Dr. Bacon is erroneous, Sir, and I'd ask him not to proceed on that basis.

MR. McGONIGAL: I can't accept that, Mr. Coughlan.

CHAIRMAN: Well, it's a matter that has been litigated on, Mr. McGonigal, and I have made very clear that we are not reenacting the High Court proceedings.

MR. McGONIGAL: Absolutely, we are not reenacting it. We are reenacting the information Dr. Bacon gave to the Tribunal and we are getting evidence on that.

CHAIRMAN: Let's do it in the context of what your solicitor acknowledged.

MR. McGONIGAL: Dr. Bacon and I were having a discussion in relation to the way it was worked. It seemed a perfectly rational inquiry. We didn't seem to be having any difficulty with it.

Q. I just want to go back, Dr. Bacon, and we may have to take this slower simply because some of my questions may be objected to, so we want to give people time to do that, if they want to object. But, can I just go back for a second  
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to the Terms of Reference, I am sorry to have to do it this way, but I may for a moment. It's Tab 1 again, and I took you through (g), and I just want to go to (i): "Whether any holder of" it's page 2 of 5 "Whether any holder of public office for whose benefit money was held in the accounts did any act in the course of his or her public office to confer any benefit on any person who was the source of that money or directed any person to do any such act."

Now, again, that was something that you weren't asked to look into in any way, indeed you didn't find any evidence in relation to that, and that's clear?

A. Yeah, that's clear.

Q. Absolutely. Now, just going back, again, to the first meeting which you had in November with Mr. Coughlan, Mr. Healy, Ms. O'Brien and Mr. Davis, the only source of what was discussed that we have in relation to that at the moment is you, and what I just want to try and understand is this was the first meeting when, in a sense, your Terms of Reference, as opposed to the Terms of Reference of the Tribunal, were being explained to you as to what it was they wanted you to do?

A. That's correct.

Q. And can you just give me a synopsis of what was said and discussed at that meeting?

A. They said that there was four areas where they required

assistance, and the four areas were the nature of quantitative and qualitative evaluation approaches; the scoring system that was used in these approaches; what the Court Reporters Ltd.

INTERNAL RATE OF RETURN - DAY 352

internal rate of return was and how it was used in this process, and as I indicated to you earlier, the notion of bankability which was used in the document.

Q. And do you think all of those matters were discussed at this meeting?

A. Well, I think they were outlined. They said these were the areas where they had concerns, and really what I was trying to get a handle on was what kind of team did I need to have if I was going to be able to deliver a competent report in those areas, and what the nature what the exact nature of the assignment was. And the conclusion that I came to leaving the meeting, was that these guys wanted technical assistance; that they had views, they had opinions, and they wanted those either confirmed or questioned or detailed in a report, and I think the conclusion was that they would send on a briefing note, which they did, and there was the question of what our methodology was going to be and what would be entailed and what was the scope of this assignment. So they sent us, as is the wont of tribunals, a rain forest of documents, from which we took those objectives that they had in mind, went through the documents and, as I say, shaped a written proposal, which

was submitted to them at the end of January 2003.

Q. I know I may be pedantic a wee bit, Dr. Bacon, but I am just wondering whether or not Mr. Hannigan and Mr. Walsh were at that first meeting because

A. I think it was only Mr. Hannigan at the first meeting. I think it was only Mr. Hannigan, but I am not sure to be perfectly honest.

Q. It's a long time ago.

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IARTY TRIBUNAL - DAY 352

A. It is.

Q. But one of the reasons why I wondered myself about it was because in fact when you were sending in your proposal, part of what you did was to outline

A. The team.

Q. your team. And I wondered to myself, and I assumed that in actual fact the first meeting between the Tribunal would have been the Tribunal, the Tribunal and yourself, but I may be wrong about that?

A. And you may be right, you know, but I'm just not sure.

Q. One of the things that puzzled me, Dr. Bacon, is where you came from in the sense of how Mr. Healy came to go to you?

A. Yeah, I think that that may have come from the fact that at that time I was working for, of all institutions, the Bar Council of Ireland.

Q. Oh, I see. How intriguing. Jocosely, I hope they were more successful?



A. Pardon?

Q. Jocosely, I hope it was more successful?

A. Dealing with barristers is never successful.

Q. And it was obviously there that you met Mr. Healy?

A. No, I had never met him.

Q. So your name cropped up. Following that then, the letter of the 13th December, which is at Tab 3, which is the one sending you the documents as a matter of interest, in relation to that first meeting, do you recollect whether Mr. Davis took notes or not?

A. I can't even remember if he was there.

Q. Because it's a curious feature that there are no notes of that meeting.

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IARTY TRIBUNAL - DAY 352

A. I just don't know. I mean, I have no notes, you know, and the reason I have no notes was because they were sending a briefing document and the document and the documentation along with it.

Q. You don't have any papers at all, as I understand it?

A. No.

Q. And is that because

A. The document I mean, what I would normally do, and this was no different from the norm, as far as I was concerned; we got a briefing of what was required and we went away and made a proposal. In this instance, it was an oral briefing. Sometimes you will be given a Terms of Reference

by a client, a written Terms of Reference and you would respond to a written Terms of Reference with a proposal. In this instance, you know, that first meeting was taken by me as an indication of what their Terms of Reference of what kind of Terms of Reference they are giving and would I say that they it was, you know, look, there are three, four areas that we need assistance with, we need technical assistance. We have this documentation and this is what it would entail." And I said, look, send on the documentation and we'll see what's involved in the assignment.

Q. No, I understand that. I mean, the letter which you were sent on the 13th December incorporated, as you say, a huge number of documents?

A. Yeah.

Q. But just to move away from just to sort of finally deal with the November stuff. Had you been involved with any of the other competitors?

A. No.

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IARTY TRIBUNAL - DAY 352

Q. Or in a review of the competition on behalf of anyone else?

A. Of which competition?

Q. The GSM?

A. No.

Q. And you weren't familiar with anyone on the Tribunal legal team?

A. No, I had never met anybody on the Tribunal legal team in

my life before the phone call I had from Mr. Healy.

Q. Now, going to the Tab 3, which is where the letter is at.

One other question: Throughout the early part of this in relation to your dealings with the Tribunal, they all seem to have been through Mr. Healy. Was there a reason for that?

A. No. I mean, I got I mean, he was the point of initial contact. Well, who sent the it was

Q. John Davis sent the letter, yeah, so I would have expected you to go back to him or to have the communication through him.

A. Well, which communication?

Q. Any communication.

A. I think the only communication that we had was a response to this by way of my proposal and then what happened, and then there was the meeting in early February, which I think was to discuss the proposal.

Q. You also send the bills to Mr. Healy, the initial bills?

A. Yeah. Well, he was the point of contact.

Q. I see. Now, the document, the briefing document which is attached, in the first paragraph of the first page, it's the analysis. It sets out really, in a sense, part of what you were to be doing: "The Tribunal has been examining in le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

detail the evaluation process that led to the award of the second GSM in 1996. The Tribunal now requests an opinion

in respect of certain issues that have arisen during this examination. The purpose of this note is to give an overview of the evaluation process to explain the context and the significance of the documentation supplied to assist in the preparation of the opinion and to identify the specific issues that it is hoped the opinion will examine."

So, in a sense, what may have happened at the first meeting in November is, in fact, more definitively put in this document and that first paragraph; isn't that right?

A. Yeah.

Q. And in particular, the next paragraph then talks about:

"In general terms, the Tribunal is particularly interested in the 'Financial' element in the evaluation process, i.e. the manner in which the financial key figures and, in particular, solvency, IRR and financial strength were calculated, assessed and ultimately marked by the evaluators. While the Tribunal does not require a general opinion in relation to the evaluation process as a whole, it is hoped that this note will identify specific inconsistencies, anomalies or other queries which have been identified during the Tribunal's examination, and in respect of which the Tribunal now seeks the benefit of economic expertise."

And that's referring to the financial matters that you spoke about and which feature heavily throughout your  
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documentation?

A. Mm-hmm.

Q. In a sense, what appears to you appear to have been asked really here was to carry out an evaluation of the entire process?

A. Well, they were very clear that that's what they didn't want. You know, as I say

Q. Why do you say that, Dr. Bacon?

A. Because they remarked at some of the subsequent meetings, I can't remember meeting or meetings, that, look, you know, the report we want is not a reevaluation of the evaluation.

I think it probably arose in the context, and if I am not mistaken, the remarks may have been made by John Coughlan, that, you know, time was a problem for them. They wanted material in the course of February. So there was an issue of timescale and when we would be able to supply material.

And it was in that context that I can recall that, you know, the sentiment of the client was: Look, can you get us the material on the areas that we are interested in? We don't want a reevaluation of the evaluation.

Q. Well, we'll tease that out a wee bit because in fact, when you read I understand what you are saying in relation to possible following meetings, and I am also conscious that Mr. Coughlan and the Chairman have said in different parts of their openings and rulings that you hadn't been asked for what they effectively identify as an audit, but in

actual fact, when you read this document, it would appear that the overall impression is that that is, in fact, what you were being asked for at this time. Now, it may have subsequently changed. But certainly from this document, it is Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

is hard to see that it was not a full analysis, including looking at the final scorings and seeing if they were correct

A. No, it was looking at I'll repeat myself, I shouldn't have to, but, you know, it was clear from day one that there were four areas that they wanted assistance with: The quantitative, qualitative methodology; the scoring system, IRR; and bankability.

Q. I understand that. In relation to the time element that you talk about on the costs; were you conscious or was it made clear to you at that time that there were witnesses who were going through who were being asked questions about issues arising from the matters that they wanted to discuss?

A. Yeah.

Q. And clearly, some of the work that you were being asked to do was to facilitate that examination?

A. Well, they had decided on, you know, we had mutually decided on what the areas were going to be, and I have indicated those areas to you. What they did then was I mean, the question arose; how can we get the material? You

know, as you say, the work of the Tribunal was ongoing and the assistance they required was at that time, and we gave them two parts of the draft report, as the draft was evolving in the course of the month of February.

Q. I think they went through Kevin Hannigan?

A. They did. They went directly from Kevin to the Tribunal.

Q. And would it surprise you to know that they are no longer available?

A. No, because what he would have been well, what he would be Court Reporters Ltd.

PARTY TRIBUNAL - DAY 352

have been submitting was his draft, which came then to me for my input into the draft about the 11th March.

Q. Well, that may be right, I am not sure, but and we will look at it when we come to those letters, but the when I say they are no longer available, I mean that the Tribunal no longer appears to have them, which is a surprise.

A. You know, I am not the keeper of their I mean, I don't have them either.

Q. Just picking it up while it's there, would Mr. Hannigan have them?

A. Well, I asked him when I looked I telephoned him this morning when I looked through your documents and asked him were they separate documents and what they were, they were parts of the draft report that he printed off and sent to me. So, you know, it was

Q. That he sent to the Tribunal at the same time?

A. Yeah.

Q. No, because we were trying to contact him to see if he had copies of them, Mr. Bacon, but we don't know where he is?

A. You what?

Q. We don't know where he is.

A. Well, I do.

Q. Would you be able to help me with where he is?

A. Absolutely, there is no problem with that.

Q. Great. Just going on then, I think I want to do this because I think it's relevant to some of the issues. On page 3 of that document, in the second paragraph, we set out they set out the significance, the section dealing with the financial key figures and the quantitative analysis: "The indicators chosen are solvency, IRR, and le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

the method of scoring in respect to both are set out:

Solvency is to be calculated by reference to average solvency over years 2, 3, 4 and 5 and the optimum IRR value is stated to be 11. no explanation as to why an IRR of 11 was chosen as the optimum value. It will be seen, however, from the final evaluation report which will be seen later, that a medium IRR was preferred to a high IRR as the latter might suggest a failure to translate. On the other hand, the IRR should not be below the general interest rate."

And it's clear that for a long time the IRR was featuring very highly, and ultimately was dropped by the Tribunal as



something that needed to be dealt with, because it appeared to be fortuitously changed, which is the word they use, quite what that meant I wasn't sure, but it clearly was focusing highly at that stage

A. So, sorry, what was fortuitously changed?

Q. That's what I'm not I think something within the IRR was fortuitously changed. In other words, it didn't require inquiry by the Tribunal any further.

A. The point, I think, was covered in their letter to me in August of 2004, as to why they didn't want IRR.

Q. That's right, yeah, and it uses the word "fortuitously"?

A. Does it? Okay.

Q. Fortuitously in the sense I am I am using it in the sense, at least I am understanding it, Mr. Bacon, as being fortuitous in the sense that it was unlikely or probably that it couldn't have been done by an outside source, whatever the change was. I think that might be a way of putting it?

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IARTY TRIBUNAL - DAY 352

A. I am not sure if I understand what you are referring to.

My belief

Q. The IRR.

A. And its exclusion subsequently?

Q. Yeah.

A. I thought what they said in their letter of August was that, I am paraphrasing, but what they were saying was that

while we had been critical in the manner in which IRR had been used in the evaluation, it wasn't an area where there was intervention. They used the word "intervention".

Q. We'll come to it in time and we can sort it out and you can explain my confusion.

And then on page 4 in the third paragraph: "In relation to solvency, it would appear that all of the applicants scored low marks, and Esat Digifone scoring significantly lower than any of the others. The solvency marks have been awarded on the basis of the average over 2 to 5 set out in the quantitative evaluation section of the evaluation model."

And they're relating back to the documents which they were furnishing with that. And then they go back into the IRR, and halfway down that last paragraph, they say: "The issues relating to IRR have been examined, to some extent at least, by the Tribunal and are dealt with in more detail in two memoranda, and they are also being provided in a separate Book of Documents. From a chronological perspective, however, it seems that the decision to recalculate the IRR values was taken by AMI during the le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

conduct of the quantitative analysis."

I think that's probably better to leave that until we come to the letter of August.

Going on then to page 7, which is Document 8.

A. Document 8?

Q. Yeah.

A. Tab 8.

Q. No, no, it's page 7 of that analysis. What I'm doing, Dr. Bacon, is just drawing attention to certain paragraphs which may have a prominence later.

A. Right.

Q. And "This is a draft qualitative evaluation report of the dimension finance. Again, solvency, financing, profitability, sensitivity are chosen as the indicators for the evaluation. The document is interesting because it is the first attempt to conduct a qualitative evaluation of the finance dimension. The handwriting in the documentation seems to belong to Billy Riordan, the Department of Finance who was a member of the sub group to financial matters. He appears to take issue with the number of the scores awarded, particularly in relation to financial strength, where inter alia Mr. Riordan feels that Digifone should have received a C instead of an A."

And a lot of emphasis was put on the documents which were being furnished to you from material concerning Mr. Riordan and Mr. Buggy, as is clear from those paragraphs. And that is covered in the next paragraph, and also in Document 9.

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IARTY TRIBUNAL - DAY 352

Document 11, then, on page 8, is the second draft version of the quantitative evaluation prepared by AMI.

"The number of differences between this version and the version of the 30th August. Dimension 4 in the earlier report was not available from the applicants in this regard. Secondly, the weightings on page 7 of the report are readjusted to reflect the redistribution of the weighting in respect of roaming plans... The evaluator has again neglect to adjust the weightings as agreed to reflect the capping of the licence fee."

So, clearly what appears to have been going on here was that the Tribunal were setting out the documents, some views they had in relation to the documents, and seeing what kind of a proposal you would then come back with for the purposes of you analysing or critiquing or doing whatever was considered best at that stage, isn't that right?

A. Yeah.

Q. Going on, then, to page 10, which deals with Advent.

"The second paragraph is also interesting particularly as it relates to investigations into Advent and Communicorp. Advent were at the time of the submission of the tender at least financial backers of Esat Digifone, in whom they were to take up to a 5% stake, and also Communicorp, Denis O'Brien's company, who according to Digifone's bid documentation were to control 40%" it's unfortunately unpaginated. I paginated it myself. It's two pages on from Document 11. And Document 20 is referred to in the le Court Reporters Ltd.

second paragraph.

Now, just in relation to Advent, Dr. Bacon, can I show you a document, and I'm not sure whether you have ever seen it before in relation to Advent, which is a document which the Tribunal has. I am not sure what its thingumabob is. It's M20, I think it is. I am not sure if you have seen this before, I have a copy, but could I ask you to just have a quick look at it.

(Document handed to witness.)

A. Do you want me to comment on whether I have seen this before or not?

Q. Yes, in the first instance.

A. No.

Q. In relation to Advent, you didn't get any, or did you get any documents in relation to Advent, other than what is referred to there?

A. Sorry, remind me again, what's Advent?

Q. Advent was one of the financiers behind Communicorp.

A. No.

Q. And were lending, or giving 30 million, making a commitment to give 30 million to Communicorp, as set out there in the first page.

A. Well, if it was included in that bundle, we received it.

Q. You would have received it?

A. Yeah.

Q. But you don't think you did?

A. No, I don't.

Q. You see, in relation to the financing, Advent weren't asked for evidence, as far as I know, and this document is a  
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IARTY TRIBUNAL - DAY 352

relevant document in relation to consideration as to whether Mr. O'Brien had the funds or not, and seems to indicate that he did have the funds, and clearly may not be an issue of relevance to the Tribunal, because they haven't sought information from Advent, but you haven't seen it anyway?

A. No.

Q. Just going to the bottom of that page, Dr. Bacon, the last paragraph: "The Tribunal lacking any expertise in economics has not been in a position to test these figures, or indeed, any other figures in spreadsheets in terms of their accuracy. Further, the Tribunal does not understand how the IRR was calculated. However, a number of observations can be made: Firstly, it seems to the Tribunal that the only spreadsheet in which there is a difference between item 104, as submitted by the applicants themselves, and the recalculated item 1040, is that relating to Irish Mobicall. All the other spreadsheets appear to be identical in respect of both sets of figures for item 104.

"Secondly, the only spreadsheet in which there is a difference between the submitted Item 73 and the

recalculated Item 73 is Irish Cellular. It seems that the recalculated Item 72 is different from that submitted by Irish Cellular. This has a knock-on effect on Item 73.

All the other spreadsheets show no differences between the submitted values under Items 70 to 73 in the recalculated values.

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IARTY TRIBUNAL - DAY 352

"This begs the question why it was felt so necessary to recalculate all the IRR values, if only two applicant's figures appear to be mistaken."

There are a couple of things there. First of all, accepting that first sentence for what it is, "The Tribunal, lacking any expertise in economics, has not been in a position to test these figures, or indeed any other figures in the spreadsheets in terms of their accuracy and doesn't understand how the IRR was calculated." It's abundantly clear that without your involvement as consultant or analyst, the Tribunal would not have been able to move forward in relation to those issues, assuming those issues were within its Terms of Reference, isn't that right?

A. Sorry, that they wouldn't have been able to move forward?

Q. Yes.

A. I doubt if they would.

Q. And I mean, that, in essence, is one of the reasons why you would bring in a consultant?

A. Absolutely.

Q. in relation to economics, to help you and advise you in relation to complicated and difficult matters.

Going on then to page 12, and on that page Mr. Coughlan, Document 19 is referred to, but the paragraph I just want to draw your attention to, Dr. Bacon, is the second paragraph and the last sentence again, it is to do with the IRR, but it says: "Again, the Tribunal has been unable to draw any conclusions due to a lack of understanding of how the Court Reporters Ltd.

THE IRR TRIBUNAL - DAY 352

the IRR is actually calculated." And again, it's simply reiterating a not unsurprising view, that if you are going into these areas, that one of the people that you would anticipate that you might have to engage would be a person familiar with economics, which is what they were doing in your case.

Now, the bottom of the page then brings us to Document 19 and the qualitative analysis of the financial dimension.

"A number of key changes have been made in this version; firstly, sensitivity has been replaced as an indicator of efficiency which was an indicator that Billy Riordan had argued should be included. It is interesting, however, that Mr. Riordan's handwriting on the copy of the earlier report suggests that he felt efficiency should be used as an additional indicator. As such, it is not entirely clear why sensitivity was dropped, although your attention is



drawn to the first page of document 8 under the heading of 'Sensitivity' towards the bottom of the page the following sub indicators."

Now, again what is happening here is that they are looking at the documents in their own way, and they are saying to you, as the person who has some knowledge of these things, this appears to us to be what's going on, can you help me in relation to this?

A. That's correct.

Q. Going on, then, to page 14, and Document 22D is mentioned on that page. The second paragraph is: "The Tribunal is particularly interested in these sets of notes." And the le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

notes they are referring to are notes of meetings referred to in the previous paragraph in October '95. "It seems that both men have agreed, at least with each other, that a number of scores" I think this is referring to Billy Riordan and Donal Buggy again "Both men have agreed, at least with each other that a number of the scores awarded in the finance section of the report should be changed.

Changes on both sets of notes tally in this regard, whereas Mr. Buggy had crossed out the existing score and written above it the suggested score. Mr. Riordan has written a suggested score and placed the existing score above it in brackets. Further, although the edge of the sheet is cut off, the Tribunal can confirm that the letters the

right-hand column of Riordan's notes are the same as in Buggy's notes. The two men seem to agree, inter alia, that Esat Digifone's scores for financial strength should be reduced from a B grade to a C grade. This is consistent with Riordan's handwritten note on the draft qualitative evaluation as far back as the 13th August, 1995. In the written notes under the table, Mr. Buggy states that Telenor and Communicorp C from B." And they go on. So, again, they are bringing a matter for your attention from documents of Mr. Buggy's and Mr. Riordan's. Now, in actual fact, I am not sure you are aware or not, but we will see later, that in your draft report you refer to Mr. Buggy and Mr. Riordan, and what I found curious, and I just want to ask you now at this stage was, that you obviously didn't realise that at the time that you wrote the report and referred to Mr. Buggy and Mr. Riordan, that le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

they had not in fact at that time given evidence. They gave evidence subsequent to that.

A. I didn't know what was going on in the Tribunal, you know.

Q. I mean, you were actually well, it's clear that you were at a later stage furnished with certain people's evidence?

A. In the letter of August 2004, I mean there were several references to evidence that had arisen.

Q. But that's why we'll see, Dr. Bacon, that in actual fact what you were doing initially and up to the draft of 2003,

if you take this document, what you were doing was advising and educating and analysing.

A. Mm-hmm.

Q. Isn't that right?

A. That's correct.

Q. Whereas in 2005 what you were doing was you were dealing with specific queries which now arose as a result of work which had been done, evidence which had been given, and asked to comment on those as a person who was going to be giving evidence?

A. Yeah. I mean, how I saw it at the time was when the Tribunal came back in August 2004, at that stage they had had the benefit of the draft report, whatever deliberations were occurring in the Tribunal, and what they wanted was well, how it was represented to me was that what they wanted was a report that would use all the material that was in the first report but was in the form of a question and answer.

Q. Well, we'll come

A. And an interrogatory.

Q. I understand what you are saying. We'll come to that in the Court Reporters Ltd.

PARTY TRIBUNAL - DAY 352

the end. I actually think there is a difference between the two stages, and I may be wrong, but I want to try and see it from the way it is at the moment. At the moment it is educate, analyse and help us in relation to these

matters because we don't fully understand them because we are not economic experts?

A. Yeah.

Q. And that's what's going on at this stage. They are asking basic questions to explain the IRR, or whatever it was. At the same time, they were saying, we've looked at these documents, we think that this requires looking at or commenting on, can you help us in relation to it. And that's really why I am drawing your attention to these paragraphs, because I don't think it's quite as simple as you were first suggesting?

A. Well, I can only give you an honest answer as to how I perceived it.

Q. No, I appreciate that. The last paragraph on page 14: "The Tribunal is particularly interested in these documents which seem to evidence serious doubts on the part of key members of the financial sub-group in respect of the financial strength of Esat Digifone, right up to a matter of days before the publication of the final report."

You see, the only thing that one would comment on at this stage in relation to that is the fact that Buggy and Riordan hadn't given evidence at this stage, the fact that the Advent documentation wasn't or hadn't been given to you, or that you weren't even aware of the existence of Advent I think at this stage, were you?

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IARTY TRIBUNAL - DAY 352

A. No.

Q. No. It, in a sense

A. What I had was the box of documents that accompanied the letter you are

Q. I understand. But where I was coming from was your report, your draft report is only as good as the documents which you were given?

A. Absolutely.

Q. And therefore, it is limited by that; if you are not given all the documents or all of the corrections that may have arisen during the course of evidence?

A. Well, it is certainly a matter of fact that the report, the report was based entirely on the set of documents we were given. That's correct.

Q. Whereas the second draft report the second report, the 2005, whatever it was based on, had the additional transcripts from certain people at least as an addition, whatever else we say it might have been missing?

A. That's absolutely true. And that was clear to me as well.

Q. So that even that report was, again, limited by the information which was being made available to you?

A. Well, you can only draw a report on the information that you have been given.

Q. I agree with that. Just going, then, to page 15, Document 24A and B, that third paragraph:

"The final evaluation report dated the 25th of October and the appendices to the report. While you may wish to look,

the whole report as an overview, the Tribunal is particularly interested for the purposes of this briefing note in the following sections: The Executive Summary, le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

Sections 1 to 3, Section 4.4, Financial Aspects, and section 5.7. Noted: In reading the report, a number of tables are partially illegible. While this is so, a retyped version of the table is included on the following page. The Tribunal apologises."

Now, Appendix 2 then is an overview of the evaluation process, albeit from AMI's perspective.

Appendix 3 is a verbatim report.

So that here you are being asked to deal with and look at the executive summary, particular sections and the appendices which are attached thereto.

And on the next page, in the second paragraph, they say:

"That Appendix 4 sets out the steps taken in attempting to internally verify the information supplied by the applicants in the Mandatory Tables. Appendix 10 is of particular significance, in that it gives an analysis of the financial risks behind both Applicants A3 and A5. It sets out the weakness behind Communicorp and its lack of equity. It is of particular interest in the context of the awarding of a B grade to Esat Digifone under the indicator 'Financial strength of the consortium members'."

Now, that, in a sense, speaks for itself, that the Tribunal

were focusing in on a weakness which they perceived existed because of lack of equity, and it was interest in the context of the awarding of a B grade to Esat Digifone under the Court Reporters Ltd.

JUDICIAL TRIBUNAL - DAY 352

the indicator, but that was all that you were being given at that time to comment on that.

Is it unfair to suggest, Dr. Bacon, that in fact you were being steered into a particular situation by reason of the documents that you were being given?

A. I honestly don't believe that was the case, yeah. I have no I mean, I have been around long enough to know if I am being led by the nose in a direction, and in 15 years, acting as an independent economic consultant, I have made my reputation on independence. I am an economic consultant, I am not a lobbyist, so... and I honestly believe that my reputation around town would be that for anybody what wants to lead somebody in a direction, I don't think they would be phoning me.

Q. You do have a reputation of an independent person, Dr. Bacon. But forgive me, in the sense of asking that question, it's asked simply because, in my simple way when I read these things and look at them, I have a sense of these are the things that we want you to focus on. These are the weaknesses which we have identified and we think are real and can you comment on them.

MR. COUGHLAN: I think My Friend should be more accurate.

It's Appendix 10 from the draft evaluation report, that is what is being identified. It was Mr. Billy Riordan identifying them.

MR. MCGONIGAL: I missed that interruption, I am afraid.

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IARTY TRIBUNAL - DAY 352

MR. COUGHLAN: Sorry, perhaps I should what was being put here, My Friend should be more accurate, I suggest, when he is putting this to Mr. Bacon, was a portion of the draft evaluation report and weaknesses which had been identified by a member of the Evaluation Team, Mr. Billy Riordan. That was what was being put.

Q. MR. MCGONIGAL: I think that speaks from the document, Dr. Bacon.

MR. COUGHLAN: That is not what Mr. McGonigal said. He said it was the Tribunal identified these as being the weaknesses.

Q. MR. MCGONIGAL: Well, if there is a difference to what I have said and what is there, Dr. Bacon, you would be able to pick it up anyway?

A. I am not sure of the point. What's the point?

Q. I think I'll come to it later

A. Fair enough.

Q. in case we have another row.

MR. COUGHLAN: Because the point which was being made by My Friend was that the Tribunal was leading Dr. Bacon to a position. This has to be this is very serious and very



clear. What was being identified to Dr. Bacon was the view expressed by a member of the Evaluation Team. That is the point.

Q. MR. MCGONIGAL: Right. Well, I better deal with it now, the Court Reporters Ltd.

PARTY TRIBUNAL - DAY 352

Dr. Bacon. When one reads this analysis document

A. Which document are you talking about?

Q. The whole document at this stage.

A. This document that you are taking us through?

Q. Yes, the analysis?

A. The briefing document.

Q. The briefing document and the sections that I have gone through, written by people who were, on the one hand, seeking to be educated because they didn't understand certain portions of it, seeking to have it analysed and had done some work on it. They appear to have, in the first instance, steered you towards four particular sections in the amount of material that we have gone through, and steered you towards weaknesses which they perceived as weaknesses from the documentation which they had read, and asking you either to agree or support or analyse it further. Is that not right?

A. I don't think so.

Q. I see. What way would you put it?

A. That there were four issues, and I have rehearsed those issues, I won't do it again, where they wanted assistance.

They provided us with this bundle of material, and they gave us, if you like, their thinking in relation to those matters. We went away on the basis of the documentation that were provided to us and we drew our own judgement.

Q. You see, forgive me, but if you had a competition and you wanted someone as an expert of economics to look at it and to criticise it and to analyse it for you who didn't know enough about it, the objective way of trying to achieve that would have been simply to give the documentation to the Court Reporters Ltd.

PARTEY TRIBUNAL - DAY 352

the expert and ask him to put it together and comment on it and steer the Tribunal towards what he saw as the weaknesses appearing in the material which he had allied to the reports which may have been prepared by the economist. And that didn't happen in this case.

A. That's true. I think if you'd have gone that route, we might have been a bit like Moses in the desert. I mean, I think what they were doing was indicating the direction that their own thinking was going in.

Q. Do you see

A. So, in a sense, what we were doing was looking on the basis of the documentation that was provided and say well, you know, is this

Q. Yes, Dr. Bacon, I understand that. But it's not the Tribunal who were the subject matter of the public inquiry, it's my client, it's Sigma, it's Irish Mobicall, they were

the persons who had taken part in the competition. They were the persons who were going to be the persons who suffered by any critical analysis of this competition. So that if you wanted to have an expert on economics criticise the competition and the reports arising from the competition, the very least that the competitors surely were entitled to was an objective, unsteered selection of or collection of documents and an objective overview, thereby steering the Tribunal rather than the other way round?

A. Well, I disagree with your point that we were being steered.

Q. Well, "steered" may be too strong a word on one level, it's the perfect word on another level, Dr. Bacon, because it is the Court Reporters Ltd.

PARTEY TRIBUNAL - DAY 352

indicates, rather than you being asked for an independent objective report based on all of the documentation, you were being furnished with the documentation and selected comments in relation to that, albeit based on the documentation and asked to confirm, deny or whatever in relation to that, you were not being asked for an overview in relation to what you saw the competition and the way it was being run?

A. Yeah, I mean, you are correct that they didn't want a reevaluation of the evaluation.

CHAIRMAN: Sorry, you have said a few moments ago, you have

been around long enough to know when you are being steered by the nose.

A. Absolutely.

CHAIRMAN: And this wasn't such a case. Do you stand over that?

A. Absolutely.

MR. COUGHLAN: Can I also make the point that in litigation which has taken place between Mr. O'Brien and the Tribunal, there would be criticism made of the Tribunal if the Tribunal had abdicated its responsibility to carry out the inquiry and conferred that responsibility on Dr. Bacon to review the whole matter.

CHAIRMAN: Yes.

Q. MR. MCGONIGAL: So you agree with me, Dr. Bacon. Anyway, le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

the next bit

A. On what point?

Q. The one that I asked you a moment ago about and you agreed with.

CHAIRMAN: We will review the evidence in due course.

Q. MR. MCGONIGAL: We don't need to rehash it, Dr. Bacon, unless you want to or you wish to add to it?

A. Move on.

CHAIRMAN: Let's move on.

Q. MR. MCGONIGAL: What I want to come to then in this is the issues, because I suppose whatever adjective you use, these

are effectively the questions that you were being asked to deal with.

A. Yeah, go.

Q. "It is hoped in this section to identify specific issues that might be covered in your opinion. The previous section has highlighted certain issues that have come to the attention of the Tribunal during its investigations. The Tribunal has not, however, in all cases been able to draw any conclusions because of a lack of detailed expertise. It is hoped that if some of these areas are identified, you might be able to assist the Tribunal by offering a more detailed analysis."

So, that, in a sense, speaks for itself; that as of this date, which is December 2002, that not only were the le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

Tribunal not able to understand certain aspects of the competition, as we referred to earlier, but they hadn't been able to draw any conclusions in relation to other aspects because of a lack of detailed expertise, and that speaks for itself. And they were asking you effectively to help them fill in those gaps and to analyse particularly the areas which they didn't understand or whatever. Isn't that right?

A. That's correct.

Q. So I won't go back to it. "In the quantitative analysis, the financial indicators chosen by AMI were

solvency and IRR. Were these appropriate indicators to cover the finance dimension in a quantitative evaluation?"

Now, this sounds awfully like the beginning of an audit,

Dr. Bacon, am I wrong in that?

A. Absolutely. Well

Q. I see.

A. Well, look, "audit" is used in so many different ways, but you are talking about finance here. It's certainly not a financial audit.

Q. No.

A. Okay, we are clear on that.

Q. But it is an audit of the competition.

A. When you say "audit," I mean I think what it is I mean, how I interpret it is, it was a question about the relevance, appropriateness and comprehensiveness of the indicators that they were looking at under the headings that they were looking at.

Q. All I am saying, Dr. Bacon, is, it sounds awfully like an audit, and if it isn't an audit, it's not very far from the Court Reporters Ltd.

ARTY TRIBUNAL - DAY 352

being an audit, depending on what you mean by "audit"?

A. I agree with that.

Q. And I am using a word which the Tribunal has used to say there wasn't an audit carried out. So maybe I am misunderstanding what they mean by "audit".

A. Well, I mean, as I said earlier at some point, I mean, they

did emphasise that they did not want a reevaluation of the evaluation. That point was made very clear.

Q. When you say that

A. They didn't want us to go back, in my opinion, they didn't want us to go back and redo, if you like, have a rerun of the competition.

Q. I understand that. And correct me if I am wrong, I think I understand what you are saying by that, and what I understand you to say by that is that effectively they weren't asking you to go back over the figures to see if the figures were right, is that right?

A. Yes, although in certain cases we did, for example on IRR.

Q. You see, the question really, when you look at what you were asked to do and what you may have done, the question that you'd sort of say to yourself is: What did he not do?

A. What did who not do?

Q. You not do that you would have done if you had been asked to do an audit of the competition?

A. Well, an audit of the competition; I mean, that competition had a lot of resources, a lot of time. You know, there were the issues of quantitative, qualitative evaluation, you know, it was a major exercise. The exercise that we were engaged in was a limited technical exercise looking at four areas.

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IARTY TRIBUNAL - DAY 352

Q. You see, can I put it to you another way, what the Chairman

said at 6.7 of his ruling on the 29th September, 2005, was:

"I understand Mr. Bacon to be an expert in this area. Like Mr. Andersen, he is an economist by training with, like Mr. Andersen, also a background of in-Government service. While he has not conducted a competition of the GSM2 type, a competition to identify a first private enterprise competitor to a semi-State organisation in a particular communications area, he has experience of competition processes, including a number of Telecom IT area. He has not been asked to conduct an audit of the GSM2 process, nor has he been requested to examine the evaluation with a view to concluding whether the correct result was reached by the evaluators.

A. That's correct.

Q. "He has, however, examined aspects of the evaluation methodology and the way in which "

MR. COUGHLAN: Sorry, I beg your pardon, the response by Mr. Bacon to that posed by Mr. McGonigal is "That is right."

MR. MCGONIGAL: I am sorry, I didn't hear you, Dr. Bacon.

A. I said "that's correct."

Q. MR. MCGONIGAL: "He has, however, examined aspects of the examination methodology and the way in which that methodology was applied. He has been directed to and has agreed to provide responses to a number of questions crafted along the lines of questioning ... officials by  
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the PTGSM. It is important that his evidence, if adduced, should be subject to scrutiny by counsel for those persons likely to be affected by any conclusion which will be critical of the process and in particular by counsel for the Department."

Now, are you saying that you weren't requested to examine the evaluation with a view to concluding whether the correct result was reached by the evaluators?

A. Yes.

Q. But surely when you were asked to, as you were asked, to attempt to recalculate the final scores for A3 and A5 in the final reports using the original weightings as agreed by the Project Group, the figures on page 17 of Document A: "Please recalculate the final scores for A3 and A5 again using the original agreed weightings, but this time assuming that the 15-year IRR submitted by each have been used. Please recalculate the final scores for A3 and A5, again using the original agreed weightings and the 10-year IRR grades as they appear in the final report, but this time on the assumption. Finally, please recalculate" surely those are recalculating, the things I read out?

A. Well, I mean, what they are, are going over those particular tables in the evaluation. It's not undertaking

Q. What's the difference, Dr. Bacon?

A. In fact, it's fundamental. And it seems to me to be, you

know, if you ask me, you haven't, but I am going to give you the answer to my own question. What was the fundamental conclusion of the consultants and what was the le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

fundamental advice that we came up with, having looked at the areas that we looked at and on the basis of the information that was supplied to us? And that was that that evaluation didn't properly understand the difference between quantitative and qualitative evaluation. Now, if you believe that going back and recalculating a number of tables is rehearsing and reevaluating an evaluation, then you are equally mistaken. It's not.

Q. I think what you have spoken about there, Dr. Bacon, may be a slightly different issue. I am simply asking you in relation to the questions that I read out to you a moment ago, where you appear to have been were being asked to recalculate final scores in different ways, that that is, in effect, to examine the evaluation with a view to concluding whether the correct result was reached by the evaluators?

A. No

Q. Surely those two things are the same thing?

A. No, they are not, and I think the difference is this: If you are reevaluating it, you would be trying to determine how the scores came about. We were not trying to determine how the scores came about. We were taking the scores that

had come about. We were taking the material that was there

Q. You were taking the scores as presented in the way in which they were presented in those three different questions?

A. Yes.

Q. And you were calculating them to see that they were correct. What the Chairman said was: "Nor has he been requested to conduct an audit, nor has he been requested to le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

examine the evaluation with a view to concluding whether the correct result was arrived at or not."

Now, assuming for the sake of argument that you had come back and said that they weren't properly calculated, that they were wrong, then I assume that that would have shown a recalculation of the marks?

A. Yeah, a recalculation, but a recalculation of the marks is not a reevaluation of the evaluation. I mean, am I misunderstanding your question?

Q. No, I think one of us may be misunderstanding something. But it seems to me that the questions which were asked at the end of this document in relation to those matters, including other questions, were in fact exactly what the Chairman says you weren't being asked to do?

A. Sorry, I don't know what the Chairman said I wasn't being asked to do.

Q. It's in Tab 37, if you'd like to turn to it.

CHAIRMAN: Well, are we back to the ruling that Dr. Bacon wasn't being asked to conduct an audit of the process?

MR. McGONIGAL: Yes.

CHAIRMAN: He has already answered that. He said that's correct. Let's press on, Mr. McGonigal, if you please.

Q. MR. McGONIGAL: I actually think that the issue that we are talking about is quite useful. You see, if we approach it from another question which you were asked on page 18, well le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

in fact what I'm going to do, Dr. Bacon, is I just want to go through, leading up to those three questions in relation to the recalculation of the weights, because what it seems to me to be is a complete contradiction of what the Chairman said in his ruling. Nothing more or less. And that the issues as defined in the briefing document: "Is the quantitative analysis, the financial indicators chosen by AMI for solvency, were these appropriate indicators to cover the finance dimension in a quantitative evaluation? "Should additional indicators also have been included in the finance dimension? In this regard, the Tribunal notes that the indicators that were ultimately used in the qualitative evaluation of the finance dimension are much more wide-ranging and all appear to be readily quantifiable, with the possible exception of financial strength of the consortia members. Does the fact that only IRR and solvency were chosen as indicators mean that there

was no analysis of financing, efficiency or sensitivity built into the finance dimension of the quantitative report?

Next page, 17: "Does the method of assessment and scoring of the solvency indicator as set out in the evaluation model provide an accurate comparative marking system? In considering this, you should have regard to the fact that solvency in the quantitative evaluation was only measured by reference to years 2 to 5 of the business plans, whereas in the qualitative evaluation the total period of the applicants' business plans were considered."

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IARTY TRIBUNAL - DAY 352

"The finance dimension in the qualitative evaluation:

"In examination of this portion of the process, you are referred to Documents 7, 8, 9, 19, 22 and 24. By looking at these documents, it is to see the evolution of the qualitative evaluation of the finance dimension. The following inquiries arise:

"Are the indicators ultimately chosen by the evaluators appropriate and accurate to obtain the best evaluation of the applicants? In this regard, you should have regard to the various changes that were made to the indicators during the evaluation process. Also discuss whether the sub-indicators accurately do the job they are intended to.

Are the sub-indicators chosen to reflect efficiency actually good indicators of efficiency when considered

together? Could more appropriate indicators have been used? Are all aspects of the finance dimension adequately covered in the qualitative evaluation?

"Taken as a whole, does the table relating to financial key figures in the final report give a fair overall view? In this regard, it occurs to the Tribunal that by reason of there only being one indicator for financing as opposed to three indicators for efficiency, the relative importance of efficiency compared with financing might be artificially inflated. In other words, does the table give an accurate result despite this inherent weighting? Would the relative importance of the different sub-areas have justified an  
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IARTY TRIBUNAL - DAY 352

internal weighting system for the table of financial key figures?

"Is the assessment of solvency in the qualitative evaluation accurate? In other words, is the approach taken in the qualitative evaluation, whereby the entire business plan is looked at, preferable to the approach taken in the quantitative approach, where only years 2 to 5 are looked at?

"Are the methods of scoring all the sub-indicators, as described in the narratives to the early drafts and in the final reports, accurate methods that would provide accurate marks? Could more accurate methods of assessment have been used?

"The mandatory tables:

"Was the correct information sought in the mandatory tables to allow a proper evaluation, both quantitative and qualitative of the applicants?

"From a general overview of the tables provided, is it possible to discern whether the various errors and inaccuracies complained of by the evaluators did, in fact, exist in the tables as provided by the applicants.

"Is it possible to state whether the recalculation of various items has been carried out correctly? What comments can be made in respect of the specific

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IARTY TRIBUNAL - DAY 352

inaccuracies in certain recalculations highlighted above in respect of recalculated IRR sensitivity, Table 32.

"The withering of the quantitative evaluation.

"The withering is described by AMI in Appendix 2 to the final evaluation report. Your attention is drawn, in particular, to page 5 of the appendix, where the reasons for the failure of the quantitative evaluation are set out.

"Is this explanation credible in your view, having regard to the information available to the evaluators in the mandatory tables and having regard to the other sections of the report dealing with the various issues referred to?

"It is clear that both versions of the quantitative evaluation give a different ranking of the top three applicants than the final report. Does this undermine at

all the veracity of the findings in the final report? Why was there such a discrepancy between the result of the quantitative evaluation and the result of the qualitative evaluation? Does this imply that the indicators chosen for the quantitative evaluation were incorrect or did not give an accurate reflection? Was the quantitative evaluation as unworkable as AMI ultimately stated? Can the evaluation process continue after the collapse of the quantitative element?

"More specifically, was there anything in the mandatory tables supplied by either Persona or Esat Digifone that the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

meant that their applications could not have been accurately compared quantitatively?

"Financial strength of Communicorp:

"You should have particular regard to Documents 8, 19, 22, 23 and 24 in their markings analysis of the discussion in respect of the issue of Communicorp's financial strength.

Particular regard should be had to page 44 in the final report and Appendix 10 thereto.

"Please provide an overview of the interplay between the various financial indicators, outlining which ones would reflect the financial strength of a particular party. In particular, please explain how Esat Digifone could be awarded a D for solvency but a B for financial strength. Similarly, how could a company with apparently severe



equity difficulties, in respect of one consortium member at least, be awarded A for liquidity which according to Documents 8 and 19 is an indicator of financing? Were the means of calculating these various indicators accurately or properly conceived? How, in general terms, could Esat Digifone have received an overall B grade for financial key figures given its inherent financial weakness?

"Were the concerns repeatedly expressed by, amongst others, Billy Riordan and Donal Buggy justified? What grade should Esat Digifone have been awarded for financial strength having regard to all the circumstances, including the manner in which the other applicants were graded?

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IARTY TRIBUNAL - DAY 352

"Please comment generally on the concept of bankability and the manner in which it was incorporated into the report.

"More specifically in this regard, is the statement in Document 23 and in the final report correct? Is it valid to say that the future availability of debt financing is sufficient to counterbalance a weakness in a consortium member's equity? What, in fact, are the real potential consequences of having a consortium member with a shortage of equity? In analysing this aspect, you might also make reference to the marketplace in terms of telecommunications as it existed in 1995, and whether or not corporate debt financiers would, in fact, have been willing to fund Communicorp's side of the project.

"The calculation and grading of IRR:

"The Tribunal has carried out some preliminary examinations in this area and two memoranda, together with attachments are provided in a separate folder. As such, it is not intended to delve any further into the background details or the discrepancies identified by the Tribunal. However, it is requested that you concentrated on the following issues:

"Please give a full general definition of IRR. Please give an outline of how IRR would be calculated, particularly by reference to this competition.

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IARTY TRIBUNAL - DAY 352

"IRR is held out in this competition as being an indicator of profitability. Is this accurate? Is the use of IRR in general terms as a financial indicator in this competition appropriate?

"Is the scoring of IRR appropriate, taking into account the purported objectives of the competition, to provide a GSM operator who would benefit to the market and the Irish public? In this regard, can you decipher how the optimum IRR value of 11% might have been decided? Is this an appropriate optimum value, having regard to the objects of the competition?

"Why were the initial 15-year IRR figures rejected by AMI?

What inaccuracies are there in the mandatory tables that preclude a comparative evaluation of the applications on

the basis of their submitted IRRs?

"Are the recalculations of IRR accurate? In this regard you should have particular regard to the variety of IRRs generated at different times in respect of Irish Mobicall set out in paragraph 2 at page 7.

"Having recalculated the IRRs, should the optimum IRR also have been recalculated to reflect the change? In this regard, having regard to the steady climb in the IRR of Irish Mobicall over the 15-year period, with the apparent leveling towards the end evidenced in Table 15, item 97 of the Document 14, should the optimum IRR have been adjusted downwards to reflect the realities of a business start-up? le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

Regard should also be had to the fact that every applicant's IRR went down when recalculated.

"Is there any reason why at the very least A3 and A5 could have been compared? Were there any inaccuracies in the original calculations?

"If possible, please recalculate the final results for both A3 and A5 based on the assumption that their 15-year IRR had been used and scored in accordance with the evaluation modern. In this regard, please ignore the inconsistencies in scoring identified in the memoranda and assume that 5 equals A, 4 B, 3 C, etc..

"In this regard your attention is drawn to 17 of the evaluation model and also to Table 16 and 17 in the final

report. Please also refer to Document 25, which is a normalisation of the weightings of the quantitative evaluation. This was required because the original agreed weightings added up to 103."

Then they set out: "The following assumptions can be made:

In Tables 16 and 17 of the final report a total weight of 30 is attributed to market development, financial key figures and experience of the applicants. In the quantitative evaluation, market penetration score 1 and market penetration score 2 are taken together equivalent to market development in the qualitative evaluation. Solvency and IRR are equivalent to financial key figures and number of network occurrences in the mobile field is equivalent to le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

experience of the applicant. It is clear that the weightings have shifted from the time of the agreement of the weightings in the original evaluation model. Without taking normalisation into account, market development has increased from a weighting of 7.5 to 10. Similarly, financial key figures has gone down in weighting from 15 to 10. The Tribunal is unable to work out the precise shift in the normalised weightings, as these are only applied to the credibility total as opposed to the individual subtotals. However, if possible."

And then: "Please attempt to recalculate the final scores for A3 and A5 in the final report using the original

weightings as agreed by the Project Group. The figures from page 17 using the marks as awarded in the final report.

"Please recalculate the final scores for A3 and A5, again using the original agreed weightings, but this time assuming that the 15-year IRRs as submitted by each had been used.

"Please recalculate the final scores for A3 and A5, again using the original agreed weightings and the 10-year IRR grades as they appear in the final report, but this time on the assumption that A5 only received a C grade for financial strength.

"Finally, please recalculate the final scores for A3 and A5 using the original agreed weightings and using both the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

assumptions, that the 15-year IRRs were used and that Esat Digifone received a C grade for financial strength."

Now, those are all of the issues which were identified by the Tribunal as being matters upon which they wanted you to report on, and I am simply saying to you that on the face of it, it is very difficult to say, having read out those questions, that that, in the first instance, was not an audit, and in the second instance, was not a recalculation of figures to see that the correct result was arrived at?

A. Well, I mean, I think on the point of an audit, you know, let's agree to differ. It wasn't an audit, you know, and

you know, in terms of what you read out, I mean what I can say is that in terms of what you read out, they are the matters that were addressed in the draft report, and call it what you will.

Q. Okay. Well, then it comes down to a definition of "audit" in reality. I am not going to argue it with you now, Dr. Bacon. I simply, I suppose, would note that you would bring it within the competency of a definition of audit?

A. As I see audit

Q. I am talking about financial matters?

A. Well, an audit is a very specific thing within the financial arena, you know.

Q. This seems to be very specific, what you were being asked here, no matter what way you look at it. I mean, the other alternative is the one which I put up earlier, which is the one that I might have anticipated would have happened, which would have been that you would have been independently given the books, documents, without comments  
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IARTY TRIBUNAL - DAY 352

and gone through them, doing an analysis or an audit or whatever was necessary to steer the Tribunal. That would have been

A. That would have been an audit. That would have been a reevaluation.

Q. That would have been what you would expect an independent professional to be asked to do, but that wasn't what you

were asked to do. You were asked to do the analysis within these terms, which effectively leaves no questions to be unanswered?

A. When you say "no questions to be unanswered"?

Q. Well, it's very difficult to think, without going through all of the documents, what questions have been left out if you were doing an audit.

A. Yeah, but I think look, I think there is a fundamental misunderstanding between us. I think if you were doing a reevaluation or an audit, to use your own word or that, you would be going back and trying to derive how the scores were determined, and we did not get into that.

Q. We agree that you were being asked to do a very detailed analysis?

A. Under those headings.

Q. Which included partially recalculating the scores to see how they shaped up?

A. That's correct.

CHAIRMAN: You may need a little sustenance after that marathon reading, Mr. McGonigal. It's just a minute or so before one o'clock. If it suits, Dr. Bacon, we will resume at two o'clock.

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IARTY TRIBUNAL - DAY 352

THE HEARING ADJOURNED FOR LUNCH

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IARTY TRIBUNAL - DAY 352

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF CROSS-EXAMINATION OF DR. PETER BACON BY

MR. McGONIGAL AS FOLLOWS:

Q. MR. McGONIGAL: Dr. Bacon, just a couple of matters before

I move onto the next document. First of all, can I just

clarify one thing in relation to the moment that you were

essentially engaged in November or December as you were

moving to the stage where documents were going to be sent

and you were going to try and do a document in return. I

just wondered to myself, did anyone or did you indicate

that for some reason or other, that you didn't want it

known that you were involved with the Tribunal?

A. No.

Q. Or was there any suggestion that it shouldn't be made

public that you were involved?

A. No, none. I would have been going on the presumption that

you were presenting a document into a public inquiry, guess

where it's going to finish up.

Q. One of the reasons I am just curious, you see, is because

on Day 161, which was the 11th December, '02, on page 21 of

that transcript, which is an opening by Mr. Coughlan, at

the bottom of the page at Number 30, he says: "I should

state at this stage, Sir, that to read, understand and

digest the evaluation report is not necessarily the easiest

thing in the world." And the Chairman answered "Amen" to

that.

Now, I said earlier to you that one of the things that was



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IARTY TRIBUNAL - DAY 352

of interest was that it seemed to me when you look at that statement from Mr. Coughlan and you look at some of the remarks in the document which I have opened up to you, it was clear, as night follows day, that the Tribunal needed somebody who was going to assist them in relation to helping them understand, read, digest and analyse any documents that they were going to deal with, and I still am puzzled as to why it wasn't announced as a formal thing, that, in fact, the Tribunal were taking steps by engaging a person who was competent in the field to assist them, and that seemed to be the first opportunity when this came about, and I am just wondering to myself whether, in fact, you had had any objection at that time or were you aware of any reason why you shouldn't be made aware that you were being engaged?

A. Except to say that at that particular time we hadn't agreed.

Q. I appreciate there hadn't been full agreement?

A. There hadn't been any agreement. I mean, it wasn't until it wasn't until I drafted, submitted and agreed the proposal, which was the end of January.

Q. No, I understand that. And I take that point, but I suppose the point I am really making is that by taking a step towards engaging you as a person involved in economics, they were effectively recognising that it was

necessary to have a person, whether it turned out to be you or someone else?

A. Yes.

Q. who would assist them. And whether you were aware of any reason why it shouldn't be made public at an early  
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IARTY TRIBUNAL - DAY 352

stage that they were engaging your services, and you are not aware of any?

A. No.

Q. As a matter of interest, in relation to the document that was furnished to you, I asked you earlier about the Terms of Reference. Did it ever occur to you or did you ever wonder why it was you weren't being asked questions referable to what might be the Terms of Reference, in a sense that you would be shown the Terms of Reference and asked to deal with them?

A. No, generally speaking, in public service contracts, you tend to have written terms of contracts. Outside of that you very often I very often have found myself in situations where a client wants assistance. Now, what exactly the assistance is that they require, they don't know and in a sense, if they did, they probably wouldn't need you. So, there was certainly nothing from there was nothing in any of the engagement between us that would have caused me to scratch my head and say this is a bit unusual or this is a bit odd. Nothing.

Q. Because it's abundantly clear, and I know it's repeating something I said this morning, but it's abundantly clear that in the document that was being presented to you, there was no suggestion or question being directed towards you or material being directed at you which was suggesting in any way that Michael Lowry had been involved good, bad or indifferent in what was going on?

A. No, I mean the engagement from my point of view had nothing to do with Michael Lowry or any other individual. It was in relation to, as I  
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IARTY TRIBUNAL - DAY 352

Q. The process?

A. the process. Aspects of the process.

Q. I beg your pardon, aspects of the process. And just apropos of that, and without wishing to revisit all of this morning, but just can I throw one question to you, because it was suggested to me, and I hope I don't upset you or anyone else. But in relation to the financial side of things which you were being asked to look at

A. Mm.

Q. would it be wrong to suggest that that was as near to an audit as you'll get?

A. You are back to the word "audit".

Q. I am, yeah.

A. No. You know, I think there was certain I mean, my judgement and conclusion when I read the material that you

rehearsed at length there before lunch was that I need a specialist finance guy on the team to look at that. And I got one and put him in. I didn't see it as an audit. I mean, I think an audit is something that I would expect to be undertaken by an accountant.

Q. No, I understand where you are coming from and I can probably understand your reluctance to look at the word "audit," and you would probably have, because you are an economist, a different idea of it, and I am simply looking at it as a word which was used by the Chairman and which I am looking at it as a lawyer, not an economist, and trying to understand the use of it.

A. Well, I would draw that distinction. But in addition, you know, I would say that "audit" implies comprehensive looking at every aspect from A to Z, and the engagement was the Court Reporters Ltd.

PARLIAMENTARY TRIBUNAL - DAY 352

not to do that. It was to look at four aspects of the process.

Q. Well, four aspects in the way in which it was set out in that document?

A. Yeah.

Q. Now, just moving on from that. Were you aware at that time, I am sure you were aware at that time, that the evidence was close to commencing or had actually commenced?

A. I became aware when we sat down at the meeting on the 10th or the 11th February, because it was then when we were

looking at I think that meeting was reviewing the written proposal that I had submitted on the 31st January, and what became clear at that point, and as I mentioned this morning, I think it was John Coughlan who said, look, when are we going to start receiving material, because, you know, we are working in real time?

Q. Just coming back to the point about announcing it to the public. I don't know if you are aware, but on Day 248, which was the 11/11/'03, which was a time that you had done a huge amount of work and produced the draft report.

Mr. O'Brien was giving evidence on that

A. The 11/11?

Q. 11th November, '03.

A. No, we were finished and done, weren't we

Q. No, I appreciate that. And it was, again it was

Mr. Coughlan asking questions of Mr. O'Brien:

"Question: But, I would just like to ask you one matter

before we do rise. And it really is, and you

are entitled to express your views,

Mr. O'Brien, in relation to matters, but you

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IARTY TRIBUNAL - DAY 352

expressed a view that it is difficult for

people from the traditional and conservative

professions to understand how these business

deals are made. You remember

Answer: That's right.

Question: And you expressed the opinion that it would be preferable for people with financial experience and expertise to be involved either solely or alongside members of the legal profession in looking at matters?

Answer: That's correct.

Question: I wonder, because you are correct in this respect: lawyers are not necessarily businessmen. Some lawyers may be businessmen, but lawyers are not necessarily businessmen. But is there something that you can tell the Tribunal now as regards law, ethics or propriety, which would assist the Tribunal in doing its very best to view these particular matters through the eyes of a businessman?

Answer: I don't really understand your question.

Question: You are the one who made this statement.

Answer: What I was really in my statement, what I am really saying is that if a solicitor or a lawyer is looking at business dealings, okay, obviously normal contracts and things like that, normal course of things they would have experience of, but if you are involved in commercial negotiations or fundraising, le Court Reporters Ltd.

raising money, putting structures together,  
rolling out businesses, the benefit of  
advisors from maybe the commercial world  
would be helpful to lawyers. That's my  
point.

Question: I see. So I can take it, that there is  
nothing as regards ethics that we need to be  
pointed to, the standards which apply, or  
normal ethics?

Answer: I think it's fair to say that the legal  
profession always has very good training  
in those three subjects that you just  
mentioned. Really what I am saying is, in a  
tribunal process, it is my opinion, rightly  
or wrongly, that when you look at matters,  
maybe it's good to have somebody with a  
financial background, for example, of a  
retired managing partner of a major practice,  
and a lawyer could turn around and say to  
that person, is this normal practice? Do you  
swap out shareholders? You know, what about,  
in terms of underwriting, all of these  
different facets of a major I mean,  
this is one of the biggest infrastructure  
products ever completed in the country.

Question: So, you are directing the Tribunal's  
attention really to a business a business

advice or angle in relation to the mechanics

of what was going on?

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IARTY TRIBUNAL - DAY 352

Answer: Yes, yeah. It wasn't a criticism of the

legal profession, I want to assure you of

that.

Question: No, Mr. O'Brien. I have no I didn't take

it as that but if you wish to, you are

perfectly entitled to you are entitled to

have that view. I t was just I was anxious

and the Tribunal was anxious could you, as a

businessman, as you have made the statement,

direct the Tribunal towards something which

would assist the Tribunal in viewing matters

under discussion here. I think a further

point, it's like a business person trying to

look at a legal contract. It would take a

great deal longer for that business person to

understand that contract. And the reverse is

the case; if you took a lawyer and asked them

to look at a business dealing and asked them

to look it over.

Question: Well, I was really asking you, because

seem to have made that statement in

the context that you were concerned deeply

that the standard dealings and manoeuvrings



associated with business, and which are an essential part of business, have been elevated by the Tribunal into the realms of public interest. It was really in that context

Answer: I think when our team, and certainly I am concerned that a great deal of time is being spent on the negotiations and the machinations of the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

between Communicorp, Telenor, Advent, IIU, the 5% and 20% and all of these issues, and I am not sure whether that is that important, because ultimately, we ended up in a certain place in May 1996.

Question: Well, what we are dealing with here is not just a business transaction, isn't that correct, Mr. O'Brien? What we are dealing with here is the conferring of a major benefit by the Irish people in the awarding of a scarce public asset; namely, a licence to enable persons to carry on a GSM duopoly. That's what this Tribunal is looking at, is that right?

Answer: No, it's the actual I would look at it differently. I'd look at it commercially, and I'd say that you are giving the benefit of an opportunity for somebody to go and invest vast

amounts of money.

Question: In a duopoly?

Answer: Sorry, it's not a duopoly."

Then the Chairman at line 4 or 5, on page 9 says:

"Is it a subtext, Mr. O'Brien, of what you mentioned in relation to a particular matter, that you feel, and certainly no one here takes any offence, be they barristers, solicitors, or judges in the legal profession, that perhaps there may have been a slightly cocooned upbringing, and that lawyers may not be entirely alert to realising the naturally competitive le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

nature of jousting for hardly contested business matters, and that perhaps for lawyers to talk in an inordinately of perhaps people feeling under duty to advise a possible opponent, may lack somewhat in reality.

Answer: That's probably correct. That's a very good summary, Chairman."

What I was really getting at there, Dr. Bacon, that that seemed to me to be an ideal opportunity for the Tribunal to indicate that you had been engaged because that's, in a sense, what you were dealing with for the previous year and a bit. Isn't that right?

A. That's a matter for the Tribunal.

Q. Sorry?

A. That's a matter for the Tribunal.

Q. Okay. Fine. Thanks.

A. I mean, was there a question that you had?

Q. It was, yes. I was suggesting that that was an appropriate time for your assistance to be publicised in a public way?

A. My existence is no secret.

Q. It isn't now. But the trouble is, Dr. Bacon, and part of the reason why we are here is that it was a secret from 2002 to 2005, and nobody was aware that you were involved.

And you see

A. But not through any fault of mine. I mean

Q. Well, it depends. You see, you were actually performing what appears to be quite an important function because we see, on three or four occasions, that the Tribunal, quite rightly, acknowledged that they didn't understand some of the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

these things within the documents, and that the, they were difficult to understand and digest and analyse. And you know, they weren't unique in that. Other people were having the same difficulty and wondering about it, and they could, they were able to advise themselves. But you were actually doing the advice for them, and there is nothing improper in that in that sense. But what was disturbing was, and is disturbing, is the fact that it was done quietly without publicity, in circumstances where it was the most obvious thing in the world to announce, that you

had been engaged to assist the Tribunal in relation to advice and analysis?

A. Well, the only comment

MR. COUGHLAN: This matter has been litigated up and down to the Supreme Court.

CHAIRMAN: Mr. McGonigal, this has been urged with conviction by you in the High Court. It was dealt with in detail by Mr. Justice Quirke. Now, I am conscious of trying to give you some rope to enable you to represent your client's interests properly, but this is a matter that has been dealt with, and whilst I am trying to give you reasonable latitude, apropos of your remarks this morning, we don't want to embark upon a Third World War. And I would be grateful if you did address the terms of your solicitor's acceptance.

MR. MCGONIGAL: Well, I think I am addressing them, Chairman, because this documentation, some of the material in the Court Reporters Ltd.

PARTY TRIBUNAL - DAY 352

in this documentation wasn't available in the way in which it is now available. And this is the first time we have had an opportunity of talking to

MR. COUGHLAN: Which document is My Friend referring to?

MR. MCGONIGAL: The 8th November and the 18th November.

MR. COUGHLAN: The document that is under discussion at the moment was opened in full by Mr. McGonigal sorry, the document under discussion, which was the briefing document

from the Tribunal to Mr. Bacon, was opened in full by Mr. McGonigal to Mr. Justice Quirke. So that document was always available.

MR. MCGONIGAL: Hold on. The document

CHAIRMAN: Mr. McGonigal, we will move on from the issue of nondisclosure. It's been dealt with. Now, please proceed.

MR. MCGONIGAL: I'll take it up again when I get to the 8th November maybe, Chairman.

CHAIRMAN: I will reserve a view on that. Let's stick to what your solicitor said he'd abide by.

MR. MCGONIGAL: I think I have been sticking to what he said.

Q. Dr. Bacon, if you could turn to Tab 4.

A. To?

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IARTY TRIBUNAL - DAY 352

Q. Tab 4.

A. Yes.

Q. Tab 4, Dr. Bacon, is simply a letter from Mr. Davis to you referring to "previous conversation in relation to the above matter and to recent telephone conversations with members of the Tribunal legal team."

One of the things that, subject to being allowed to ask the question, one of the things that is of interest to me is that, what was going on between you and the Tribunal legal team in relation to the information that you may have been seeking? Or can you recollect?

A. I can't. I mean, this was before I submitted the proposal, 20th January.

Q. The documents, I think, are in the correct sequence, so that you have the one at Tab 3, which is the analysis furnished to you with all of the documentation, and then you clearly have a number of conversations in relation to matters

A. I think that material on the floppy discs was the IRR data.

Q. Yes, that's in the next paragraph. "Further to your requests, the Tribunal has now located floppy discs containing financial information in respect of five of the six applicants in GSM2." And it goes on to deal with that then in the balance of that paragraph and the next paragraph, and then in the last paragraph it says:

"As well as the discs mentioned, I am also enclosing an eight-page extract from the transcript of the public sittings from last Friday, 17th January, 2003. The witness le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

giving evidence in the extract is Mr. Martin Brennan, who was, and indeed still is, a senior civil servant within the then Department of Transport, Energy and Communications, and was the Chairman of the Project Group set up to run the evaluation of the applicants for the GSM2 licence. To put the extract from context, Mr. Healy for the Tribunal was at this point in the transcript asking Mr. Brennan about a minute of the Project Group meeting dated 18th May, 1995, a

copy of which I am enclosing. The 'Evaluation model' was presented by Andersen Management International and approved by the rest of the Project Group at this meeting. You will recall from a previous meeting with the Tribunal that there has always been some confusion as to how precisely the scoring formula in respect of IRR was formulated. The Tribunal has been of the view that it was likely that Andersen Management International came up with the ideal that 11% be considered the optimum and that deviations of either direction from this optimum would be marked down accordingly.

"As you will see from the transcript extracts now enclosed, it appears that in fact Andersen Management International initially proposed a straightforward marking system in respect of IRR, the higher the IRR the higher the marks that would be awarded. According to Mr. Martin Brennan, it was as a result of this objection to this formula, raised by himself and other members of the Project Group, that the final formula was reached. This may be of some assistance to you in reaching any conclusions in respect of validity of otherwise of the treatment of IRR in the evaluation of the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

process."

Then in the last paragraph: "The Tribunal has now entered the public hearing phase of its investigations and as such is anxious to gain a full understanding of the various

technical issues relating to the evaluation as soon as possible. As such, the Tribunal is very grateful for your ongoing assistance in this regard and looks forward to hearing from you at your earliest convenience."

So, at this stage a number of things seem to have been happening. First of all, you seem to be in communication conversation with the Tribunal legal team in relation to, certainly, the floppy discs and maybe other matters. The Tribunal itself was, at that stage, in public session hearing evidence, and in particular, Mr. Brennan was giving evidence and his evidence was being furnished to you for your comments, I take it?

A. Yeah, I think the issue there was that this the notion of an optimal IRR is not one that I have ever come across in my professional career.

Q. Sorry?

A. The notion of an optimal IRR is not one that I have ever come across in my professional career. And I think at this stage we were probably scratching our heads saying what the hell is this and what's behind it? Because we were going to submit our proposal of what work we would carry out. And, again, the floppy discs must have been for the purpose of carrying out the IRR analysis. I mean, that's what was on those floppy discs.

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IARTY TRIBUNAL - DAY 352

Q. I think was it containing financial information in respect



of the five?

A. I think it was I'm not sure. I think it was the IRR, I think it was the basis for the IRR calculations.

Q. One of the things that puzzled me in relation to the way in which the thing ultimately progressed, was that you seemed to have, in effect, for one reason or another, and perhaps you can help me as to why, confined the report as such to two teams rather than the six teams. Was there a reason for that?

A. No, which report?

Q. The draft and final report seemed to reduce itself to A3 and A5?

A. No, there was no particular reason.

Q. Because I would have expected, rightly or wrongly, that it would have involved you commenting on the whole competition rather than just two?

A. I think that goes back to the point of, you know, how broad was the inquiry.

Q. Yes, very broad.

A. Well, I think we have been over that.

Q. Well, we have, in the sense that your Terms of Reference, as such, were identified in the document which we have opened. Whether insofar as they may relate to the Terms of Reference as asked by the Dail is a different matter.

A. Absolutely, yeah.

Q. You see, one of the things that I was hoping you might be able to assist me in relation to was that the material

which you had been asked to review and which you were dealing with was more than simply technical material; it is the Court Reporters Ltd.

PARTY TRIBUNAL - DAY 352

was substantial analysis in relation to things which had been carried out.

A. Yeah, I think that's fair comment. I mean, it was technical analysis. I mean, I think it was technical. I think all of I do hold the view that the analysis that we were undertaking was of a technical character.

Q. But certainly the issues which you were being directed towards was more than technical?

A. We weren't directed.

Q. Sorry?

A. Directed?

Q. Well, they were the questions which were asked, the issues?

A. Ah, questions that we were asked.

Q. Issues?

A. Issues, okay.

Q. Directed?

A. We weren't directed.

Q. Well

A. I take issue

Q. I understand your reluctance on that.

A. I take issue with that word. We weren't directed to do anything. We were provided with a briefing note. We responded with a proposal to carry out work. We were not

directed to do anything.

Q. I take that correction, Dr. Bacon.

A. Thank you.

Q. The next document which is attached to that letter is a portion of the transcript, and the only matter that I have identified in that that I just wanted to briefly draw your attention to was that it deals it's Mr. Healy on the IRR le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

before the before you actually report, and I am not going to go through it in detail, but would simply refer you to the question on page 50 at 120.

A. Sorry, where?

Q. It should be attached

A. What tab?

Q. It's Tab 4. It's behind the letter. And it's the, it's the third page of that transcript, I think.

A. It's question 117, is it?

Q. Page 50 is at the top. And I think that relates to the IRR, and this was before

A. Sorry, I can't follow where you are.

Q. I beg your pardon. Have you got the transcript?

A. Yeah.

Q. And on the top right there should be a number and it's 50.

A. 50, okay. And which question do you want me to look at?

Q. It's 120. It's the last question on the page, I am just drawing your attention to it. "I am interested in finding

out about it for two reasons, firstly, because I think it's of some relevance and it's something to which the Tribunal has devoted some attention, and that will become clear as we go on but secondly because I didn't realise that Andersen had a role in this and that there had been some debate on the point. It is extremely difficult to get information from Andersen, in fact it's impossible to get information from Andersen at the moment and the company which has now bought over its business in Mercantile..." So, this is the point we become aware that Andersen is not available and therefore, on the face of it, is a gap within the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

the Tribunal's knowledge, and you take that place actually, Mr. Bacon

A. Well

Q. pretty well immediately?

A. Well, I don't know if I am taking somebody else's place.

Q. That transcript was well taking your place isn't the correct way to put it actually.

A. No.

Q. Because they still made efforts to get him after that. But you seem to have been brought in around the time that he was disengaged?

A. To provide technical support and assistance.

Q. Precisely, because he had disengaged. He had been doing that before that, Dr. Bacon.

A. Okay.

Q. And the question, at 119, is also of relevance because Mr. Healy was making the point that obviously there were no practicing economists on the group, and the group that he is referring to there is the PTGSM group, I think?

A. The which group?

Q. The PTGSM group?

A. That's the Evaluation Group, is it?

Q. Yeah.

A. Because one of the questions I did ask was whether Mr. Andersen was an advisor to that group or a member of the group. There was never an answer.

Q. Well, he was the expert in control of the competition after a certain point, there is no doubt about that. And he was, using a neutral word for the moment, assisting. But equally, after the Tribunal was set up, he was assisting le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

the Tribunal in relation to, for an early stage, up until 2002, and then he begins to disengage, and as he disengages, you are brought on board to take his place, effectively, as far as I can make out, though if he had stayed, it's not quite clear what would have happened.

MR. COUGHLAN: Is that a question?

Q. MR. MCGONIGAL: Would you agree with that, Dr. Bacon?

A. I wouldn't know.

Q. Were you aware that Mr. Andersen was advising the Tribunal?

A. Advising? I think cooperating I think was the I mean, I was aware that there was, there had been an engagement between the Tribunal.

Q. Before you came in, before you came on board?

A. Yes.

Q. And I think you became aware of that from talking to the Tribunal?

A. Yeah.

Q. And I suppose they explained to you that he had, he was going AWOL and that they needed someone to assist?

A. Well, certainly they got the first part of that message all right.

Q. And that they were looking for you to assist them?

A. Well, that's the reason that they were looking for technical assistance.

Q. Now, the next document is the proposal to, for tender, which is January 2003?

A. Yes.

Q. And there are a few matters in this that I just want to  
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IARTY TRIBUNAL - DAY 352

deal with. Just in relation to this document, how did this come into existence? Was it Mr. Hannigan or you who prepared this?

A. Well

Q. Or was it a combination?

A. It would have been a combination, but you know, like, you

know, I have responsibility for signing off on the assignment.

Q. This wasn't sent in this wasn't sent in draft form with a view to getting it approved?

A. No.

Q. It was simply the proposal which was sent?

A. This was our proposal of the work that we would undertake.

Q. And you have identified in that, in the second paragraph

A. Which page?

Q. The first page: "The work of the Tribunal in this area can be divided into two parts. The first is to determine the validity, robustness and efficacy of the evaluation process and the results produced. It is understood that the role of the consultants would be to provide advice and reach conclusions in this regard under the headings identified in this proposal. The second area of interest to the Tribunal is to determine if the award was linked to the core areas of examination as determined by the Tribunal of Inquiry's Terms of Reference. The consultants will not be examining this issue, nor expressing opinions in this regard."

Now, just in relation to this at this stage, is it not correct to say that this was done at a time when evidence wasn't being anticipated by you?

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IARTY TRIBUNAL - DAY 352

A. I mean, I would have as I indicated to you before, I would have felt that whatever we gave was probably going to

find its way into the public domain in a public inquiry.

Now, whether it was going to be used as evidence or not, I wouldn't have a basis for making a judgement.

Q. No, I understand that, and I don't disagree with that in principle. I am just curious to know what it was that you thought at that time?

A. If you are asking me what the paragraph means?

Q. No, I am going to come to that.

A. Okay. Sorry, well what

Q. I was asking what was your understanding as to what your role ultimately would be in relation to giving evidence?

Because as I said to you before

A. I didn't have a view. I mean, I felt that what the culmination of the assignment was going to be a final report. Now, what happened that final report and how it got dealt with in the Tribunal, I wouldn't know.

Q. No, I understand that, because as I said to you earlier, one of the matters that concerned us was the fact that there is a perception, when you read these documents, that there were effectively two stages to your two almost clearly identifiable stages to your involvement. The first was from 2002 to 2003 when you hand in the report. And the second is from 2004 to today when you end up giving evidence and in the meantime supply the report. Because the draft report, if I can put it this way: The draft report doesn't appear to have been presented as a report which would be evidence. The document in 2005 was



specifically drafted to deal with the evidence, but only in  
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IARTY TRIBUNAL - DAY 352

relation to the questions arising from the letter of the  
30th August?

A. That's quite right. From my perspective, the draft report  
was never concluded. We never received back comments on  
the draft report for consideration to put into a final  
report. What we got instead was a letter from the Tribunal  
of the 22nd August, whenever it was, saying we'd like a  
different report to be used in evidence.

Q. You see, the point that I wanted to try

A. Now, I have to say, sorry to interrupt you, but I have to  
say, from my point of view, you know, I looked at it and  
said okay, they want effectively the report that they got  
in a different format. I mean, to be perfectly honest with  
you, you know, this, the business of whether the report was  
or wasn't for evidence, it's a report.

Q. No, I absolutely understand that, Dr. Bacon, and don't  
think I don't, but what is concerning me and concerning my  
client is the fact, and indeed others I think, that during  
this period, 2003, from the time that people started giving  
evidence, that you were assisting the Tribunal in relation  
to issues which had and were arising, giving assistance by  
way of answers to them in respect of certain things, which  
appear to have been used then in cross-examination  
unbeknownst to all of the people who should have known that

you were involved, i.e. the people up here?

A. But you are asking the question of the wrong man.

Q. Why is that?

A. Well, I mean, I didn't have a view one way or the other how the material was supplied. I was writing a report. In the proposal here that you are looking at in Tab 5, I was le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

saying, I'll submit a draft report - which I did at the end of the March - and on foot of that, we'll get comments back from you and we'll consider those as appropriate and we'll submit a final report. Full stop. So, that was, you know, the job of work that we embarked upon, and we got as far as delivering the draft report within the timescale that we indicated and we sought to bring that to a final conclusion for the genuine purposes of closing the book on the report, and that didn't happen.

Q. No, I understand that. Can I just go back to the second paragraph there, the first is to determine the validity, robustness and efficacy of the evaluation process and the results produced. The briefing document was indicating that the Tribunal is particularly interested in the financial element in the evaluation process and does not require a general opinion in relation to the evaluation process as a whole.

Do those two things equate? Surely

A. I mean, the work that is proposed can be expressed in terms

of four general tasks. These are bang, bang, bang, bang.

That's what we proposed we'd do. I mean, I think

juxtapositioning what's the question that you have

specifically about paragraph 2?

Q. Well, it seemed to be different to the document that had

been sent, in the way in which I quoted it to you.

A. Well, I have made the point to you that, you know, there is

an issue for anybody in my shoes sitting down and taking a

briefing document as to, you know, how long is a piece of

string? And this document should be understood as our

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IARTY TRIBUNAL - DAY 352

response to that briefing document and the requests that

was in that briefing document in terms of the scope of the

work that we would undertake. So, if you like, this

proposal represents the contract, as it were, for the

supply of services, and what's in that proposal was what

Peter Bacon & Associates were contracting to supply to the

Tribunal.

Q. You see, you may well be right, Dr. Bacon, when you said

that I am asking the wrong person, I quite understand that

comment. But and the only place that we can come from

is by looking at the information that was supplied by

looking at the information that was requested, by trying to

understand what was going on at this time. Because, I know

it's difficult, from where you are sitting, to fully

appreciate the angle that we are actually trying to

present, but you have to perceive it from the point of view that while you were engaging with the Tribunal, effectively behind the scenes, what was happening in here was that people were giving evidence and being asked questions in relation to work which they had done. No one at any stage had ever suggested to him, listen, we have an expert working away on an analysis. And as you produced work for the Tribunal, this was being reproduced, as far as we can make out, in the questions and statements which were being made

MR. COUGHLAN: Sorry, Sir, this is a statement being made.

Mr. McGonigal is here to ask questions of Mr. Bacon. The Tribunal has put its position forward at all times and the nature of the involvement of Mr. Bacon. Now, what is the Court Reporters Ltd.

JUDICIAL TRIBUNAL - DAY 352

Mr. McGonigal is doing all the time is making speeches and not asking questions, Sir.

CHAIRMAN: Mr. McGonigal

MR. COUGHLAN: The Supreme Court has decided this matter.

CHAIRMAN: I have made a ruling that this issue is not to be taken up.

MR. MCGONIGAL: Which issue?

CHAIRMAN: It has been heard at length in the High Court and the Supreme Court.

MR. MCGONIGAL: Which issue, Chairman?

CHAIRMAN: The issue of Dr. Bacon being concealed and

matters proceeding in the course of the Tribunal work, that has been heard by Judge Quirke. It has been dealt with.

MR. McGONIGAL: Of course it has been dealt with, and Mr. Justice Quirke recognised the close relationship which existed between Dr. Bacon and the Tribunal, and decided that it wasn't inappropriate. That doesn't stop me from asking questions in relation to it.

CHAIRMAN: No, that's not the case, Mr. McGonigal. Your solicitor accepted the terms upon which this cross-examination was to take place.

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IARTY TRIBUNAL - DAY 352

MR. McGONIGAL: But the questions which I am asking relate to the information which Dr. Bacon was given and asked for. All of the questions relate to that.

MR. COUGHLAN: I have no objection to Mr. McGonigal asking questions

MR. McGONIGAL: I fail to see the sensitivity of the Tribunal in relation to these questions.

MR. COUGHLAN: There is no sensitivity. My objection is that Mr. McGonigal is making speeches and not asking questions. That was the objection.

CHAIRMAN: It would be helpful if we got on to some of the information that Dr. Bacon gave to the Tribunal.

Q. MR. McGONIGAL: You see, one of the things, Dr. Bacon, Mr. Healy says was that there is no theory, this is an outrageous suggestion it's in the nature of inquiries

that things develop. But what I am saying to you, Dr. Bacon, from the information which you were giving to the Tribunal and the questions that you were being asked, that theories were being developed in relation to the way in which the analysis was carried out. Would you agree with that or not?

A. Sure, I don't know what they were doing with the material.

Q. Precisely. And neither did anyone else, Dr. Bacon, and that is why I would probably agree with you that I might be Court Reporters Ltd.

ARTY TRIBUNAL - DAY 352

well be asking the wrong person, because the only person that I could get answers from in relation to this would be a member of the Tribunal.

CHAIRMAN: That's not a question, Dr. Bacon, so don't concern yourself with it.

Q. MR. MCGONIGAL: Going on to the third paragraph, then, Dr. Bacon, of the issues involved which you identified.

Towards the end of that paragraph you say that:

"Although not involved in the initial design of the process, nor the calls for tenders, AMI set out in advance of undertaking of the evaluation, but after the design of the competition a model to be used in the evaluation. A concern of the Tribunal is that there appears to be instances of deviation from the procedure as initially outlined and it wishes to uncover the causes and possible impacts of those deviations."

A. Yeah.

Q. Is that technical matters?

A. Yeah, that was the issue. That was the technical or, what else was it? I mean, that was the question of what was set out in that evaluation model, as we commented on, was a perfectly recognisable and, I would have said, best practice statement of the way in which they were going to proceed; namely, that they were going to have two processes of evaluation: A quantitative one and a qualitative one, and they described in some detail how that process would work and what the relative importance of each of those

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IARTY TRIBUNAL - DAY 352

would be. Now, as the process evolved, they moved away from this quantitative evaluation, this word "withering" was used. That's what that's talking about.

Q. Then you carry on and identify the work which you have to do as under four categories: "First of all, to clarify certain issues regarding the relative evaluation of tenders, e.g. the use of measures of IRR and solvency ratios." What does that mean?

A. The way in which the IRR tool was used in the evaluation. I made reference earlier to the fact that they had a notion of an optimal IRR. Now, that's something that I had ever come across before.

Q. And then secondly: "Examine the procedures followed by the evaluators in applying and using these metrics for the

purposes of evaluation."

A. Yeah, this was the way in which they interpreted the results of the IRR and awarded scores.

Q. And then: "Assess the results obtained in the evaluation in relation to the model outlined and with reference to best practice."

A. Yeah. Well, this was the question of how those matters were dealt with from both a quantitative and qualitative way; the two methodologies that they set out as being the bases upon which they would conduct the evaluation.

Q. And with reference to best practice?

A. Mm-hmm.

Q. What does that mean?

A. Well, within the literature on methodology of evaluation, the methodology the literature clearly recognises quantitative and qualitative techniques, and best practice  
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IARTY TRIBUNAL - DAY 352

is where both of those methods are deployed, you are not relying on one or the other with the shortcomings and strengths that each of them have, but you combine them to get a crosscheck, if you like, of one against the other.

Q. At this stage I think it's correct to say that you, at this stage, had not been involved in any competition processes?

A. Are you asking me?

Q. Yes.

A. I think four competition processes.



Q. In 2003?

A. Not in 2003.

Q. That's the point I am making.

A. No, not in 2003.

Q. You see, in your CV which you have there at page 6, it appears to me to be clear that at this stage you hadn't been involved in those competitions, but in 2006 or 7, whenever you were asked about it, you were able to identify competitions which you had then since been involved in: Nortel and some other one I think?

A. Yeah.

Q. The documents are there. But they were all post 2003?

A. No, I don't think so.

Q. Well, I may be wrong about that, I thought they were

A. No, I don't think they were.

Q. reading the documents.

A. No, I am pretty sure they preceded it.

Q. And the last one was then: "Comment on the conclusions reached by the evaluators, with particular reference to the quantitative criteria employed." What does that mean?

A. The well, I think that one is self-evident. The  
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IARTY TRIBUNAL - DAY 352

conclusions from the quantitative evaluation. I mean, they moved from a quantitative evaluation.

Q. Is, effectively, part of the question then really saying:  
This is the right result or this is the wrong result?

A. No, I think this is a question about the methodology.

Q. Yeah, but also it's about results.

A. No, the conclusions reached by the evaluators I mean, the conclusion that was reached by the evaluators is they weren't going to use it.

Q. "Assess the results obtained in the evaluation and comment on the conclusions reached by the evaluators"

A. Yeah. The conclusion that was reached by the evaluators was that they weren't going to use the quantitative output.

Q. I see.

A. I mean, they used it. They did a run, they got a result, and then they moved away from that quantitative approach.

Q. No, I am aware of that all right. The only other thing that I wanted to ask you about, Dr. Bacon, is in relation to your own CV, on page 6, where it talks about "including examining techno-economic relationships; for example, in the field of evaluating the impact of telecommunications development on economic competitiveness and in the area of measuring environmental economic relationships." Is that not a paper which, an exercise which was carried out by McDowell and Thom in UCD?

A. By what?

Q. McDowell and Thom in UCD?

A. What are you talking about?

Q. The impact of the field of evaluating the impact of telecommunications developments and economic

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competitiveness and the area of measuring environmental economic relationships?

A. Well, the area of measuring environmental economic relationships is actually the basis of my own Ph.D. and work that I have undertaken subsequent to that event, now a long time ago. The impact on telecommunications developments and economic competitiveness: We had done a number of reports in that area. What one are you referring to?

Q. I think these may be them, is it, DP/E2 evaluation report May 1989?

A. No. They are evaluations that I was involved with. They are evaluations of Departmental programmes for awarding support

Q. For investing in telecommunications broadband infrastructure services?

A. Exactly.

Q. Two, three in 2000 and 2001. Two in '99, one in 2000 and one in 2001.

A. Pre-dating this.

Q. Then the National Treasury Management Agency, NTMA. They are different to this kind of a competition, I think?

A. In what way?

Q. In the way in which this competition was set up and carried out?

A. No.

Q. You wouldn't agree with that?

A. I wouldn't.

Q. Okay.

A. The stuff of economics is the allocation of scarce  
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IARTY TRIBUNAL - DAY 352

resources among competing ends. The market is the most  
usual way of doing that. For example, it was open to the  
authorities here to say come along, bid for this licence  
and let the highest bidder win. That's using the market.  
In this case, similar to those other programmes that we  
had, that wasn't the criteria that was being used. A  
scarce resource, namely the licence was being awarded  
against, you know, a set of nominated criteria in the Terms  
of Reference. You know, the same process is involved in  
trying to I mean, what you are effectively doing is here  
you are rationing a licence to somebody. In those other  
evaluations that I was concerned with, you were rationing  
money to people who were bidding for that money with  
programmes to roll out broadband telecommunications  
infrastructure. You went through the same kind of an  
exercise, a quantitative evaluation of the proposals that  
were received and a qualitative assessment. From that  
point of view, from a methodological point of view, there  
was no difference in substance from the exercises?

Q. The next thing I want to turn to, Dr. Bacon, is the meeting  
on the, I think it's the 10th February, 2003, which is Tab

6. And this appears to be a meeting between you and members of the Tribunal.

A. Yes.

Q. And there are just a few things I want to try and understand. The "PB" refers to you, I think?

A. I presume so.

Q. And the "JH" refers to Mr. Healy, and the "JC" to Mr. Coughlan?

A. Yes.

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IARTY TRIBUNAL - DAY 352

Q. And it opens with: "A written proposal/spec is what's required." What's that referring to?

A. I can only presume that it refers to the proposal.

Q. Yeah, that's what I was wondering. And what I take, correct me if I am wrong, what I assume we should take from that is that although the proposal is dated January 2003, that it probably in fact postdates at least this meeting?

A. Predates it.

Q. Postdates it? "Written proposal/spec is what's required."

This is February 2003?

A. Exactly, so they had the proposal. So I think that meeting must have been to discuss the proposal.

Q. I see. That could be right. I mean, this is a shortened version of what was said. I actually read that slightly differently.

A. Well, to be honest with you, I was a bit lost myself when I

looked at the date and said well, why was I saying a written proposal was required on the 11th February when I had submitted one in January? So I can only presume that, you know, the proposal had been tabled and I had said a written proposal is what's required and that's what we were there to discuss.

Q. I mean, let's just go through it because it may help you to answer the piece. "Had impression were parts of work going to too far down road of doing evaluation."

A. And this was the point that I was making to you this morning, that it was very clear to me that the Tribunal team did not want, you know, another evaluation, or an evaluation of the evaluation.

Q. "Main concern is to critique the report." Then  
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Mr. Coughlan says: "Need things fast. Need to cut to the quick, i.e. costs."

A. Yeah, and that the conclusion to that was that we submitted two batches of material, you know, as they were being written in the course of the month of February.

Q. Yes, I understand that. I see, in fact, how that was being done, and we'll come to it very shortly. But I take it that you were aware that at this stage people were being, giving evidence in the Tribunal?

A. Well, I mean, that was the import of what John Coughlan's remarks were, they needed material to assist them.

Q. To help them with that?

A. Yeah.

Q. And were you also aware at this stage, as a matter of interest, that proceedings had been issued against the Government and others in relation to the GSM?

A. No.

Q. You then say after Mr. Coughlan said that: "Aware his report could be used in a subsequent action."

A. Yeah.

Q. What does that mean?

A. I don't know. I don't know. I mean, what I was indicating there, I believe, was that I believed that the report could be used, and this goes back to the question yourself of, you know, did I have a problem with my, with my service? Was I trying to hide the fact that I was giving a service? You know, well, I mean, my position from the outset was I was doing a report which was going to find its way, in all likelihood, as every other report that I have done virtually, has found its way into the public domain.

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IARTY TRIBUNAL - DAY 352

Q. No, I have no difficulty with that. My concern is not my concern was not with that. I have made my concerns clear in relation to it, but what I am interested in here is

A. The words "subsequent action."

Q. Because clearly it refers to something happening later. It

doesn't refer to giving evidence in the Tribunal, first of all.

A. Well, I'm not sure. I mean, I don't know. I don't think it's a legal action I am speaking of. I mean, you are a legal man and would tend to see things in legal I'm not sure.

Q. I appreciate that I am looking at it through legal eyes, and that's why I was really asking you from the economist point of view what interpretation you sought to put on it?

A. I think that it would go into the public domain and be commented on in the public domain or be used in the public domain.

Q. In a subsequent action?

A. In whatever form.

Q. In litigation or whatever?

A. I don't know.

Q. Do you recollect, as a matter of interest, whether there was discussion about potential actions?

A. No.

Q. You don't recollect or there wasn't?

A. I don't think there was. Legal actions?

Q. Yes.

A. No.

Q. You were then asked about the timescale and you suggested the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

sorry, you weren't, you say "Timescale? September 20/21



had a ranking of D and in October got to a ranking of 1.

PB: This is the nub of the problem." So somebody said that to you. And then you replied, and then Mr. Healy:

"That was with the quantitative report. This withered away.

PB: Nothing withers away."

A. I mean it was not a bunch of flowers we were talking about, it was an evaluation process.

Q. Then Kyran says, who was Kyran Hannigan, I think

A. I think that was actually, I mean it's Kevin Hannigan.

Q. Sorry, I beg your pardon.

A. So I think that was Kyran Walsh.

Q. I see. "Can they concentrate on 3 companies? Yes, and possibly down to 2, A3 and A5. How to be useful in the next two weeks. Can deal with the change from the 21/9 result to the final result. Can explain this change in the next two weeks." Can you just help me and explain to me what was going on there?

A. This goes back to the point of the timescale and what you could cover in the period that was involved, and I think what the question that was being asked is: Can we concentrate on three companies? And the question that we were going to address in the following two weeks was, or try to address in the following two weeks was: How the change occurred between the result of the quantitative evaluation, which was described to have withered away, and the result that finally emerged from the qualitative

result, from the qualitative evaluation.

Q. Am I incorrect in thinking that part of what was happening  
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IARTY TRIBUNAL - DAY 352

here was, first of all, that there was an effort being made  
to focus on the two major companies, A3 and A5, to the  
exclusion of the others?

A. Because of the timescale.

Q. And that the timescale was of importance because at that  
stage the evidence or material was needed for the  
Tribunal's work which was being done in public at that  
time?

A. Yeah.

Q. And a degree of pressure was being put on to have it done,  
I think within a period of have some of it done anyway  
within a period of two weeks?

A. Have some of it done within two weeks.

Q. Then: "Weaknesses in consortia 50% in one and 27% in  
another. Can this be measured? Not really." What does  
that relate to?

A. I don't know.

Q. Sorry?

A. I don't know. The only thing I can think of is, wasn't one  
of the consortia members a 50:50 and there was a 27, there  
was a minority party in one of the other consortia. That's  
the only thing that gels my memory of the 50%.

Q. No, the only thing that I was seeing of relevance there was

the Advent document that I showed to you before, that that might have some materiality in considering it, but you didn't see that document?

A. No, no. I think that is talking about the financial weakness issue and how it was handled, and I mean, I know what the report says, so I can't recall exactly what the meeting was saying, but there was, I know, a distinction  
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IARTY TRIBUNAL - DAY 352

drawn between the 50% relationship which Communicorp had in its consortium and I think there was a 27% relationship in one of the other consortia.

Q. I suppose, in a sense, the question may have been directed towards the possibility of seeing whether it could be measured in a way that would have allowed it to be taken into consideration?

A. Maybe so. I mean, the answer is being given there by Kyran Walsh. So it was a question it was a question about the financial weakness.

Q. In any event, and I think then there is this discussion about "bankability is not a remedy for insolvency. What do you want us to do in the short-term?"

A. Yes.

Q. "Page 44 bankability. Notion that you don't score the other aspects."

And I think what that is is they were giving you a page from the report, I think?

A. Yeah, probably.

Q. And seeking to see how it was affected. And then: "PB: Liquidity and solvency are not equal concepts. Treated equally by AMI. You (JH) said last week you were not interested in scoring." What does that mean?

A. I don't know. Well, I think the liquidity and solvency are not equal concepts, they are not and the same thing. The reference to the scoring, I don't know.

Q. But it does seem to indicate, it does seem to indicate that there had been a previous meeting in relation to this a week earlier, which was roundabout the 3rd February, at le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

which discussions in relation to something took place concerning scoring inter alia?

A. I don't think there was a meeting. And I can't recall if there was a telephone call.

Q. I suppose, in fairness, there was communication going obviously communication going on between you and Mr. Healy all the time?

A. No, not all the time.

Q. Irregularly, then?

A. Irregularly?

Q. Yes.

A. Yeah, irregularly.

Q. Going over the page then: "Banks will look through the subsidiary into the parent companies."

A. Yeah, you see this discussion was dealing with the question I mean, I think what was going on here at this part of the meeting was to try and determine what we could usefully supply in the coming two weeks.

Q. Yes. It certainly seems fair comment to suggest that since you became involved, you were furnishing them with quite a sufficient amount of information and knowledge?

A. Well, your Tab 7 and 8 referred there to, and this is something you wanted clarity on and I phoned him this morning to find out what was submitted, and it was drafts of section 4 and section 5. Now, section 4 and section 5 are the bits dealing with IRR, of the draft report, dealing with IRR and the financial section.

Q. Don't worry, we'll come to that, Dr. Bacon, but thank you for that. In relation to this document, though, you are satisfied that Telenor you say there: "PB: AMI were le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

satisfied that Telenor were at the end of the line...

Communicorp need put in a suggestion that there be licence conditions to deal with it." And then: "Bankability and scoring of lack of financial strength. IRR. Send on transcript re how they came to the 11%..."

That referred to evidence which was being given or evidence which had been given which somebody on your side thought would be helpful in trying to analyse the IRR situation?

A. Yeah.

Q. And then: "Totally inappropriate use of IRR" says Kevin, isn't that right?

A. Yes.

Q. "PB away over the next two weeks. Kevin and Kyran will finish documents in relation to 3 issues." Now, what do you think those issues were?

A. The ones up above, bankability, scoring and IRR.

Q. "And why did they put in those figures showing negative equity and they didn't have to? Maybe it was due to mandatory tables.

Talk to Siobhan re discs containing transcripts.

Accountant's report, do they have it? Send on three (pages 44) of the report and drafts."

The accountant's report, what is that referring to?

A. I don't know. Question mark I don't know.

Q. Because I don't think we have ever seen that report, if one actually exists. And I am curious as to why it was, why it appears there if there was a report, what it referred to.

I don't know if anyone in the Tribunal is prepared to

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IARTY TRIBUNAL - DAY 352

indicate whether there is an accountant's report?

MR. COUGHLAN: There is no accountant's report, I can assure you there isn't.

MR. McGONIGAL: Thank you for that, Mr. Coughlan.

Q. Then, over the page, Dr. Bacon, it comes to the letters.

And he refers to the meeting yesterday and: "Enclose for

your attention three different copies of page 44 of the evaluation report dealing with sensitivities, risks and credibility factors.

"I also enclose an extract"

First of all, in relation to that, three different copies of page 44. I am not quite sure what this relates to?

A. I think it's the final scoring in the evaluation report.

Q. But this is work done by Mr. Hannigan?

A. No, no, no. Three different copies of page 44 of the evaluation report. It's not our report.

Q. I see. And then: "I also enclose an extract from the evidence of Mr. Martin Brennan where he dealt with the marking"

A. Marking for the IRR.

Q. "And copy of the MIPS, and these later two documents were previously forwarded to Mr. Bacon. If you have time, please give me a call."

This is effectively furnishing the documents which had been asked for, is that right?

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IARTY TRIBUNAL - DAY 352

A. "These latter two documents were previously forwarded to Mr. Bacon." You see, I think that's the transcript that's referred to

Q. Sorry, they had been sent to Mr. Hannigan. I beg your pardon, I apologise, I misread this. Those pages are actually on the next page. I thought you had jumped to

Mr. Hannigan's letter. Apparently those three pages are not the pages

A. I am sorry?

Q. Just one second, Dr. Bacon. I just want to clarify something. Sorry, those are our substitutes, I beg your pardon.

Then, I just want to go to Tab 8 then, Dr. Bacon. It deals with the treatment of IRR. "We are working on the next issues which are both relating to funding and will forward you material in the early part of next week. If you require additional information on the contents of this paper..."

Now, I understand that you are saying that that is somewhere in the report?

A. What it was was, it was, I think, what came to be section 4 of the draft report.

Q. Yes. I think that it may be 5?

A. Well, it could be. I mean, I spoke with Kevin this morning and it was those two letters, Tabs 8 and 9 deal with sections 4 and 5. I think I was away on holidays and they sent on the material.

Q. Just, that was sent on separately though?

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IARTY TRIBUNAL - DAY 352

A. Yeah. Kevin Hannigan sent it.

Q. Sorry, can I put that slightly differently. The document that was sent with Mr. Hannigan's letter was separate to



the report?

A. Yes.

Q. And

A. But it was part, it was part of the draft that was evolving.

Q. No, I understand what you are saying about that. My only concern is that whatever document was sent, that it no longer appears to exist?

A. No, I don't think we have it because I think what it was was an extract from the draft.

Q. No, I understand why you may not have it. What I was trying to understand is why the Tribunal don't have it?

A. I can't help you there.

Q. One minor detail I know, two matters of detail. First of all, no matter what way you look at it, the communication line seems to be straight into Mr. Healy?

A. Yeah, I think that's fair comment. I mean, I was reflecting on your remarks earlier that I sent the bill to Mr. Healy, but he was the point of contact.

Q. And the other matter that I just want to draw your attention to, is the word you use in relation to the first paper is the "evaluation of the GSM2 licence"?

A. Yeah.

Q. Do you see any significance in that?

A. I don't think so. I mean, it's not my word; it's Kevin's word, but I wouldn't think I wouldn't attach specific weight to the word.

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IARTY TRIBUNAL - DAY 352

Q. Now, the next document, then, is the 25th February, and again it's the second paper which is sending in the treatment of issues relating to funding and solvency. It includes discussion on the use of concept of bankability and the scoring/non-scoring of certain variability. And if you require additional information.

Now, again similar points just to be made in relation to this; that those documents, whatever they were, don't exist within the Tribunal's archives and they don't exist within yours either, apparently?

A. No, they wouldn't have been separate documents within they would have been extracts from a draft and that draft would have evolved, you know, on a computer hard drive into the draft report that was submitted.

Q. "If you require additional information on the contents or wish to discuss the contents..." Can you help me as to whether there was contact arising from that, or do you know?

A. I don't know. I don't believe so.

Q. Now, moving on from that, the next memo is from you, again to Mr. Healy, on March the 18th, an e-mail. "A draft report is attached which I believe deals with the point you raised the other day, as well as the Terms of Reference contained in our proposal. When you have had the opportunity to absorb this we should meet to finalise the

report. I would be grateful if we could do this by the end of March."

Now, that can you help me in relation to that,

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IARTY TRIBUNAL - DAY 352

Dr. Bacon?

A. The other day?

Q. Yeah.

A. I don't know. It's not it can't have been the meeting, which was not the other day. I don't know.

Q. Well, clearly there was further contact in relation to some aspect of it, or it may have been simply looking for the draft report, it may have been simple?

A. It suggests, though, that there was some particular point.

Q. It does suggest a particular point. "As well as the Terms of Reference contained in our proposal."

A. Yeah, you see, I would normally do that. I mean, you are submitting a draft report and you are submitting you are submitting the proposal, you know, upon which the draft report is based.

Q. And then: "When you have had the opportunity to absorb this we should meet to finalise the report." I actually have to confess, I don't understand that.

A. I am sorry, because I did try and explain that earlier.

When the the proposal envisaged a draft report being submitted and it envisaged comments being received, you know, on the draft report which would be taken into

consideration by us and we would then, having considered any comments we received, conclude a final report. And that would be my normal standard.

Q. I understand that might be your normal way of dealing with things, dealing with other bodies and groups, but, I may be wrong about this, but I think that dealing with a tribunal, I'd expect it to be slightly different. But where I want to try and come at it is from this: That between February 1993 and March 2003 a number of other people had given evidence, including John Loughrey, John Fitzgerald, Sean McMahon, Owen O'Callaghan and Mr. McQuaid, and one other I think. During all of this time you had been assisting the Tribunal by explaining and analysing and furnishing them with information or

PARTEY TRIBUNAL - DAY 352

A. Working papers.

Q. or material on which they could cross-examine people?

A. Well, do as they wish.

Q. Yes. And in one sense, you would almost automatically say to one's self, why was it necessary to furnish a draft report at this stage?

A. Well, that's what my proposal charged us with doing.

Q. I understand that.

A. And that, we did.

Q. But in actual fact, time had moved on, Dr. Bacon, in the sense that now so much water had passed under the bridge?

A. Well, that's what my proposal charged us with doing.

A. Not from our point of view.

Q. Well, in this sense: That a lot of evidence had been given by members of the PTGSM for which you had not had sight of?

A. Yeah.

Q. And therefore, the report that, the draft report that you were furnishing at this stage was an out of date report on one basis, because it didn't have regard to all of the material that we now know that then existed as of that date?

A. That's absolutely correct. I mean, the report was based on the material that you rehearsed at great length before lunch in the briefing document. But that's I mean, I was very conscious of what our contractual obligation was.

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IARTY TRIBUNAL - DAY 352

Our contractual obligation was to supply a draft report on foot of a proposal which drew on the briefing material, and we submitted a draft report.

Q. I am not criticising you for that, I am simply I actually am simply trying to understand what was going on from your side?

A. Well, from our side what was going on was that we were delivering what we proposed and were contracted to do: A draft report for consideration by them and then a final report.

Q. But I am also trying to fit in your side of it with what was going on elsewhere to see whether they actually marry

or don't marry.

A. But we didn't know what was going on.

Q. Precisely. I understand that. And I am not criticising you, Dr. Bacon, for not knowing, but what I am suggesting is that when you look at all the material that had been dealt with in the Tribunal in public sessions, and bearing in mind that your draft report, as such, was only of benefit in relation to the documentation that you had previously been given and a few transcripts, but not the complete; that, in a sense, the value of your report, draft report is completely, other than in principle, diminished as a document relevant to what had happened in the witness box?

A. Well, you know, I can't answer that question. I don't know. It may be that that was the reason why we never received the comments on the draft report.

Q. But you understand what I am getting at?

A. No, I don't understand the question.

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IARTY TRIBUNAL - DAY 352

Q. The question that I asked.

A. Being?

Q. The one that I just asked in relation to the value of your report vis-a-vis what you had and vis-a-vis what you didn't have; that the value of it was effectively diminished as a document. I mean, it may well be for the reason that you say that's why they didn't come back to you at that time.

I don't know. We don't know. And again, as you say, we are asking the wrong person.

MR. COUGHLAN: The witness said he can't answer that question. When My Friend deals with the content of the information supplied to the Tribunal by Dr. Bacon, as was ruled on by the High Court and was agreed to by his solicitor, perhaps he can then indicate to Dr. Bacon, which would be the appropriate time, the information which was unavailable to him which showed that the content of his report was valueless or worthless. That might be the appropriate time to do it, seeing as Dr. Bacon can't deal with it at the moment.

Q. MR. MCGONIGAL: You see, I am trying to understand, Dr. Bacon, a report is attached which I believe deals with the point that you raised the other day. There is something that we know nothing about in relation to the information and how it might have affected. Secondly, in relation to the final report, you are saying there has to be a meeting to finalise the report, and presumably part of that discussion would have been to inquire or to resolve where the evidence

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IARTY TRIBUNAL - DAY 352

A. No, I don't think so. I think what we would have expected, and here it may well be that may well be that my unfamiliar art with the procedure of the Tribunal or let's put it a different way, my reliance on my experience with every

other client I would have had, would have been that what I would have expected was comments on the draft report, expand that, could you explain this, this is unclear, don't understand how you got that, whatever the comments might be, and we'd consider those comments as appropriate, adjust the draft, ignore the comment, do what we felt needed to be done and submit a final report.

Q. And you were anticipating that that would happen fairly shortly?

A. Well, I wanted it to happen fairly shortly.

Q. When you say "finalise" the report, is it wrong for me to suggest that the document which comes out at the end of the day, a finalised report, is different in the sense that it is dealing with a number of set queries as opposed to finalising this report?

A. It is it's a different report.

Q. Yeah, that's all I wanted to know. Now, the draft report is the next document. Now, that was furnished in March of 2003.

A. The 18th.

Q. 18th March, 2003. Now, just in relation to this document, first of all what the document is in the first instance, is the review of specified elements of the tender appraisal process used in the award of the second GSM licence. And that's referring back to the, I presume, the analysis document which we have already discussed and your proposal?

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A. Yes.

Q. Isn't that right? And then, "The consultants have been requested to examine a number of identified issues arising from the evaluation that was undertaken in 1995 in advance of the award. The evaluation involved a comparison of six applications that were deemed to have met the basic criteria for inclusion in the competition.

"The evaluation covered a range of criteria identified as aspects and dimensions and resulted in a recommendation to the Minister. Many of the criteria were related to technical aspects of the service to be delivered. This examination is concerned primarily with financial aspects, in particular in relation to the evaluation of solvency and the IRR. In addition, the overall design of the evaluation is examined."

And those are the matters which, I think, we have already identified and which we have discussed?

A. Yeah.

Q. And so far as those are concerned, correct me if I am wrong, but I am right in saying that those were all identified by the Tribunal's documents which were furnished to you?

A. Yeah.

Q. Then, in the third paragraph: "Where possible, the conclusions reached by the Evaluation Team have been examined by the consultants with a view to determining

their accuracy." What does that mean in actual fact? I mean, I know it's going back to a question which I keep the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

asking.

A. Yeah.

Q. You see, the "determining their accuracy" seems to me to be checking the result?

A. Well, I think there is a bit of that. I think really what this you see, one of the things which I it didn't bedevil, but one of the focuses that we were drawn to by the material that upon which we based the report and analysis was this: That most of these data that were supplied were actually quantitative data, and the methodology as propounded in the evaluation model, you know, gave precedence, in our mind, undoubted precedence to the quantitative approach. The qualitative approach was going to be used as a check of the quantitative data, and yet this quantitative model withered, fell out of bed, was abandoned, you choose the word, but it ceased to be used and was replaced by what the evaluators called the qualitative approach. Now, you know, there is a lot of pages in that report devoted to what we believed the qualitative approach was and what was used. And I think on numerous, there are numerous references during that report where we say substituting A, B, and C for 1, 2 and 3 is not substituting a qualitative for a quantitative approach.

Q. No, I think I understand that. But I think that the

A. And I think that's what that is reaching towards, that sentence that you asked me about, the accuracy of the conclusions. In fact, the conclusions, were, you know, inherently inaccurate.

Q. Which conclusions?

A. The result. An A, a B and a C is not an accurate numeric  
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IARTY TRIBUNAL - DAY 352

any more than an ordinal numbering 1, 2, 3, first, second and third.

Q. No, I understand that as a principle as to what you are saying. But where I am coming from in relation to this, Dr. Bacon, is simply, I am quoting to you from your document simply to get an understanding that because what you appear to be saying that you did was that you reviewed the conclusions to determine their accuracy. And you acknowledge, at the same time, which I think is important, "However as will be seen, much of the final report was based on judgement reached after discussions within sub-groups formed to examine various aspects of the applications."

A. Yeah.

Q. "In many cases these either involved either non-quantifiable data or the data was transformed into non-numeric indicators and scored accordingly."

A. Precisely.

Q. "This makes it very difficult to replicate the outcomes or adjudicate as to the validity of the conclusions reached."

A. Yeah.

Q. In my parlance, and forgive me if I am wrong, and I know you will correct me, as I understand that to mean is what it means, is there were things going on in the sub-groups and in the groups about which you didn't have information, didn't appear to be recorded, wasn't capable of being recorded, and as a result, it is impossible to review the conclusions in

A. I think that's fair comment.

Q. And you say that: "It makes it very difficult to attempt  
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IARTY TRIBUNAL - DAY 352

to replicate the outcomes or to adjudicate it as to the validity of the conclusions reached. This difficulty is compounded by the fact that in many cases the procedures followed are either stated without explanation or explained only briefly. In these cases, the consultants must necessarily examine any underlying assumptions that can be identified and extrapolate from these to determine the validity of the conclusions. Furthermore, a large volume of financial analysis was undertaken to determine the accuracy of quantifiable data where this approach was used in the evaluation."

And that appears to be saying, effectively, the same thing.

Isn't that right?

A. Yeah, I don't disagree with that.

Q. And that's against, I mean, that is against a background, and I don't want to really lose sight of this, that in fairness to this report, you can only look at it in the context of the information which had been made available to you?

A. Yeah.

Q. And it's equally clear that the probability is that there was more information available through the transcripts, because that was going on at the same time, which might have been of assistance, I put it no further than that, it might have been of assistance in helping you to clarify certain things?

A. Or confuse it even more.

Q. Or confuse it even more, I accept that. And you then identify the four aspects of the evaluations that you  
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focused in on, and we have touched on them already: The use of quantitative and qualitative evaluation and the reflection of these two approaches in determining the final recommendations; the scoring system that was adopted in determining the overall outcome; the assessment of the funding strength of the various consortia, particularly with respect to solvency and liquidity and the judgements reached; and the assessment of IRR and the subsequent scoring of this aspect.

And that, we have discussed and it speaks for itself. The four aspects that we were talking about had already been identified through the documents.

"These issues are examined in each of the following sections. Each section deals with each issue in total and the sections need to be considered in any particular order. Conclusions and issues requiring further examination by the Tribunal are identified in each case."

Can you just explain that sentence to me?

A. Well, they were really our, the you know, what we were highlighting at the end of each section were the issues that arose on foot of our analysis that the Tribunal might want to take up. I mean, they were really the questions that were left in our mind after conducting the analysis, or the issues.

Q. So that you were, in a sense, laying down markers of issues which you felt should or could be?

A. Should.

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IARTY TRIBUNAL - DAY 352

Q. With a view to trying to further understand the process and what might

A. They were, if you like they were, if you like, the bits that we were left scratching our heads about.

Q. I mean, in one sense, I don't want to underplay this or overplay it but, in one sense is it, would it be fair comment to say that when you look at all that has gone

since you were first briefed in relation to this, that the draft report is, effectively, out of date as of this time?

A. I don't think it's out of date if you go back to what the original purpose was. The original purpose was to provide assistance and guidance to the Tribunal team in relation to these technical areas. Now, I think the guidance and analysis that's provided, you know, in those technical areas is I can't see how its relevance has been diluted.

I mean, other information has come to pass, but in terms of the role of the report of informing, to use your own words I think, filling the knowledge gap in the Tribunal, I mean I think that function is still intact.

Q. No, I understand, I think I understand that, and if I can say it this way: The technical aspects which may be identified in the draft report are always going to be the technical

A. Exactly

Q. aspects, because they don't change?

A. Yes.

Q. What changes is the way in which they may be applied or the way in which people approach their use?

A. Fair comment.

Q. And where the report may be useful in relation to the le Court Reporters Ltd.

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technical aspects, because you hadn't access to all of the information, the second part of that is of less value?

A. The second part of?

Q. Of the non-technical aspects: The conclusions, the analysis of certain ways in which the PTGSM used these things is of less value?

A. Yeah.

Q. To put it that way.

A. Yeah.

Q. And in a sense, in fairness to you, could only be updated by having access to all of the material that has gone through the Tribunal?

A. Yeah, that would be a reevaluation.

Q. And that would be a reevaluation?

A. Mmm.

Q. And absent that, then, with no disrespect to the draft report, its function or its importance really relates only to the technical aspects?

A. Absolutely.

Q. When you say "technical aspects," forgive me because I am not an economist, what do you mean, briefly?

A. As pitifully as I can, I would say it's the bits that don't need a judgement to be drawn. You are not requiring on somebody sitting back and scratching their head and saying: Well, I wonder.

Q. Do you mean by that that we could actually reduce it to the way in which the competition is set up?

A. No, for example, IRR is a good case, you know. You run an IRR model. It's a technical exercise. You come along



afterwards and say well, do you know what, you know, there  
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IARTY TRIBUNAL - DAY 352

is a figure in here that's a magic number. It's 11.

What's that? That's not a technical; that's somebody  
coming to a judgement. And it's also a judgement that 11  
means something. It actually gives some content or value  
in the IRR number. Now, you know, as I said to you, and as  
the report, you know, concludes, you know, we don't see  
that. An IRR is an IRR is an IRR. And a number of 20 is  
not better a number of 11 is not a better number than  
20. An IRR would say well, look, the internal rate of  
return of 20 is better than an IRR of 10. So a judgement  
about some particular thing in the middle is not a  
technical application of IRR; it is some judgement that's  
being reached about the methodology and one for which we  
couldn't find any basis in the economics literature.

Q. I want to go through further parts of the report,  
Dr. Bacon, but perhaps I'll pass from it for the moment and  
just move on a bit, if I can, to the issues to be addressed  
at the back of it. In fact, let me leave that for the  
what I'll do, Dr. Bacon, is I'll come back to that and move  
on to the meeting on the something in March of 2003, which  
is Tab 13 31st March.

A. The 31st March.

Q. And this is the meeting which presumably

A. reviewed the draft report.

Q. Yes. And Mr. Healy says: "The more you read the report the more you see that it's impossible to see the result or to work it out." Now, I actually am not sure, I had thought, maybe you can help me in relation to that, I had thought when I read that that the report that Mr. Healy was speaking about was the Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

A. Was mine?

Q. No, actually, but you may be right.

A. I hope not.

Q. Was the evaluators' report, but you may not remember?

A. No, I think he is referring

Q. To your report?

A. Yeah, but I don't think I hope he is not saying that it's a deficiency of the report. But I think I can only conclude that that comment was that having read the report and having read the analysis, it's impossible to see how the evaluators came to the conclusion that he came to, how the conclusion was arrived at.

Q. It's interesting, because I had read it the other way, that they were talking about the evaluators' report?

A. Maybe you are right. But I mean, the meeting was there to discuss my report.

Q. Your report. Because in one sense, and I'll explain to you is, "The more you see that, it's impossible to see the result and to work it out." I actually thought that that

wasn't really a thing that you were concerned with, was the result or how it came about or the accuracy of it. But it may be that I'm absolutely wrong about that, and that this is your report and that it wasn't, for whatever purpose, clear as to how, whatever result you reached, you reached it or that it was impossible to work out from it?

A. I think it's referring to my report.

Q. You see, the next line is from Mr. Coughlan who says: "The difference between the draft and final reports, disturbing, new info from John McQuaid's evidence...transpires that all that was agreed in advance of quantitative weightings." So  
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IARTY TRIBUNAL - DAY 352

that bearing in mind that you had only done the draft report, it's unlikely that Mr. Coughlan was referring to the draft and final reports, and added to my belief that it may have been the evaluators' reports that they were actually talking about?

A. Well, I think there they were. It now transpires that all was agreed in advance was the quantitative weightings, I think that was the case in the evaluators' reports. Like, our conclusion was that what had been agreed was the quantitative weightings.

Q. Well

A. And the problem that they had, of course, was when they abandoned the quantitative methodology, they had to come up with a set of weightings in the qualitative.

Q. And then, you go "Task in Table 17 was to provide construction for result in Table 16; in other words, they started with the result."

A. Yeah, Table 16, if you recall, was a table of alphas, it was an alphabetical table, and, you know, the issue I think that we had, and I think that others had, was when you looked at it and say, well, AB, BC, DE, and A, E, F, G, what's the average of that lot? But there was one on Table 16.

Q. No, it's clear that you had a problem in relation to it.

A. I wasn't the only one though.

Q. You may not have been, but you are the only one here at the moment that concerns me, Dr. Bacon. But clearly you had a problem in relation to it?

A. Absolutely.

Q. And you Mr. Hannigan then asks the question: "Problem  
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IARTY TRIBUNAL - DAY 352

lies in what does an A mean?"

A. Yeah.

Q. And, "Quantitative evaluation must have a purpose. Then a qualitative evaluation didn't wither, it was abandoned.

What is the fundamental flaw? A genuine failure to understand. Thought As and Bs were the same as figures.

Problem with this report is nobody understands it apart from the man who wrote it."

A. I think that is that's not my report. I think that's

Mr. Andersen's.

Q. It's certainly an insight into the way in which people viewed it at that time, that it was nobody understands it except the man who wrote it.

A. Well, you know, look, there is a fundamental here: That you can not add letters of the alphabet, weight them and divide them and get an answer.

Q. I understand what you mean when you say that. I would have been looking at it slightly differently, in the sense that I think Mr. Healy is right, that the person who writes the report is the first port of call in trying to understand anything that happened, because he had access to what was going on and was involved at the time.

A. Yeah.

Q. And trying to reconstruct something which was done by somebody who isn't there is incredibly difficult.

A. But I mean, it's not a question of, you know, in my opinion, humble opinion, you can not, nobody can add letters of the alphabet and divide them and get an average.

It doesn't work. That's not what letters of the alphabet do.

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IARTY TRIBUNAL - DAY 352

Q. No, I understand that.

A. And that's when they went to Table 17 and put numbers in in place of the As, Bs and Cs.

Q. I understand that, Dr. Bacon, and I understand that you

appear to have been making that very point in March of 2003.

A. Yeah.

Q. And I am quite certain that people, for example, probably in the Department would have been fascinated to know that you were making this point to enable the debate to be, to happen.

A. Well, it seems from the evidence subsequently that they were making the point themselves.

Q. Yes, but not in the way in which you are making it, I think.

A. I thought it was.

Q. I see, okay. Well, I'm not going to review those transcripts at this stage. You say then: "What's the fundamental flaw? The problem with this report is nobody understands it apart from the man who wrote it. How do you apply weightings to results in Table 16? You don't. You apply them to Table 17."

It's been pointed out to me, Mr. Bacon, and I should suggest it to you, is that the meeting that you went to was a meeting you thought to discuss your draft report?

A. Mmm.

Q. You end up discussing Mr. Andersen's report?

A. No, I don't think I think we I think we did discuss my report. In fact, I have little doubt that we discussed  
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my report, but I think, you know, it was in the context of the conclusions of Mr. Andersen, of the evaluation report.

Q. I mean, I'm not disbelieving what you say, don't get me wrong about that, but all I can do is look at a document which is supposed to reflect what happened at the time.

A. Yeah.

Q. And it is correct, someone has just pointed out to me, there is absolutely no doubt that you thought that you were going to discuss your draft report?

A. Yeah.

Q. You even thought that the first remark may have referred to your report, and maybe it did, but the balance of that page certainly appears to refer to Mr. Andersen's report and not your report, and there is

A. Well, to our conclusions in relation to his.

Q. Well, to the discussion in relation to the fundamental flaw, what does an A mean? Those kinds of things?

A. That was the Table 16 and 17 of his report, which was, you know, that was the substance of the analysis that's contained in sections 2 and 3 of my report.

Q. Anyway... "Not a qualitative assessment at all. Replaced a precise quantitative instrument with an imprecise quantitative instrument and got the benefits of that. Facilitates a diversity of results and that's what they wanted.

Methodological failure. Moved from numbers to letters and believed this was qualitative.

Should have had a round-table discussion to go through scores. PB: Yes, and might have said this 5 is a weak 5 relative to that 5 or in fact it is only a 4 and mark it le Court Reporters Ltd.

IARTY TRIBUNAL - DAY 352

down accordingly."

And that was obviously a suggestion as someone looking at it would say that's how you talk about those kind of things?

A. Yeah, I mean, in my experience of doing evaluations, that's how, you know, in teams that I have participated in or consortia, that's what would have happened; you do the quantitative and that's what was, as it was set out in the evaluation model, you do the quantitative, you look at it, you consider it, you conduct a qualitative assessment, you go back and say well, you know, that 2 really is not a 2, it's more like a 1. Why did we get a 2? You adjust the quantitative, you know, as Mr. Andersen's evaluation model proposed. But that's not what happened, and what I'm saying there is that, you know, the view that I'm expressing there is that, you know, in my opinion, they got into a muddle with their Table 16, you know, that they replaced there was this notion that, well, look we are not going to have a quantitative, we will have a qualitative but a qualitative was interpreted to be we'll put down A, B and C as a score. To my way of thinking, and as was set out in Mr. Andersen's evaluation model, what



they were going to do was, conduct a quantitative analysis and then review it qualitatively and then adjust it. But they didn't do that in the event.

Q. And then it continues: "The recalculation of Table 17 assumed no weighting. Substantial point. Fundamental question. There wasn't an qualitative analysis done. What was done imprecise quantity. Originally a precise

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IARTY TRIBUNAL - DAY 352

quantitative. Degraded then imprecise. No qualitative analysis as such was undertaken. Can't apply weighting to a C or a B. Fundamental weakness of going over a failure to understand. Did MMA understand what he was doing?"

That was a question which you were asking?

A. Yes.

Q. "Should have had a system where better scores was between 0 and 1. MMA had no room for a 0 in his scoring system."

I am not sure that I fully understand that, Dr. Bacon, but

I don't think I need to ask you anything about it.

"MMA should have presented

A. The essential point, the essential point that was being made was that if you can translate A, B, and C into 1, 2,

3, you know, it's really an imprecise quantitative score

you are giving. And that's not a qualitative assessment of

the score, which is what had been envisaged would be the approach taken.

Q. No, I understand that, the point that you are making. Just

as a matter of interest, I take it you know Mr. Andersen,

or know of him?

A. No.

Q. Oh, I see. And you still know nothing about him?

A. No.

Q. I see.

A. When they were talking about the Andersen report, I thought

it was Andersen Consulting, not AMI.

Q. And you have never come across him?

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IARTY TRIBUNAL - DAY 352

A. No.

Q. You are aware of well, then you are not aware of his

expertise?

A. No.

Q. And that he has carried out many of these competitions

throughout the world?

A. It doesn't alter my view.

Q. No, no, I'm not suggesting that it does, Dr. Bacon, I'm

simply

A. I mean, I don't think you have to be an expert in anything

or experienced in anything to fail to see how you can add

A, B, C and D together and get an average, and that's what

their Table 16 did.

Q. I understand what you are saying by that and I understand

that it was others who dealt with this.

A. What do you mean "others"?

Q. Well, the Department and

A. Yeah.

Q. and Mr. Andersen and people like that and

A. Mr. Andersen didn't deal with it.

Q. And it seems to me that, so far as those are concerned,

that those criticisms, as such, were entitled to be known

by the people who were expecting to be dealing with them.

Going on then

CHAIRMAN: Well, I suggest, Mr. McGonigal, that we don't go

beyond this memorandum, I think there is only another page

or slightly less.

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MR. McGONIGAL: Well, I am quite happy to pull the plug at

this stage, Chairman, if it's easier, because there isn't

much left in that anyway.

CHAIRMAN: Well

MR. McGONIGAL: Would you like me to go through it?

CHAIRMAN: Maybe we will finish the last page and we'll

have a definite point.

Q. MR. McGONIGAL: "MMA should have presented quantitative"

sorry, I have done that bit. "Even though there is a

result in the report, is it conditional? Liquidity,

solvency, if you are low on solvency how you can score high

on liquidity, KH gives e.g., if someone floods the house

with this is market falls with house only with half, but

did nothing, still earning a good income so you are liquid.

Getting a loan doesn't improve your solvency, disimproves it, imprecise liquidity."

That's a thing which is current at the moment, economic mortgages, loans, values?

A. The point that's being made there is a purely technical point, that, you know, liquidity is not a remedy for insolvency.

Q. "Bankability means being able to go into a bank and get money. Not a solution to insolvency, but is to financial weakness.

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IARTY TRIBUNAL - DAY 352

"Sentences in report re robustness of project. How is the ability to raise corporate debt for project a solution for problems of a consortia member if one member is strong?

"Didn't want a situation where consortium got the licence and then went belly-up.

The Bacon report identifies 4 issues regarding finance.

"Everything points to Andersen having been manipulated, he was pushed around. He was the servant of the steering group who took decision to say move from numbers to letters. I think it was Andersen. Can't add soft scoring and you can't weigh it.

Why did he back away from the quantitative?

Need to come back to you a draft report before Easter, just need this steer for the moment."

And that's the end of that discussion.

So, in a sense, whichever report that was discussing, it was a full discussion relating to matters which didn't see the light of day for a long time. In fact, that never saw the light of day at that time.

A. The draft report?

Q. No, yes, until 2005.

A. Yeah

Q. With the other reports, and I think your conclusions are different in it?

A. Sorry, the conclusions are different?

Q. In your final report.

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A. I don't believe so.

Q. Well, we'll have a chance to check it before Tuesday.

A. Okay.

MR. McGONIGAL: Thank you. Thank you very much, Dr. Bacon.

A. You are welcome.

CHAIRMAN: We will resume on Wednesday.

THE TRIBUNAL ADJOURNED UNTIL THE 7TH MAY, 2008.

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