

THE TRIBUNAL RESUMED ON THE 7TH OF MAY, 2008, AT 11 A.M. AS

FOLLOWS:

DR. PETER BACON RETURNS TO THE WITNESS-BOX AND CONTINUES TO

BE CROSS-EXAMINED BY MR. MCGONIGAL AS FOLLOWS:

CHAIRMAN: Thanks Dr. Bacon.

Q. MR. MCGONIGAL: Thank you, Dr. Bacon. I should indicate to

you, Mr. Chairman, that since Friday we managed to get in contact with Mr. Hannigan, and Mr. Hannigan has furnished us with some documents relevant to the matters which we are going to discuss, and the first document I wanted I am going to put up on the screen and give copies to everyone.

And it appears to be an attendance of the 28th of November, of 2002. (Documents handed to parties.)

Dr. Bacon, you can either look at the document or see it on the screen, and it is apparently an attendance note by

Mr. Hannigan at the Tribunal offices on the 28th of

November of 2002. And on the right-hand side it lists the

persons who were present, being John Coughlan, Jackie

O'Brien, Jerry Healy, Michael Moriarty and Stephen, who I

assume refers to Stephen McCullough.

Can you help me in relation to whether that is, now that

you see it, your recollection of the persons who were

present?

A. It is not.

Q. You know, when I spoke with Kevin Hannigan, my presumption

was that the names on the top right-hand side was actually

a notation of what the Tribunal's team was. Do you

remember when you asked me last week was the solicitor at the first meeting?

A. Yes. And I said and I recall saying was it Stephen. I was going from this, I thought I had presumed that this note was a note of who the legal team were, rather than who was at the meeting. And I have to say honestly to you that I don't remember Michael Moriarty being at the meeting.

Q. I understand that. When you say you spoke to Mr. Hannigan about this?

A. I asked him yesterday; I said, you know, on that note I said were the people that were at were the people that you have named, I said was that the legal team or was that the people that were there? And he said it was the people that were there.

Q. You see, what is puzzling me is, when did you have this note first?

A. When I spoke with Kevin I checked with Kevin after I had after I had been here last week.

Q. I am just a bit puzzled about this, Dr. Bacon, because on the first day, on the Friday when you were giving evidence, one of the first questions I asked you was whether or not you had looked through the books and then later on in the morning you said that you had spoken to Kevin Hannigan after looking through the books in relation to documents which appeared to be missing?

A. That's correct.

Q. And I presumed that at that stage that you would have

become aware of the existence of this note of the 28th of

November?

A. That's correct.

Q. So that the first time you spoke to Mr. Hannigan about this was before you gave evidence on the 28th?

A. That's correct.

Q. So that you would have known at that stage more definitively not only that there was a document in existence which would have assisted us in relation to this inquiry, but presumably that the names on the list may be in error in relation to what was your recollection?

A. No, I didn't discuss that with him.

Q. Well, how could you have known of the existence of the note?

A. Because he told me.

Q. And did he tell you what was on it?

A. He said there is nothing on it. He said there is a list of names and a few scribbles of mine.

Q. And I am sure he told you the list of names?

A. Absolutely.

Q. Yes. You see, that in normal parlance would suggest that those people were at the meeting?

A. Well, as I say to you, my presumption was that this was a first meeting. My presumption was that the list of names was a list of their team.

Q. Perhaps I can deal with it this way. Mr. Chairman...

CHAIRMAN: I was just thinking, Mr. McGonigal, insofar as I

can be of any help; I have a dim recollection that I may have very briefly met Mr. Bacon on a totally brief and preliminary basis at some very early stage. I can put it no further than that.

MR. COUGHLAN: I think you were introduced when Mr. Bacon and Mr. Hannigan arrived. I think you entered the room, you said hello, exchanged a few courtesies, Sir, and I think you left then.

CHAIRMAN: All right.

MR. McGONIGAL: Mr. Chairman, I am going to be difficult about this, because I do not understand for one minute why the Tribunal could not have been upfront in relation to this. I cannot

MR. COUGHLAN: Sorry, sorry, before My Friend engages again in the hypervia that he has engaged in all along, could you indicate the point that he wishes to establish about you being introduced, as you might be to anybody, Sir?

MR. McGONIGAL: The point is very simple, Mr. Coughlan: That the Chairman has indicated that he met in some way at some time Mr. Bacon with the legal team. This has not been made known before since 2002.

MR. COUGHLAN: The point of that, Sir?

MR. McGONIGAL: In fact, Mr. Coughlan, since 2002 you have spent an awful lot of time trying to cover up the fact that there was a meeting at which Mr. Bacon attended which was attended by the Chairman in some form or fashion and by the legal team. That is highly improper.

CHAIRMAN: Mr. McGonigal, I think, what you are proposing is another needlessly and unwisely inflammatory line of remarks. As I have alluded to in the past, it has been a practice of mine not to attend meetings in general terms. Where persons, such as Government Ministers may have attended, as a matter of courtesy I may have looked briefly in to meet witnesses who attended, out of courtesy, for the first time. As regards Mr. Bacon or Professor Bacon, my recollection is that some very brief or perfunctory exchange which took place on what was probably the first time he dealt with the Tribunal. And beyond that I had no interaction or dealing with him.

MR. MCGONIGAL: Listen, Mr. Chairman, it is abundantly clear that whatever your introduction, assuming that was what it was, that you were aware that Bacon was on board that Dr. Bacon was on board at that time. That fact has been completely withheld from 2002 to 2005. It was initially believed that this was a strategy by the Tribunal using Bacon to forge a particular line which appears clear from some of the documentation. Now what we discover is that the possibility is that the fact that your involvement with Bacon, whatever it was, at that time, was in effect being covered up by reason of the fact that you go from a position of not discussing Bacon between 2002, 2005, bring him into the public domain by the back door through your ruling in 2004, and introducing him in 2005 as a named person, indicating that you might call him as a witness,

then not calling him as a witness and nobody understanding what was going on. Except now it becomes clear that there were things going on internally within this Tribunal which have not been made apparent. Dr. Bacon was paid $\frac{1}{2}$ 100,000 for what? This Tribunal is a public Tribunal, and this Tribunal is failing to deal with the public issue as to what the internal relationship was between Bacon and the Tribunal. And it is difficult to see how anyone, anyone, can have confidence in any report which emanates from a Tribunal where it is not open and upfront.

CHAIRMAN: Mr. McGonigal, you have a very explicit and clear judgement from Mr. Justice Quirke

MR. MCGONIGAL: I have.

CHAIRMAN: that was unanimously upheld in the Supreme Court. I regret and deprecate the constant efforts to stir up mischief. You might do well to reflect on the background to this. Mr. Bacon was engaged to assist the Tribunal and to equip them with assisting as regards the legal personnel into their inquiries into the GSM process. The proceedings were brought by you and determined in the manner that I have described. When the question of calling Dr. Bacon as a witness was then again aired, I received submissions from a sizable number of affected persons, including yourself. I acceded to those submissions, taking the view that it did not require professional expertise and that I was prepared to write the report without the aid of that assistance from Mr. Bacon given in expert evidence.

That is the situation. You then exercised your entitlement to call Dr. Bacon in cross-examination. I pointed out to you at length that this is limited to the matters of information exchanged between Dr. Bacon and the Tribunal. And it is a cause of some regret to me that you constantly appear to be trying to re-enact proceedings that have been conclusively determined in the High and Supreme Court, and to seek for any particular instance of stirring up what might appear to be any potentially pejorative matter. I would be very grateful if you would proceed with your cross-examination on the lines that with were empathetically and unequivocally made clear by Mr. Justice Quirke.

MR. McGONIGAL: Mr. Chairman, what Mr. Justice Quirke said:

"The Tribunal's legal advisers first met with Bacon on the 28th of November. They met with Mr. Bacon again on a number occasions in 2002 and 2003. The Tribunal received a draft 58-page report on the 18th of March. The Applicant contended that the terms of the e-mail suggested collaboration between the Tribunal and Mr. Bacon in the preparation of the report. That was not borne out by the evidence suggested in these proceedings."

What was not known to Mr. Justice Quirke at that time: (1) was your involvement with Mr. Bacon on whatever basis, and we still do not know what that basis was. Secondly, the 8th and the 18th of November were not made known to Mr. Justice Quirke. If those had been made known to

Mr. Justice Quirke, then that finding might well be different. These meetings contradict completely the belief that Mr. Justice Quirke had that we had been given everything by way of information or documents. We have not. And despite our insistence through many years of trying to get documents, it is only on a drip-feed basis that we find out the actual information which eventually comes to the public domain. And it is by drip-feed. If we hadn't called Dr. Bacon, this would not have been known. If we hadn't gone to Mr. Hannigan, this wouldn't have been known. We do not understand why this Tribunal did not correct Dr. Bacon when he was giving evidence on Friday in relation to your involvement, because it would have been a matter of simple common sense to simply say to him: I was at that meeting for a short period, or I was not. In effect, there was silence not only from you, Chairman, but also from your legal team. It is this silence that is distressing to anyone, particularly the public, because it is silence that this Tribunal is supposed to be opening up and it is not.

CHAIRMAN: Mr. McGonigal, I very greatly resent your suggestion that there is some sinister or improper motive beyond an occasion, as which I have done with many, many witnesses, I went in and said: Hello, thank you for coming to assist. No more was my involvement and I very much regret this behaviour on your part.

MR. MCGONIGAL: Listen, there is no note of the telephone

conversation which first heralded this involvement with Bacon. There is no note, no solicitor apparently at the meeting on the 28th of November. And if Mr. Davis was present, I am absolutely certain he would have taken a note, because that is what Mr. Healy told us at a later stage, that Mr. Bacon (SIC) does, that he takes notes. So why is there no note of the 28th of November from the Tribunal which acknowledges who was there, acknowledges what was happening and sets up the work which Dr. Bacon was allegedly going to be carrying out? Instead what we then find out is whether or not Mr. Davis was there, we don't know. What we do know is that the notes either don't exist or have not been kept and it is still not clear which. We also know that you were present for part or all of that meeting. For

CHAIRMAN: I was not present for all of any meeting.

MR. McGONIGAL: for what purpose, I do not know.

CHAIRMAN: I have already made it clear, Mr. McGonigal, where witnesses attend for the first time as a courtesy, I have done so in the case of senior politicians and other persons, I have come into the room briefly in advance of meetings and thanked them for their attendance or involvement. My involvement on this occasion was no more than that. And I would thank you to proceed with your cross-examination, because if it is going to become pursued on this recriminatory basis, I will have to take a particular course on it.

MR. McGONIGAL: Well, maybe you would be prepared to take that course now because it is my intention to go through all of these meetings to find out where the notes are.

CHAIRMAN: You are entitled to cross-examination on information exchanged between Dr. Bacon and the Tribunal legal team.

MR. McGONIGAL: And I want to know, first of all

CHAIRMAN: You will be confined to that.

MR. McGONIGAL: the information which was exchanged by Dr. Bacon and you at this meeting on the 28th of November.

CHAIRMAN: There is no information exchanged. Get on with it, Mr. McGonigal.

MR. McGONIGAL: So you're saying, Mr. Chairman.

MR. COUGHLAN: Mr. McGonigal is setting out for some kind of walk-out here, it is obvious to any advocate listening to this. Mr. McGonigal has not questioned Mr. Bacon on the substantive matters that Mr. Bacon gave evidence about, technical aspects of the PTGSM process, Sir. He did not cross-examine Mr. Bacon about the evidence he gave last Friday concerning the withering away of the quantitative evaluation. He did not cross-examine or suggest there was anything incorrect when Mr. Bacon stated last Friday that one did not have to be an expert to understand that you could not add letters and average them and apply weights to them. Mr. McGonigal at all times has been engaged in here, Sir, a process of seeking to jettison what is happening in the Tribunal and has not agreed and carried out what has

been agreed by his solicitor; that there would be an

examination of Mr. Bacon as a technical witness.

A. Sorry, Mr. McGonigal, I have to say to you, you know, since it is my remarks that has given rise to your...

Q. MR. MCGONIGAL: No, it is not your remarks.

A. Or this note or whatever.

Q. It is Mr. Hannigan, and only Mr. Hannigan can deal with it in evidence.

A. I mean, you know what I want to point out is, that I hold to what I said last Friday; I have who I recollect being at the meeting was Jerry Healy, John Coughlan, and their lady colleague.

Q. I have no difficulty with you holding with that evidence, and I expect you to hold with what you believe to be the truth.

A. Absolutely.

Q. I am simply pointing out to you, Dr. Bacon, that the note which is in existence doesn't seem to support that, if Mr. Hannigan was reporting on people who were present at the meeting and...

MR. COUGHLAN: My Friend is engaging in argument here, Sir.

Has he put a question to Mr. Bacon that Dr. Bacon was in any way influenced by any member of the legal team or by you, Sir? Dr. Bacon has said already in sworn evidence that he was not lead or set up to do anything. The purpose of this is to cause mischief, Sir. And it is not appropriate for a barrister who is supposed to be

conducting a cross-examination of a witness on technical matters.

MR. MCGONIGAL: It is not supposed to be causing mischief, it is supposed to be getting at the truth. A line of inquiry trying to find out what was happening on the 28th of November in the Tribunal offices when Mr. Bacon was being engaged. Perhaps you or Mr. Healy would like to give evidence about it?

MR. COUGHLAN: The purpose of it was to examine Dr. Bacon, and on the information. He has not finished examining Dr. Bacon on that particular matter. Dr. Bacon has given sworn evidence on his independence, that he wasn't set up to do anything. He has given evidence of technical aspects of the evaluation process which he has looked at and expressed a view. My Friend moved on from consideration of that first draft report and went on to a next meeting, Sir. So I just wonder when is My Friend going to cross-examine Dr. Bacon about the technical matters? Dr. Bacon has already said he was not influenced.

MR. MCGONIGAL: That is a matter of reading the transcript, Mr. Coughlan. But he was certainly influenced by the fact of what he was asked to do. Furthermore, Mr. Chairman, what you said on the 10th of November of 2005 was: "I should make it clear, Mr. McGonigal, I do not attend meetings because I have to adjudicate or assess witnesses as they appear in the Tribunal, and except, I think, for one very early occasion on a fairly non-contentious

situation when the Tribunal was very short-handed, I have made it an absolute rule of policy that I do not attend meetings, except perhaps introductory ones for individuals who are in the fringes."

CHAIRMAN: Precisely.

MR. McGONIGAL: In the fringes, Mr. Chairman, not major participants. "But I do not as a general practice attend meetings with witnesses." That is in 2005.

CHAIRMAN: Yes.

MR. McGONIGAL: That does not support that is not supported by this meeting on the 28th of November.

CHAIRMAN: It is exactly that situation. Now, are you going to take up this cross-examination or is it

MR. McGONIGAL: It may be that is what you would like it to be, but it is not what it is.

CHAIRMAN: Mr. McGonigal, if you propose nothing except unwarranted mud-slinging, you are doing no service to the public functions of this Tribunal, or indeed, to your client. I once again have to request: Are you going to cross-examine Dr. Bacon in accordance with the formal undertaking given by your solicitor some weeks ago?

Q. MR. McGONIGAL: Dr. Bacon, in relation to the note of the 28th of November, you gave evidence the other day of what happened at that meeting. I am trying to reconcile your evidence by what is there on the note. It would appear that what is on the note is: "Andersen evaluation document, 11% IRR." That clearly refers to the IRR?

A. Mm-hmm.

Q. "What is happening key figures due diligence." Underneath is: "Roger Pye KPMG input in the past. Three parts, criteria for due diligence PYE. Application in this case. Overall design for decision. Three things. IRR set is very important ahead of time. Getting into the case. Business planning. Return to Ireland. Criteria for each."

Now, that seems a far distance record of what you suggested happened on the 28th of November, which was that four matters were outlined: IRR evaluation and qualitative and quantitative, bankability, and solvency, I think, was the fourth. None of those, apart from IRR, none of those appear in this document?

A. Well, you know, I didn't write the document, I didn't write the note and, you know, what was discussed was what was discussed, you know, and I stand over that. I mean, this note here

Q. First of all, Dr. Bacon, do you agree that what you said doesn't correspond with this note?

A. The four points that you made are not noted in this note, except for IRR.

Q. Yes. So, can what should we take from that, that those matters were not discussed at that meeting?

A. What? The four matters that I said, sure of course they were discussed. I told you that they were discussed and on foot of them I went away and drafted a proposal.

Q. Well, I think, the first thing that happened was that you

were sent a briefing document?

A. Correct.

Q. So you think that reflects what happened at the meeting on the 1st?

A. I think what reflects?

Q. Now, I just want to go back

A. Sorry, what was the question that you just asked me?

Q. That you think that your evidence reflects what is in that note?

A. What is in this note?

Q. Yes?

A. No.

Q. You see, no doubt, Dr. Bacon, if there was a Tribunal note, which if Mr. Davis was present, I believe, there would be, we would know what was discussed from the Tribunal side at that meeting?

A. Look, all I can tell you is what was discussed from my side. I was the one that was being asked, you know, to engage in the work. I was the one that was going to have to stand over the work, and I am here doing that, you know.

And if I said that there were four criteria that we were asked to give assistance upon, that's what we were asked.

Now, if there were other remarks made at the meeting, that's fine, but in terms of what happened of the areas on which advice was being sought, the four areas that I indicated to you are the four areas.

Q. Now, I wonder if you would turn to Tab 23 for me, please.

Now, this is a document of a meeting of the 8th of November, Mr. Bacon, which was not disclosed in the High Court proceedings either. And this is, apparently, a Tribunal note and the at Tab 23 is the typed version of it. Do you have that?

A. Yeah.

Q. Now, it says "Peter Bacon" do you remember this meeting?

A. Vaguely.

Q. Do you have

A. This is the meeting

Q. Do you have any notes of the meeting?

A. No.

Q. Do you have any notes of any meeting?

A. No.

Q. Why is that? Does Mr. Hannigan have any notes of this meeting?

A. No. I mean, I asked Mr. Hannigan if he had any notes.

Q. At any stage was there an instruction to you or Mr. Hannigan that you are aware of to get rid of any notes that you might have?

A. Absolutely not.

Q. Because it is a curious feature that Bacon & Associates don't seem to have any papers working or otherwise?

A. No, we don't. All of our work would have been on computer in terms in terms of draft material.

Q. If the work was on computer then you would have print-outs?

A. Look, I mean, what we printed out was we printed out

Kevin Hannigan printed out the working, the working drafts of Section 4 and Section 5 and furnished those in February of, what was the year? 2003, while I was on vacation.

They formed part of what became the draft report which I submitted on the 18th of March, was it?

Q. And these are all on disks?

A. They are not on disks.

Q. Well, where are they?

A. What?

Q. Where are they then? Are they still on the computer?

A. The draft report, the draft report that I submitted is on my computer.

Q. Are all of the papers that you worked on on the computer?

A. Well, there was only the draft report is on the computer.

Q. Dr. Bacon

A. Yes.

Q. you were asked to produce any document or material which you had in relation to the working papers, in relation to the papers concerning the issues in this Tribunal. Are you saying that there is material on the computer which you have not produced?

A. I don't know, I would have to check.

Q. So the answer is possibly, yes?

A. I would have to confer.

Q. Apart from that, there must be working papers which you had when you were doing some work or Mr. Hannigan had or

Mr. Walsh had?

A. I don't Mr. Hannigan doesn't have

Q. Sorry?

A. We have given you I gave you data this morning that I collected from Mr. Hannigan last night, which was some literature and notes that he had to himself. And I contacted Mr. Hannigan after you, after you asked me.

Q. I understand that, Dr. Bacon. What is interesting to me is: We wrote to you early on in 2007 and we requested documentation from you, and at the time we wrote to you on the 7th of 26th of October, 2007. And in that, inter alia, we asked you for provide: "Full details of how you came to be engaged by the Tribunal. This response should include details of the identity of the individuals that initially approached you; the date of same; what was explained to you as being the proposed purpose of the proposed engagement. Please provide full details of your initial meetings with the Tribunal. This response should include the date; location of same; the identity of those persons present; the instructions that were given to you; materials that were furnished; and the information imparted to you during. Of particular importance, the direction regarding the question of direction given to you by the Tribunal." And you chose to ignore that, why?

A. My client was the Tribunal. My client was the Tribunal, not your client. I mean, I think you wrote or your client wrote, his solicitors, to me four or five times,

unsolicited, and indicated in a high-handed fashion, you know, saying this might be a bit of bother to you. I was suppose to take time out of my life to be of assistance to your client. Now, I have nothing, you know, against your client one way or the other or for but I wasn't going to get myself into a position where I was lending assistance to the interested parties of this Tribunal and assist one and then what? Get a list from another one and say no to him. I mean, I am quite happy to assist you through the Tribunal.

Q. Yes. But we copied this letter to the Tribunal, Dr. Bacon.

We were writing to the two of you saying: Please assist us. Now, you contacted the Tribunal on receipt of this letter?

A. That's correct.

Q. And what happened?

A. I said, you know, I have been contacted by Denis O'Brien's solicitors, what should I do about it? And they said: It is a matter for yourself.

Q. So you decided not to reply?

A. Absolutely.

Q. Why didn't you reply?

A. Because if I was you know, on what basis would I reply?

Q. To write back and say: I have been advised by the Tribunal that I do not have to reply. It is not my intention to reply.

MR. COUGHLAN: That is absolutely distortion and a disgrace

for a member of the Bar. Dr. Bacon said that he was advised by the Tribunal it was a matter for himself.

A. Absolutely.

MR. COUGHLAN: It is now being put by a barrister that he was directed by the Tribunal not to reply.

A. I wasn't directed. I mean it was a matter for myself.

Q. MR. MCGONIGAL: Why didn't you write back to us and say that, Dr. Bacon?

A. Look, you know, I am sorry; my time, like yours, is valuable. I wasn't going to get into a situation or open into a dialogue, you know, with you independently of my assignment to the Tribunal. I am quite happy to come here and, you know, at the request of the Tribunal, which is my client.

Q. I understand that, Dr. Bacon. But what is concerning me is that you were paid $\frac{1}{2}$ 100,000 out of public monies in relation to work that you did for the Tribunal. You were being asked by a person involved with the Tribunal, as was the Tribunal, to assist in relation to documentation and other matters which you had personally been involved in. You contacted the Tribunal and listened to what they said, and as a result of what they said you decided not to reply to that letter, to the letters of the 7th of November, the 19th of November, the 13th of December, the 20th of December, until eventually we were forced to call you here?

A. And I am happy to be here.

Q. So far as the Tribunal were concerned, 25 letters went to

the Tribunal trying to seek similar information, and now when we get the, begin to get at some of the information, we find it is not the complete information. So why didn't you reply, Dr. Bacon?

A. I have answered your question, you know.

Q. Okay. Going back to the meeting of the 8th of November; is that an accurate record, so far as you can recollect, of that meeting?

A. So far as I can recollect, yeah. This was the meeting, I think, where

Q. Now, taking it from the beginning, can you tell me who was in the meeting?

A. Well, I can well, I have no reason to disagree with the with what is at the top of the page.

Q. You have no recollection, in other words?

A. I don't have a specific recollection if there was anybody else there. Who is SMcC?

Q. Stephen McCullough?

A. Right.

Q. But apart from those, do you recollect whether anyone else was there?

A. No.

Q. Did the Chairman pop in, for example?

A. No.

Q. Was Mr. Davis there or Mr. Heneghan, it may have been at that stage?

A. I don't know. I don't know.

MR. COUGHLAN: Mr. Heneghan was on holidays.

Q. MR. McGONIGAL: Now, can you take me through the note, Dr. Bacon, and interpret it for me as you recollect it?

A. The meeting of the 8th of the 11th. This was in relation to the second report. It was to deal with the letter of August that the Tribunal had sent to me requesting a second report.

Q. And wondering why you hadn't responded.

A. I am sorry?

Q. And wondering why you hadn't responded, I think, is that right?

A. Well, I mean, they had made a number company

Q. The lead-up to it is the tab before that, Dr. Bacon, the 23rd of November, you rang on the 1st of November. "You had not returned sooner in response to our letter of the 30th of August. He has been abroad and the matter is not at all straightforward. He intended to answer the questions posed, and he would need to come to judgement along with a colleague, and it is not a simple yes or no.

His judgement will be contrary to other experts' evidence and would put his colleagues in conflict with others. I asked him to come to the office to discuss this, and he will come on Monday the 8th of November at 3 p.m.."

So, in effect what appears to have been happening was that you had received documentation, primarily the letter of the 30th of August, you had gone away, you had come back, you had reviewed the material, you had seen that the Tribunal

was seeking that you should come to judgement in relation to a number of your colleagues, that there wasn't a simple yes or no, and that the judgements would be contrary to other experts' evidence and would put those colleagues in conflict with others.

What does all that mean?

A. I am not quite sure. What tab are you reading from?

Q. 22?

A. Yeah. What this is about is the second report. The second report you will know from the letter that was sent to us in August that the, that what was being requested there, according to the letter, was a second report, but basically one that the material in relation to which had been covered in its entirety or virtually in its entirety in the first report. But it was in a format of a question and answer, what they were looking for. And I felt that, that it wasn't a straightforward matter of reformatting the report that was there, you know; it wasn't a question of doing a cut and paste job on the first report to deliver the second report. There were specific questions in there that judgements would be required to be made about. That was what I was saying.

Q. Dr. Bacon, what the document says is that it was going to put you in conflict with other experts. What does what is that referring to and whom is that referring to?

A. The experts in the Evaluation Group.

Q. I see. You see, the actual sequence of events is that you

got your letter of the 30th of August of 2004, and on the 14th of September, 2004, on day on the 15th of September, the Chairman indicated that he "alluded to fresh matters not yet dealt with in evidence as being comprised of the overall bundle of remaining items. Firstly, the question of possible testimony or other otherwise from Michael Andersen, the Danish consultant, in the course of the GSM, and secondly, a matter that was touched upon in part in the evidence of some leading witnesses on behalf of the former Esat Digifone Consortium. The question of some limited measures of expert evidence by way of guidance to the Tribunal in some of the issues that arose in the course of the GSM competition. Not in a position to give full details in relation to either of these matters. This is because on-going work is proceeding on both these fronts as a matter of urgency, and also because in the course of a meeting since the last deferral of evidence on the part of the Tribunal lawyers with the legal representative of Denis O'Brien that information in relation to Andersen would not be sprung at the opening. I think it fair that I should probably regard the basis of understanding to be applicable also in relation to any expert report that is procured by the Tribunal."

But at that stage and he continued on on Page 6:

"Regarding the expert report, the main reason why it has not proved feasible to furnish this particular document today to interested persons is because Tribunal lawyers

have been endeavouring to ensure that it remains as brief as lacking in unnecessary complexity or technicality and is devoid of matters falling outside the Terms of Reference which is conceivably possible."

Now, in actual fact bearing that in mind, you had already furnished the report of March 2003, you indicated to us on Friday that in fact you were anticipating a meeting to close off that as the final report?

A. I wasn't anticipating, I requested.

Q. Yes. You wanted to have a meeting with the Tribunal to ensure

A. Correct.

Q. to ensure that the report dealt with the matters and the issues which you said needed to be dealt with or at least which they needed to be dealt with. Now, subsequent to that that never happened, subsequent to that the letter of the 30th of August of 2004 was issued which was not seeking, was seeking a new report in the terms of that letter?

A. That's right.

Q. Which was for the purpose of giving evidence?

A. That is what it said in the letter.

Q. And was based not on anything that Esat Digifone or Mr. O'Brien had said in evidence, but was based on the fact that you had been engaged back in 2002 as a consultant?

A. Yeah, I am not sure that you are correct that it wasn't based in evidence because somewhere in that letter, at

least in one area, it was quoting evidence that had arisen.

I think, in fact, in relation to that paragraph 9 which you are asking me to ask of the or was it paragraph 9? 9 or 12?

Q. What happened then was that you were written to, the Chairman made a statement on the 14th of September, you were reminded on the 23rd of November. You made a phone call on the 23rd of November, and you then had this meeting or telephone call on the 1st of November. And that

A. Yeah.

Q. That appears to indicate that whatever was in the letter of the 30th of August was causing concern to you because it was asking you to adjudicate on colleagues' evidence which would not be a simple yes or no?

A. The difficulty that I had was to find the time myself at that time which is what accounts for the delay. I was working on an assignment at that time that had me out of the country a significant proportion of the time, that is what accounts for the late while I was managing a number of projects here. When I had looked at the letter of August, you know, I felt we would have to sit down, and as I had done in relation to the first report, draw a proposal. Now, in the event the proposal I drew was by way of a letter of response to that, to that letter of August.

The point from my point of view, the issue was that the second report that was being requested wasn't a matter of re-editing, doing as I said to you before, a cut and paste

job on the first report and simply, you know, resubmitting it. There was a body of work that was going to have to be undertaken with respect to that first report, and the letter of August, to come up with a report that met that letter of August Terms of Reference.

Q. And that was the purpose of the meeting of the 8th November?

A. That's correct.

Q. And as part of that meeting you seemed to be saying on Page 3 of it that you were being asked to do a direct criticism of the process?

A. Where is that?

Q. The third page.

A. I don't think yes, it is referring though to the paragraph 9 and 12.

Q. Yes.

A. And the specific issue there was the that the question was putting me into a position of conflict was between the statement in the evaluation there was a statement in the Evaluation Report talking about the scoring had been done in connection with the criteria that had been agreed before the competition closed. And my memory is in that letter of August, that in relation to that item the Tribunal team were pointing out that it had subsequently arisen in evidence that the scoring was determined, I think, was it in a meeting in Copenhagen?

Q. Yes.

A. Yes.

Q. You see, if you go through this

A. And in actual fact sorry, if I can expand on that? In actual fact, you know, I don't think there was a conflict in the heel of the hunt because it seemed to me, when I was looking at the letter, that, you know, we were getting we were getting ourselves into a situation where we were going to have to adjudicate on conflicting evidence, and I didn't know how we would do that. How would I know which was the correct evidence? Of the in actual fact, I don't think the evidence is in conflict because when we actually got into it. What the report was saying was the criteria what the evidence was about was the specific weightings that were finally determined in a meeting in Copenhagen. I don't think there was a conflict between saying that the criteria had been determined before the close of the competition and the weighting that was going to be applied to those criteria subsequently.

Q. Yes. What I am trying to simply understand, Dr. Bacon, is what it was you were being asked to do, going back to the idea of an expert as opposed to someone that is being asked to reach potential conclusions. On the first page you have the suggestion: "The other issues require us to make judgement. We don't have empirical evidence." What is that referring to?

It might be easier if we just go through it from your own point of view. The beginning of it suggests that "Peter

Bacon with the legal team JH, JOB and SMcC. Difficulties:

6 topics. Paragraph 4 evaluation process. 8 the position

to abandon 9+12" that is dealing with a

A. These are reference to the paragraphs in

Q. In your letter?

A. In their letter, exactly.

Q. Of the 30th of August?

MR. COUGHLAN: In the Tribunal's letter?

A. In the Tribunal's letter, yes.

Q. MR. McGONIGAL: "9 plus 12, validity of certain comment of

M Andersen." Was simply being asked to comment in relation

to comments made by him either in documents or to the

Tribunal, it is not clear to me which?

A. Yes. And I and I can't recall which. I mean, it would

have been to whatever the content of the letter is.

Q. "Financial. Our belief that we have dealt with everything

except paragraph 9?

A. Yeah.

Q. And, "No differences with paragraph 4."

A. Difficulties, I suspect that is.

Q. I beg your pardon, "Difficulties with paragraph 4. The

other issues requires us to make judgement. We didn't have

empirical evidence."

A. Yeah.

Q. "Those issues" were which?

A. Well, I presume it was the other paragraphs.

Q. Well, I am not sure that is the case?

A. I think I mean.

Q. If you can recollect I would just like to know, if you can't it doesn't matter?

A. I can't specifically. Looking at it there, I would interpret what it was was we had no difficulties with paragraph 4, whatever paragraph 4 was, and that the other issues required us to make judgements; the other issues being the other paragraphs, the matters in the other paragraphs.

Q. You then say: "In substance they are asking you to go into Brennan and Towey's evidence"

A. Yes, this is in relation to 9.

Q. That was the only evidence that they may have furnished you with?

A. Sorry?

Q. That was the only evidence that they may have furnished you with?

A. Yeah.

Q. And was that do you know whether that was all of their evidence or part of their evidence?

A. I have no idea. It was the quotation that is contained in the letter of August.

Q. Then: "JH: A process quantitative and qualitative done a different way, mainly qualitative."

A. Yeah.

Q. "PB: They caused it to wither. PB: A choice, interpretation or conspiracy." What does that mean?

A. You can interpret whether that, I think, relates to the final results on the quantitative and qualitative, where they you know this Table 16 and 17 that I spoke to you about at the end of last week, that you started with Table 16, which was letters of the alphabet which appear to us to have been added up to give an average, and Table 17 which was numbers.

Q. Yes. What I am concerned about, Dr. Bacon, is what you were being asked to do?

A. I wasn't being asked to do anything other than answer the questions that they had in their letter. What I was saying was that you had a choice of interpretation in answering that question.

Q. Which question?

A. that we were talking about there. I believe that was either the decision to abandon the quantitative evaluation or the results in table, the final results as they appeared in Table 16 or 17.

Q. But

A. As I look at the note there it appears to me it was it is a reference to the withering.

Q. I mean the words being used were "interpretation or conspiracy". They presumably must have come from the Tribunal?

A. No, no, I think, they are they are my words.

Q. I know they are written down there as your words, but where did they come from?

A. I think they came from the discussion of the withering, the so-called withering process. I mean, let's be clear: The position the consultants took in relation to the quantitative, the move from the quantitative and the qualitative was that to describe moving from a quantitative process that the process withered. The process in our judgement, you know, didn't wither. They decided consciously they were moving away from a quantitative approach because they were unhappy about the results that were coming from that approach, and as a result of data deficiencies that they were experiencing. Now, the position that I said was, look, they moved from a quantitative to a qualitative approach, you know, you can interpret, you know, why that was done; that it was, you know that it was a deliberate decision to abandon a process that would have worked. I mean, I mean, to this day the view that I hold is that, you know, I don't understand why they abandoned their quantitative approach.

Q. And is that what you said?

A. Yeah, sure we have said that in the report.

Q. So in actual fact, so far as the interpretation or conspiracy was concerned, it was as clear as night follows day from the documents that you had looked at, from the papers you had looked at, that there was no conspiracy to do something which was inherently wrong?

A. No, that is not what I am saying. What I am saying is, you know, I don't know what the motivation was. I don't know

why they abandoned the quantitative approach. I know the reasons that they stated why they abandoned the quantitative approach.

Q. You see, what you then say is: "Abandon requires a judgement, were they justified? I don't think there is an answer, can't say, is subjective. Was not an imperative. But decision made to abandon."

A. Yeah.

Q. So it was made within the meetings, if you like, of the PTGSM?

A. It was, and they gave reasons why they abandoned it.

Q. Yes, absolutely. And it was clear from everything that you saw, that wherever the decision was taken it was taken within the PTGSM, whatever that decision may have been, whatever the reasons were for it, but there was nothing in those documents good, bad or indifferent to suggest that there was an outside influence of any kind?

A. No, that is correct.

Q. And then you say: "Was there an alternative to wither the black box."

A. Yes.

Q. What does that mean?

A. Well, you know, that is referring to, you know, to whether the quantitative approach was simply seen as a black box, that you put numbers into it and you got an answer out of it, a sausage machine, without a qualitative check on that quantitative...

Q. The next bit is: "PB: 9 plus 12. The validity was a qualitative process valued. Asking us to make a judgement.

Asking us to consider a direct criticism of the process.

Asking us to criticise. "Maybe" could be the answer."

Now, as I understand that in English, you were being asked, or you were saying that you were being asked, to directly criticise the process or part of the process?

A. That the question, the specific question of the substance of paragraph 9 and 12.

Q. And an answer could be "maybe"?

A. Yeah.

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

A. That's right.

Q. What does that mean?

A. This is what they refer to in their letter.

Q. Go ahead.

A. What we were discussing was paragraph, I think, it is 9, in fact, of their letter, which sets out this statement that the Evaluation Report has this statement in it that the final result - I am paraphrasing - that the final result was on the basis of criteria that had been agreed prior to the closing of the competition. That was the substantive point, prior to the closing of the competition.

Q. Let's just go to paragraph 9?

A. Okay, where is it?

Q. It is Tab 16.

A. Right. You see it there in under paragraph 9 on the sentence about three-quarters of the way down: "At page 48 of the report these weights are described as having been determined prior to the closing date. However, in evidence the Tribunal was informed that this set of weights was in fact determined in Copenhagen in or around the end of September at a meeting between Mr. Martin Brennan and Mr. Fintan Towey and Mr. Andersen."

Q. What it then says is: "Notwithstanding the remarks made above concerning the application of a weighting in the context of a purely or mainly qualitative evaluation, have you any comment to make on whether the same weighting should have been applied to the sub-criteria where the evaluation was quantitative or qualitative, not to the answer of an appropriate weighting have been approached." And you took that as being to make a judgement asking you to consider a direct criticism of the process?

A. No, what the issue that I had was, you know, that you know, that on the face of it there what you had is the final report saying that at page 48 the weights are described as having been determined prior to the closing date and the next sentence which is saying that the weights were determined in Copenhagen in September, which was after the closing date. So there was a conflict there on the face of reading that.

Q. And from going to 12, Dr. Bacon: "From the evidence, it would appear that the weights to be applied in 16 and 17

were agreed, and following the actual scoring in which they were applied, and the Tribunal wishes to know whether in your expert opinion this is an approach that ought to have been documented in the report and whether as a general principle after the scores had been arrived at is an appropriate one in an evaluating processes."

A. Yes. Sorry...

Q. Am I wrong in thinking that is requesting effectively a criticism of the process?

A. No, I think, my view was that it was

Q. Yes.

A. that the question as posed there was going to entail a criticism of the process.

Q. Now, continuing on

A. But by the way, having undertaken the assignment and gone on, as you are no doubt aware, we did criticise the process.

Q. One of the things that I just wanted to check with you, Dr. Bacon, is in relation to the August 30th letter, and the report which came out in '05, which is part of your evidence. Is that what the second 42,000 was for?

A. Yeah.

Q. And how, as a matter of interest, how is that broken down?

A. I can't remember at this point in time. In terms of how, in terms of between the consultants?

Q. Yes?

A. I don't know.

Q. I take it Mr. Hannigan and Mr. Walsh were involved?

A. Mr. Hannigan.

Q. And that Mr. Hannigan probably did most of the work?

A. You know...

Q. Well, he did most of it in the first one?

A. Absolutely, in terms of time allocation, yes.

Q. And you say that is what the second 42 was. Now, just

going on then with this: "JH: Example, are we not right

as non-professionals thinking it was unusual"

unstatable, I beg your pardon.

A. Sorry, where are you now?

Q. On the same page?

A. Of Tab 16?

Q. Yes. Sorry, Tab 23. Sorry, I have moved back to the note.

Sorry, I beg your pardon.

MR. COUGHLAN: Just, My Friend, in error said: "Are we not

right." I think the note says: "Are we right."

Q. MR. MCGONIGAL: "Are we right as non-professionals thinking

it was unusual or unstatable. PB: On evaluation how could

he weigh..."

You see, the impression, Dr. Bacon was that you were

uncomfortable with what was happening here; being asked to

do a direct criticism of the process; being asked to

comment on the evidence of Brennan and Towe; being asked

questions relating to matters which you were not happy

about answering?

A. No, that is not true. The

Q. Why then did you put it in capitals, as a matter of interest?

A. Pardon?

Q. Why then did you put it in capitals, as a matter of interest?

A. Sorry, this is not my note. This is not my note.

Q. Why did Michael Heneghan put it in capitals?

A. Look, if you want an answer to that question you are going to have ask the man that put it in capitals.

Q. That is a fair answer. I take it that the emphasis

A. The issue for me was whether there was sufficient material for us to come to a judgement on the material in paragraph 9.

Q. Dr. Bacon, Mr. Heneghan was sufficiently concerned to put it in capitals and underline it, if you go to the actual note on Tab 24?

A. I see it.

Q. And that, presumably, was based on a concern which you raised in the way in which you dealt with that and in the way he recorded that?

A. Well, I mean, what I would have said is, as deadpan as I am saying to you, is that there is a conflict or there appeared when you looked at that paragraph to be a conflict between the Evaluation Report and the evidence of the two gentlemen who were, whose evidence is being quoted.

Q. Brennan and Towey?

A. Yes. And the difficulty I have is, well, how do I know,

how do know who is right or wrong?

Q. Continuing on then: "It was how he could weigh qualitative, he never weighed sub-criteria, sub-weightings." I don't know what that means.

A. This is about you see, the difficulty and in fact the remark that I made to you there, that in the heat of the hunt I don't think there was a conflict. The issue that arose for them was that they had articulated at, you know, at considerable detail, you know, the weights that would be used in the quantitative process and they certainly didn't they didn't and nor would you expect them, by the way, to articulate a set of weights that they were going to apply in the qualitative process. You know, that was going to be qualitative, you know. So they were going to indicate areas of relative importance over others, but they weren't going to use specific numbers. And that was perfectly, in my opinion, the right way to go. The problem that they had was that having abandoned the quantitative approach, to get a final result what weights were they going to use in a qualitative scenario? Now, they used the same weights. Well, sure, why didn't they stick with the quantitative approach so?

Q. You then

A. But that's I am answering a question, you know, you know, what that is about. That is what that is about.

Q. You then continue: "He attempts to incorporate the other. Try to reconstruct a qualitative formula to replace. Are

you aware that a qualitative J Healy could be evaluated in tables ex post facto rationalisation. PB: Going back some reasonable/good practice can he reply to our letter."

A. Yeah.

Q. So that what appears to have been happening was a consultation between you and the legal team discussing the letter of the 30th of August, what it was that the Tribunal were asking you to do by way of the questions that appeared in that letter, and you displaying some concern in relation to those queries?

A. Whether we had enough

Q. Whether you had enough evidence or not?

A. Whether we had enough information to be able to come to the judgements that were being asked.

Q. Yes. Now, the next document then that is which wasn't disclosed is one of the 18th of November, which was another meeting with the Tribunal. At Tab 26, 25, 26?

A. Sorry, which tab?

Q. Sorry, the handwritten is at 25 and the typed version is at 26. Now, Dr. Bacon, first of all, do you remember this meeting?

A. Yeah.

Q. Do you remember the purpose of it?

A. We were coming to discuss my response.

Q. Which response?

A. The letter, my letter.

Q. And why were you giving them a draft letter?

A. To see if it was dealing with the if in scope it was dealing with the Terms of Reference that were set out in theirs.

Q. What this note records is: "Peter Bacon gives draft letter"?

A. Yes.

Q. Now, I presume in a sense, correct me if I am wrong, that what that means is that you gave the draft letter to the Tribunal which they then took away to consider?

A. Yeah.

Q. And surely that is totally abnormal?

A. In what way?

Q. To give a draft letter to ask somebody else to redraft it?

A. No

Q. Or to deal with it?

A. Look, you are trying to put words into my mouth, Mr. McGonigal, and look, you know, I am here to be completely helpful, but look, don't try and put words into my mouth, you know. The answer that I gave, the reply by way of a letter was in the form of the letter, but remember what it was: It was identical in substance to what we gave the first time around. It was a proposal to undertake the work and the scope of the work.

Q. Dr. Bacon, you did a draft report?

A. Yeah.

Q. You gave it to the Tribunal?

A. Correct.

Q. Before finalising it?

A. Yeah.

Q. You gave them a draft letter on the 18th of November before finalising it?

A. No, hold on, hold on. We gave them a draft report consistent with the proposal that was set in the June

Q. Hold on

A. Okay.

Q. Dr. Bacon, you gave them a draft report, you wanted to have a meeting to discuss the finalising of the report?

A. Correct.

Q. You gave them a draft letter on the 18th of November?

A. In response.

Q. presumably to discuss before finalising it?

A. Correct. I mean, the draft letter that we gave was a response to their letter of the 30th of August for the second report, and was given on the basis that, look, this is on the basis of the resources that we have, this is what we can do, is that sufficient for us to proceed?

Q. Dr. Bacon, I understand in a sense what may have happened.

I don't understand why it happened, but I want to be clear in my mind what happened on the 18th of November. Am I right in understanding that you made an arrangement to come from Wexford to go to the Tribunal offices to give them a draft letter for their consideration?

A. Yeah.

Q. And the purpose of that was that that draft letter, having

been considered, would be returned to you with or without comments, and you would then issue a letter on foot of that agreement?

A. Which would that's correct.

Q. And I am suggesting to you that that is totally abnormal?

A. Well, it is not.

Q. And I am suggesting that the ordinary way for an expert to give evidence is to prepare his own report independent of the people who are asking him to do the report?

A. Well, it is a matter of the scope of the report.

Q. No, it is the matter of the report and the idea of an expert, Dr. Bacon?

A. I am sorry, I don't understand your point.

Q. Well, if you ask a medical person to do a report, he doesn't do a report and send it into the client as a draft and say, please comment on this. If you are an expert and you are asked to do an expert report, you do the expert report and you send it in. You don't send in a draft and ask for people to comment on it?

A. Right, I think, I think that may be the case in, you know, in the corner of the world that you are living in here of the courts. You know, in all of the work that I would undertake, all of the consultancy work, you know, I would provide a draft report for the consideration of the client.

And that was specifically but to be honest with you, I think, you yourself are confusing a point: The draft report that was submitted in March of whatever year it was, that

was provided for in the proposal which I had submitted in January, okay? We said we would submit a draft report, you know, for comment and we would finalise the report. That would be my normal practice. In relation to the letter that you are referring to, the draft letter, the draft letter from me, if you like, was our proposal to the, as I interpreted the letter of the 30th of August, the Tribunal's Terms of Reference for a second report. And what I was submitting down to them on that date in 11 was; look, I have looked at the letter, I have looked at the material, and there is the scope of the work that we can do and the manner in which we can do it. Can you confirm if you want us to proceed on that basis and do the second report? And they did. Now, you say it is unusual, it may be unusual in the context in which you are talking about.

It is the norm

Q. Dr. Bacon, the context in which I am talking about is the context into which you directly or indirectly invited yourself when you agreed to become a consultant to the Tribunal, on whatever basis and whichever form that took place. Now, I am simply saying to you that a person who presents himself as an expert, if he is asked to do a report, does the report himself, furnishes it to the person who asks him to do it, not for his approval, or confirmation that it is in order, but furnishes it as a final report?

A. No, we weren't furnishing anything to see if it was in

order. We were furnishing it to see if it dealt with the Terms of Reference, the scope.

Q. Dr. Bacon, I can only take it in a sense in the way in which you have dealt with it when you sent in the report, where you said that you wanted to have a meeting to finalise the report, and you were sending it in for them to consider. That seems to me that there was to be a discussion about it to possibly alter and change aspects of it, and that was what was in your mind when you sought to send in the draft report and sought a meeting?

A. Well, that is

Q. Am I wrong in that?

A. No, you are not wrong in that.

Q. If I am not wrong in that then, can I just remind you what the Tribunal solicitor said in paragraph 75 of their Affidavit in the High Court proceedings: "That the Respondents also reject as being completely without foundation the Applicant's assertion that the Tribunal finalised the report of Mr. Bacon."

A. Well, they didn't finalise the report.

Q. The intention, clearly, was that you and the Tribunal were going to finalise this report?

A. No, hold on, hold on. Look

Q. Isn't that right?

A. No, it is not right. Hold on, you know, it is my report.

I submitted the draft. What I would have expected, as I would always expect from a client, is to say for a

client to, for example, say: Look, the conclusion you reached there, we don't see how you could could you expand on that? We don't understand. These were technical areas where I was dealing with non-technical clients. I was expecting them to say: Well, look, can you draw out that analysis more? Can you explain it more? They are the kinds of comments that I would get on any report that I would do from a client and consider those comments, but in no sense would I expect or allow a client to come and say, change the conclusion to this conclusion. In other words, to interfere with the substance of the analysis.

Q. Dr. Bacon, that can only happen when you actually have the meeting. What actually was intended was, "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."

A. Yeah.

Q. And that was the 2003 report?

A. Yeah.

Q. And: "I would be grateful if you would do this by the end of March."

A. Yes.

Q. That means to me, reading that in simple English, that you and the Tribunal were going to get together to finalise the report. And I am suggesting to you that that is highly

unusual?

A. No. That get-together, in my mind, would have involved us taking the comments of the client, which as I have indicated to you, would be, you know the kind of comments that would typically arise at meetings like that would be, you know, could you expand on this? Could you explain the conclusion? Could you draw it out? It is too technical. Could you put it more into non-jargonised speak. Those are the kind of comments.

Q. You see, what you actually say is, in your letter of the 22nd of November: "Thank you for your letter of the 30th of August setting out a request for a report to address issues which have arisen in relation to the work of the Tribunal. The purpose of this response is to identify the scope of the work to be undertaken. Some of the issues have been examined in our earlier report, and the work that is envisaged will draw on the analysis therein. However, it is clear that in a number of areas it is necessary to go beyond this analysis."

You see, in a sense what is puzzling me, Dr. Bacon, one of the things that is puzzling me is that you had done your draft report in 2003, you had sent it in, you wanted it to be finalised, and it was to be your final report on the documentation on which you had been given back in 2002?

A. That's correct.

Q. So why didn't you finalise that report?

A. Because the Tribunal never, never allowed that possibility.

Q. But that was your report

A. Well

Q. into the questions that you had been asked to do?

A. Well, subject to them confirming that.

Q. No, no

A. As I said

Q. No, no, this was your report, Dr. Bacon?

A. Look, I have said already, I will say it again: The process that was set out in the proposal of January, right, my proposal of January, was the same as the process I would specify to any other client; that we would deliver a draft report for the client's consideration, take comments on it, and consider those comments before submitting a final report.

Q. Now, in relation to the draft letter, Dr. Bacon, that you furnished on the 18th of the 11th, is that on your computer disk, on your computer?

A. I don't believe so, no.

Q. Why do you say that?

A. Because at the time that the Tribunal asked me what I had, I checked.

Q. Checked what?

A. I checked my computer, and couldn't find it.

Q. Well, maybe it wasn't there in the first place?

A. What do you mean maybe it wasn't there in the first place?

Q. Well, how did you draw up the letter?

A. Sure, I would have written the letter.

Q. I know you would have written the letter, but if you wrote it out you wouldn't necessarily have put it onto the computer?

A. No, no, n, I would never write out a letter. You mean write it out in longhand?

Q. Well, I don't know, dictate it, got a secretary to type it?

A. No, I don't use dictation.

Q. Well, then, it would be on your computer?

A. Well, unless I removed it from my computer.

Q. And why would you have done that?

A. Because with the passage of time, you know, I tend to take projects and say, look, that is gone.

Q. Well, are you saying that you have taken everything in relation to this project

A. Look, I don't know how many files I have. As far as I know, Mr. McGonigal, I

Q. Dr. Bacon, you may not think that it is relevant to us, that we should be asking the questions about what may or may not be on your computer, but it is quite clear that every time we go to someone and ask them to look to do something, something turns up.

A. Okay.

Q. And the best demonstration is what turned up on Friday, or today rather?

A. Kevin's note?

Q. You have a draft letter you give to the Tribunal, the Tribunal don't have a copy of the draft letter, you do not

have a copy of the draft letter?

A. As far as I know.

Q. The meeting which you had on the 18th of the 11th must have been for more than giving a draft letter?

A. It was to discuss the response.

Q. Yes. And where are the notes in relation to that?

A. There are no notes in relation to it. I mean, I mean, to the best of my knowledge, you know, the Tribunal confirmed that what was in the draft letter covered the, by way of response, covered what they wanted from their request that was in the letter of August.

Q. I understand what you are saying, but what is fascinating me more and more, Dr. Bacon, is the way in which a lot of the material of your interaction with the Tribunal no longer seems to exist. You do a draft letter which doesn't exist. We have a letter of the 22nd of November, which is at the next tab, which apparently is the official letter, that is the letter that was assigned by you and approved by the Tribunal before it went out. How that came to existence from the draft letter is not clear, and we may never discover unless there is a draft on your computer?

A. Yeah. Well, even if there were, Mr. McGonigal, you know, what I would have done was change the draft and issued it as a final letter. But I don't recall the Tribunal indicating or requesting, you know, any further elaboration or changes from the draft letter. So, you know, my honest presumption is that that draft letter, you know, is what

would have gone to the Tribunal as a letter of undertaking.

Q. You see, what you said on Friday, Dr. Bacon was, when you were asked, was: "Was it never envisaged in your first involvement that you would ever be giving evidence as an expert?" You said: "I am not sure about that, to be perfectly frank. 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 in some shape or form, and experience has shown me that that judgement has been by and large correct.

A. Yeah.

Q. "So going into this, which is a public inquiry, I always had the belief that the material I supplied would form part of the Tribunal's deliberations."

So what would occur to me from that, in relation to dealing with an expert, Dr. Bacon; that such a person would make sure that he kept all of the documentation relating to the project which he was involved, which had become the subject matter of a public inquiry. You, on the other hand, either don't know or aren't sure whether the material is on your computer?

A. I looked on my computer and I gave the answer to the Tribunal.

Q. And the only conclusion one can draw from that is that you destroyed it or deleted it, whichever word you wish to use, for some reason or on some instruction?

A. Look, there was no instruction.

Q. So why was it deleted, Dr. Bacon?

A. Because I think the project would have been considered by me I mean, this is, you know, three years on, you know.

Q. Three years is a short time?

A. I do not hold records of projects going back in time.

Q. Dr. Bacon, it was indicated to you in 2005 that you might be giving evidence. In fact, you were set up to be giving evidence in September 2005, so at that stage the material would not have been deleted?

A. The report, which is the material.

Q. Whatever was on your computer would not have been deleted at that stage?

A. I am sorry?

Q. Whatever was on your computer would not have been deleted at that stage?

A. That is true.

Q. And from that time up to this there have been the High Court and the Supreme Court proceedings which discussed as to whether or not you were going to be a witness?

A. And to be honest with you

Q. You got the correspondence in 2007 asking you for documentation. So why did you or when did you delete the information?

A. Look, what information are you

Q. That was on your computer?

A. The only thing that was on my computer would have been the draft report, the draft the draft report, the little

supplement to the draft report, and the second report, and the letter.

Q. That is what we know would be on it?

A. Yes.

Q. There would also probably be communication between you and the Tribunal?

A. No, there wasn't.

Q. Through e-mail?

A. What there was no e-mails.

Q. I have no idea, Dr. Bacon.

A. The only e-mail, the only e-mail, and I don't have e-mail records, but the only e-mail that seems to be between myself and the Tribunal was me submitting the draft report on the 18th of March, and the reason, the reason I know it is an e-mail is because I was handed a copy of an e-mail.

Q. And I take it that apart from your own computer, the other places that these documents would be, would be on Mr. Hannigan's computer or on Mr. Walsh's computer?

A. Yes.

Q. And have you checked with them?

A. I checked with Kevin. Kevin was dealing with Mr. Walsh.

Q. Yes. And clearly he has documents?

A. Who?

Q. Mr. Hannigan?

A. He has had the copies of the material that he sent in February and some notes to himself, and some literature.

Q. And do you keep a diary, Dr. Bacon?

A. I keep an electronic diary in my Blackberry.

Q. Do you have the historical diary?

A. No, I don't have it historically, no.

Q. Okay. So, in relation to the meeting of the 18th of November, apart from giving the draft letter, other matters were discussed at that, but not the subject matter of the notes?

A. No. Well, the only thing that the substantive matters that were discussed on the 18th of November was the response of what we were going to undertake in the second report.

Q. I am sure you are right, Dr. Bacon, but there appears to be no note or no confirmation one way or the other of what was discussed at that meeting. The draft letter, when was that given back to you?

A. I don't believe it was, I don't believe it was. I think I must have got a phone call or to say, look or maybe it was at the end of the meeting that it was confirmed that, that the draft, as proposed, dealt with the concerns that the Tribunal had in relation to the second report, the commissioning of the second report.

Q. Are you in a position to tell me whether the draft, whether the draft was changed or not?

A. I don't believe there was any change made.

Q. I take it

A. I have no recollection. And normally if there was any change of substance that would register with me, for the

very good reason that it would probably entail a change in the resourcing of the project.

Q. Yes. So that so far as the letter of the 22nd of November, at Tab 27, is concerned, while you may believe that to be the letter as drafted, you cannot be positive?

A. I what?

Q. You cannot be positive

A. I am being positive.

Q. in relation to whether

A. I don't believe there was any change.

Q. I understand that you are saying that.

A. Yeah. I can't prove it to you, but to the best of my knowledge and belief there was no amendments made following the meeting of the 18th of November to that final letter that was issued.

Q. Now, subsequent to that then, on the 24th of November, 2004, it was confirmed to you that it was in order to proceed as outlined in your original request?

A. Yes.

Q. "And to our recent meetings in the Tribunal offices." To what does that refer, can you help me?

A. Well, it must have been the ones in I mean, there was no meeting took place after the 18th what was it? The 18th of November was there one in June? There was one in June, wasn't there? Yeah, June. There was one in June, June of 2004.

Q. No, no, I am talking about the recent ones, but so far as

you recollect those were the only ones?

A. Yes.

Q. Now, I just want to go to your report briefly for a second, at Tab 30?

A. Yes.

Q. And if you would go to the first page. First of all, I suppose at Tab 29 is the sending in of the final report, and that was sent in by Mr. Hannigan, or sorry, it was signed by Kevin Hannigan for you, and it was sent to Mr. Healy?

A. Yeah.

Q. And then the report is at page, Tab 30. And I just want you to go to the first page, which is the Table of Contents, for a second?

A. Yes.

Q. And if you can help me in relation to this. "This report has been prepared in response to a series of specific questions from the Tribunal in the letter of the 30th of August in respect of the awarding of the second GSM. It is structured not as a narrative but proceeds to an inclusive conclusion but rather as a response to each question. The questions are dealt with under six headings, each section and subsection starts with the question as asked and then provides the response. In many cases expert opinion is required to address the points raised."

A. Yeah.

Q. That last sentence, what does that mean?

A. It was a statement of fact.

Q. I know that, but what is the statement of fact?

A. Well, that is the statement of fact.

Q. Well, do you mean by that statement of fact that it would be necessary to get an expert in to do certain aspects of this work?

A. No, no.

Q. You see, that is the interpretation that one can put on that, isn't that right?

A. Sorry, what is the what is your point?

Q. What I am suggesting is that you are saying there that this report is dealing with the questions of the 30th of August, but that in many cases expert opinion is required to address the points raised, and I am assuming that what you are indicating there is that the Tribunal would require an expert to deal with many of the points raised, and that you are excluding yourself from that sentence?

A. No, I don't think I am excluding myself from that sentence.

Q. You think that you are including yourself within that?

A. Absolutely, yes.

Q. Well, what does it mean then, Dr. Bacon? I actually am puzzled as to why it is there in the first place?

A. I think it goes back to the point, to the points that, you know, was raised as an issue for us in relation to paragraph 9, you remember where the evidence of civil servants was being adduced in relation to weightings and the specific weightings that were being discussed at a

meeting up in Copenhagen. And we were saying that, look, you know, the questions raised here in the Tribunal require the experts. Now, it seemed to us that we were responding to questions where non-experts were involved in determining, for example, weighting processes; for example, optimal IRRs; for example, the level of equity in the, as a measure of the financial strength of Applicants.

Q. So what am I to take from that, that in fact what you are saying here is that it doesn't refer to you, it refers to the fact that you felt that expert opinion would be required wherever those issues were being discussed?

A. Mm-hmm.

Q. Is that what you are saying?

A. In the question in the material that was being provided to us.

Q. And as I understand it, Dr. Bacon, you indicated to me the other day that you didn't know Mr. Andersen

A. No, I am not talking about Andersen.

Q. or any of his team?

A. I am not talking about Andersen.

Q. But they would have been experts. You indicated that Brennan and Towey were experts earlier this morning, are they not experts now?

A. When did I indicate that Brennan

Q. I understood you to say that there were experts in the PTGSM, and we indicated Brennan and Towey. Am I wrong in that?

A. Absolutely. When did I say that?

Q. This morning, and I will have it checked.

A. All right, just have a check. I mean, I had felt what I had said was that we were being asked to adjudicate as between evidence of Mr. Brennan and Towey and the statement in the final report about when weightings were...

Q. Yes. Now, is this, is this a draft report or a final report?

A. This was the final report. There was no draft.

Q. Why not?

A. Because we were given we had already been submitted a draft report, okay. This report as represented by the Tribunal was to take the material from the draft report and address it, reconsider it in the context of specific questions and answers.

Q. Well, what I understood to have been happening was that the draft report was effectively being put to one side, that you were now being asked a specific series of questions, the answers to which, some of which could be taken or could be got from the draft report, others couldn't be got from the draft report; that this was a new report, a report upon which you were going to give evidence, you told us that your modus operandi up to date was to do a draft document, submit it to the Tribunal, have it approved, and then to sign off on it. And I am simply asking you whether there was a draft report prior to this which was approved by the Tribunal and which was signed off on?

A. No.

Q. You see

A. And look, again you are putting words into my mouth. We didn't submit the draft report for approval, we submitted the draft report, as I stated, in the January proposal of 2002 for comment.

Q. For finalising?

A. If you read the proposal, Mr. McGonigal.

Q. I was reading the note that you sent, which I read to you a moment ago, the 18th of March, which says "to finalise the report"?

A. That is true, that it does use those words.

Q. Well, that requires comment and saying, yes, I approve of this, or, no, I don't approve of this?

A. It requires us to consider the comment.

Q. You see, in a simple way, Dr. Bacon, one could look at what you have done over the last period of time and simply say that this report was effectively put together for the purposes of giving evidence for a sum of money, i.e. £100,000, which was finalised, to use that neutral expression, by the Tribunal, but had no independent expert approving of it?

A. Sorry?

Q. You are not an independent expert when you were doing this work?

A. Well, I mean, you made that point last week to me, and I have to say that, you know, I failed to grasp the point. I mean, you know, as far as we were concerned, you know, we

provided the draft report which we were, would have finalised had we received comments on that report, and we were asked to do a second report, which the letter specifically says would be used in evidence. But to be perfectly honest with you, you know, I didn't see why the first one wouldn't be used in evidence or I didn't, in my own mind, have a view that this was a report of a different character, other than that it was more purposeful from the Tribunal's point of view to have material in the form of question and answer rather than a narrative.

Q. Yes. I will just come back to that in a second. You asked me to review the question of the experts, Dr. Bacon. And the question that I asked was: "Dr. Bacon, what the document says is that it was going to be put to you in conflict, it was going to put you in conflict with other experts, what is that referring to and whom is that referring to?" And you answered: "The experts in the Evaluation Group."

A. Yeah.

Q. And I took it, perhaps wrongly, that you were referring to Brennan and Towey?

A. I am sorry, I was, you know I wasn't referring to expert in that case as, you know, a professional economist or statistician, I was talking about the people in the Evaluation Group.

Q. Just going to the conclusion then on page 27 of your report.

A. Yes.

Q. The conclusion that you have in the third, fourth paragraph: "The report concludes there is a definite well-supported ranking of the applications, with A5 being the best. In our opinion, the closeness of the final score, the doubts about the methodology employed and the fact that the process was not carried out as intended should have led to this conclusion being stated less definitively. On the basis of its conclusion, the report makes a recommendation. It is therefore proposed to advise the Minister to enter into negotiations with the consortium behind the A5 application."

Now, that is the conclusion that you reached in relation to the work which you had been asked to do on this occasion?

A. Yeah.

Q. Which, I suggest to you, is different to the conclusion that you reached in the first report. But what I want to ask you about is: It seems clear, Dr. Bacon, that on all the work that you did and all the reevaluations that you were asked to do by the Tribunal, whether on all of the figures or some of the figures, but on each and every occasion the only result which one came out with was A5 first, A3 second, whatever the difference between the two of them?

A. Yeah.

Q. And that is, our client came first on all occasions?

A. Except in the first run of the quantitative.

Q. Yes, that's right. Now, and as I understand it, all that you are saying, correct me if I am wrong, that the result is less definitive than the result which you found should have been less definitive than the way in which it was put in the report?

A. Mm-hmm.

Q. Nothing more and nothing less than that?

A. No.

Q. And clearly no outside influence of any kind, good, bad or indifferent that you were available to find?

A. I wasn't looking for outside influence, you know, I am not

Q. You were acting within a Terms of Reference which was totally different?

A. I am sorry?

Q. You were dealing with Terms of Reference which were not the Terms of Reference of this Tribunal? We have been through that before.

A. Okay.

Q. You see, based on what you have just told me, Dr. Bacon, it would seem to me that it is not possible for you to have said correctly at a meeting that everything pointed to Andersen having been manipulated if the results were right but should have been stated less definitively?

A. I think the problem is, it's the margins of error, you know, were such that, you know, it was impossible in our judgement to say who won.

Q. Sorry?

A. The margins, the margins of error, you know, inherent in that scoring system, you know, made it difficult to get a, to determine, you know, a robust and definitive result.

Q. So far as you were concerned, based on the limited amount of work which you were able to review?

A. Based on the work that we carried out.

Q. The limited amount of work that you were able to do, having regard to the limited documentation which you were given?

A. Well, based on the documentation

Q. I mean, you weren't given all of the documentation,

Dr. Bacon, you weren't asked to look at the other areas other than financials?

A. You know the areas that we were asked to look at.

Q. Absolutely. But the point I am making, Dr. Bacon, is that there were other areas, financials were a small part of the competition?

A. Mm-hmm.

Q. So that if you had an opportunity

MR. COUGHLAN: With respect, with respect, the report deals with other areas other than financial aspects of the competition. 62 is the only one where that statement is made.

Q. MR. MCGONIGAL: So far as you were concerned, the financials were the only area that you were asked to look at?

A. No, that is not correct, we looked at the score system.

Q. Sorry, the IRR, the evaluation?

MR. COUGHLAN: Let him answer the question.

A. I mean, the issue of quantitative, qualitative, the scoring system as it applied to all of the competition. I think, in fact, we used, if I am not mistaken, in the draft report, we used the example of management experience to illustrate the inconsistency of the use of some of those qualitative scores.

Q. MR. MCGONIGAL: You see, the matters which were involved were set out in the RFP document, in paragraph 19, and they included, inter alia: "The credibility of the business plan; the Applicant's approach to market development; quality and viability of technical approach proposed in the compliance with the requirements set out therein; the approach to tariffing proposed by the Applicant which must be competitive; the amount the Applicant is prepared to pay for the right of licence, which was changed; timetable for achieving minimum coverage requirements and the extent to which they may succeed; the extent of the Applicant's international roaming plan; the performance guarantee proposed by the Applicant; efficiency or proposed used of frequency spectrum resources."

They speak for themselves anyway. The areas which you were asked to were the four areas which you have identified?

A. That's correct.

Q. Now, going on from that then, Dr. Bacon, I just want to try and trace through some of the correspondence which followed

from this in relation to you giving evidence. And the first is a letter, Tab 31: "The Tribunal envisages that in the resumption of its hearing into the GSM in the very near future, it will be necessary to ventilate some of the material you have produced. The Tribunal has circulated this material to a number of entities and individuals upon whom, in the judgement of the Tribunal, it was felt it might have an impact. As the Tribunal has a duty to examine these responses, I am enclosing a set of extracts and would be obliged for your comments."

And that well, first of all, is that the first time that you became aware that you may have to give evidence?

A. Well, apart from the noting in the letter of August that the report, you know, may be ventilated in evidence, but as I said to you last week, when I, when you were asking me about my involvement with the Tribunal, you know, I had always believed that the report would finish up, you know, being deliberated upon in some shape or form.

Q. You see, I understand you repeating that, but the point I am making is that it makes it all the more interesting as to why, or puzzling, as to why no matter how innocuous or obvious that the documents might seem, that you would then proceed to get rid of them from your computer?

A. I think look, that is tidying up. Now, you know, maybe I tidy up more than you tidy up, but, you know, you know...

Q. But this isn't the first time you have given evidence, Dr. Bacon?

A. I am sorry?

Q. Is this the first time you have given evidence?

A. To a Tribunal?

Q. To a court?

A. In a court; I think there was one occasion before where I was providing, you know, witness material, but in fact wasn't called.

Q. Yes. And I am sure you are aware of the importance of retaining and keeping documents and making them available to whoever the person is?

A. Well, look, I mean we made the documents available to the Tribunal, you know, the report.

Q. I understand what you are saying about that, I am simply asking you for your documents and you don't have any?

A. No, I don't.

Q. And attached to that letter were certain comments which have been made by Mr. O'Brien, Mr. Desmond and others. I mean, this was the first time you became aware that you were going to be giving evidence?

A. Yeah.

Q. And I take it that you are also aware that this was the first time that we became aware of your existence, never mind the possibility of you giving evidence?

A. Well, you made that point to me last week.

Q. You see, that is why I am puzzled, Dr. Bacon. In the earlier reference which we discussed on Friday where you talk about having to give evidence in a subsequent action,

it doesn't seem possible at that stage that that could relate to this Tribunal, and that it must relate to some other proceedings?

A. Well, I mean look, you know, I don't know what that specific reference is. I mean I said that to you.

Q. I accept that. What following that then you contacted the Tribunal on the 1st of June?

A. Yeah.

Q. In response to the letter of the 30th of May?

A. Yeah.

Q. And you responded in relation to the comments?

A. Yeah.

Q. And you then had a meeting with the Tribunal

A. Yeah.

Q. on the next day (SIC) to discuss those, on the 4th of July, to discuss those and also to produce the nature of the competitions which you had been involved in?

A. Yeah.

Q. Which I think were not GSM competitions?

A. No, they were competitions.

Q. But of a totally different kind?

A. Well, involving quantitative and qualitative evaluations.

Q. If we just go through your attendance on the 4th of July.

The purpose of the meeting: "Discuss the response.

Mr. Bacon was asked about his previous involvement in various commercial competitions, and he confirmed that he had judged a broadband competition recently. These were

beauty contests which were done by evaluations and economic output, in particular he was involved in a competition with Mason Hayes and Curran who were the legal advisers. And Mr. Bacon was also involved in another telecommunications competition which involved Nortel Ireland. He said there would be four rounds in these competitions, with the marking system, but dissimilar to a matrix. It was a numerical scoring with marks out of 20 or 10, and Mr. Bacon would have input into the tender documents. These were designed by Nortel with the various drafts, quantitative/qualitative basis. All four rounds involved the same technique. The rounds would have been directed to telecommunication providers and the capital outlays ranged from 50 - 60 million to 100 million. There would be up to 40 tenders per round, and some very significant players; ESB, who had been cable wrapping onto their own communications system.

"7 years ago he was involved in benchmarking on behalf of COMREG, jointly with Norcontel. Competitions would reflect the liveliness of the market, the infrastructure and the general purposes. Mr. Bacon was involved in another contract awarded for the prize bonds. At the end of the meeting he said he would do a page to summarise."

And then that page is on Tab 34.

A. Yes.

Q. Which is the Nortel (SIC) one there?

A. Sorry?

Q. Which is the Nortel (SIC) one?

A. The four of them, the four of them are there were four competitions where Norcontel and myself and Mason Hayes in not all of those four, but in some of them, were the evaluators.

Q. Then the next letter, on the - Tab 35 - is the 25th of July: "Intends to resume its public sittings to complete hearing evidence in connection with its inquiries into the circumstances surrounding the grant of the second GSM. The Tribunal has now set Tuesday, the 20th of September, as the commencement date of its sittings, and envisages hearing evidence from you during the course of the sittings either towards the end of the first week or during the early part of the second part of the week of the sitting. Perhaps you would be kind enough to confirm your availability to attend to give evidence during that time in advance. The Tribunal would propose arranging a further private meeting with you, probably in early September, to review any outstanding matters in relation to the material which you have provided to the Tribunal. I look forward to hearing from you at your earliest convenience."

Just in relation to that, Dr. Bacon, when they talk about material which you have provided to the Tribunal, what material is that referable to?

A. The reports.

Q. In other words, there was no other material which you furnished to them on the 4th of July?

A. No.

Q. Now, were you asked to prepare or do a statement in relation to this?

A. No.

Q. And you rang then on the 16th of August to confirm your availability for Tuesday the 20th of September?

A. Yes.

Q. Which was the date which was anticipated that you would be giving evidence, isn't that right?

A. Yeah.

Q. And then that didn't happen. And the next development then was the correspondence which I touched on this morning, in 2007.

MR. McGONIGAL: It might be a convenient time to rise, Chairman?

CHAIRMAN: Well, I am anxious to maximise the time, Mr. McGonigal.

MR. McGONIGAL: I am quite happy to sit at five to two, if necessary.

CHAIRMAN: Pardon?

MR. McGONIGAL: I am quite happy to sit at five to two, if necessary.

CHAIRMAN: Ten to two, if that is convenient to you, Dr. Bacon?

THE TRIBUNAL ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

DR. PETER BACON RETURNED TO THE WITNESS-BOX AND CONTINUED

TO BE CROSS EXAMINED BY MR. MCGONIGAL AS FOLLOWS:

Q. Dr. Bacon, just before lunch I had taken you to document 36, which was confirming your availability for the week of the 20th. Subsequent to that, there clearly were further communications between you and the Tribunal, which do not appear to be recorded?

A. I don't have any recollection.

Q. I know you don't, but there clearly were some, for example, in relation to

A. I don't think so.

Q. Well, there must have been one in relation to it telling you that you weren't going to be needed to give evidence, that kind of thing?

A. Well, was there not something that they sent me subsequently for the decision of the Chairman.

Q. Yes, they may have sent that to you, that is at Tab 39, is the ruling of the Chairman?

A. Yeah.

Q. And you think that may have been sent to you?

A. Yeah.

Q. Okay. So that can I just take it in general then between well, hold on now. That was the that was the ruling of 17th of July, 2007. This was 2005 we are talking about?

A. Yeah, I don't think there was any. Like I don't have any recollection of having

Q. Sorry, I know you may not have any recollection and you

certainly don't appear to have any note, but I am just curious that between 2005 and the correspondence 2007, that there doesn't appear to be, on the face of it

A. Look I would go stronger, I don't believe there was, it is not just a question of recollection, I don't believe there was any

Q. Sorry, Dr. Bacon, I just want to assist you; there was in fact a ruling on the 29th of September, 2005, which may in fact be the one which you are referring to which is at Tab 38?

A. Well, certainly, I think, the next contact was to say, look, your report is not being used in evidence.

Q. Yes. Just, what I just want to do finally, Dr. Bacon, in relation to your evidence is just to highlight what we say are the dates for which there appears to have been communication between you and the Tribunal, but of which there appear to be no notes or memorandum. And it is simply, I think, I have your answers in relation to most of them, but they are matters in which we are still seeking documentation from the Tribunal. And, I think, it is worth just going through them in sequence just to be clear what we are all talking about. The first one is mid-late November 2002, which was the phone call referred to in Transcript 352 at Page 14 and 15 which was your introduction phone call. The second is the 28th of November, 2002 which is the meeting which we discussed this morning, and there is no note on the Tribunal's side in

relation to that. The only note we have is Mr. Hannigan's.

The next is a number of possible telephone conversations between the 28th of November to the 13th of December, 2002, between you and Mr. Healy. And that is between the first meeting and the Tribunal issuing briefing documents of the 13th of December, 2002. The next one is between that date and January 2003, which refers the letter of the 20th of January, 2003, refers to a recent telephone conversation with members of the Tribunal legal team. And it is it appears to have been a number of meetings, but again, there is no clarification or memoranda in relation to it. The next is January 2003, a cover letter or an e-mail possibly, covering your January 2003 proposal. The next is the 10th of February, 2003, attendance of a meeting between the Tribunal and Mr. Bacon. You refer in that to a meeting, to a conversation last week, I think, this is to Mr. Healy, when you said you were not interested in scoring, that meeting or telephone conversation doesn't appear to be recorded. The next is disks re containing transcripts and the accountant's note which you may remember, that may refer the accountant there may refer to Mr. Pye of KPMG.

The next is the 18th of February 2003, letter from Mr. Hannigan to Mr. Healy re the IRR paper. That doesn't appear to the paper doesn't appear to be there. The 25th of February, 2003, same matter, different issue, funding insolvency. And the 18th of March is also there appears to be a conversation relating to the other day

which doesn't appear to have been covered.

Then following apart from those then, June 2004, there appears to have been a meeting between the Tribunal and Mr. Bacon, and there appears to be either a letter a telephone conversation or a meeting setting that up, missing. The 30th of August, 2004, it refers to a meeting, a recent meeting with the Tribunal legal team which clearly, probably isn't the June meeting, but may be. The 8th of November, 2004, which was produced on the 11th of March and the 18th of November gives the draft letter, which we talked about this morning, and we have dealt with that. There seems to be no copy of that. Then the 4th of July, 2004, a meeting between Bacon and the Tribunal, and we have no notes of that meeting being set up. Now, between September 2005, there seems to be no documents of meetings or telephone conversations between you and the Tribunal, though clearly there were some, and you instanced one when you got our letter of 2007 seeking documentation from you, you were onto the Tribunal at that time. And it does occur to us that there may have been other meetings during that period, or communications

A. I don't believe there were.

Q. Yeah. Now, so far as documentation is concerned, can I confirm two things with you, Mr. Bacon: That if there are any other documents or disks or whatever in your possession, you are more than happy to make them available to either the Tribunal or to us?

A. Yeah, but I am sure yeah, but I am sure there aren't.

Q. And secondly, the same would apply for Mr. Hannigan and Mr. Walsh?

A. I can't speak for them, but I would have absolutely no reason to think that they wouldn't.

Q. But they would have been part of the Bacon & Associates; isn't that right?

A. Yeah.

Q. The only other matter, Chairman, that I just want to indicate at this stage is that we would be formally asking for Mr. Hannigan to be called as a witness at some appropriate stage, but we will write to the Tribunal in relation to that.

CHAIRMAN: Well, I will consider that when it arises.

MR. McGONIGAL: Thanks.

CHAIRMAN: Mr. Nesbitt.

THE WITNESS WAS CROSS-EXAMINED BY MR. NESBITT AS FOLLOWS:

Q. MR. NESBITT: Good afternoon, Dr. Bacon. Unfortunately I am a barrister like Mr. McGonigal, but I will try and make sure that that doesn't interfere in things. I understand your concerns about barristers and not getting anywhere. In relation to helping the Tribunal, as I understand it, and I don't want to delay you unduly, you were contacted and asked to provide advice on a number of topics that were discussed with the Tribunal and eventually found their way into a written document?

A. A proposal from me.

Q. Yeah, a proposal, that this is what you'd like to do?

A. Yeah.

Q. And you prepared in 2003 a draft report. And that was really your best attempt, subject to discussing what was in it with your client, as to what you thought about the questions asked of you then?

A. There weren't questions asked about

Q. The proposal made?

A. There were issues raised by them and I you know, I mean, I will go through it again, if you wish, but I did cover this last week.

Q. Yes, I have read your transcripts so I won't be repeating any questions?

A. Okay. So what was given to them on March of I mean, the draft report that was submitted in March as far as we were concerned was a draft report provided to the client to allow the client the opportunity to see that the report discharged the Terms of Reference that were contained in the proposal of January, and to make any comments that they might wish to make.

Q. Yes. So, what I want to just understand and try and get some agreement on is that that report was a pure piece of work by you and your colleagues to come back on what the Tribunal had asked you to deal with?

A. Exactly.

Q. And you make the point that it was in draft form, which, I think, is appropriate to discuss these things with your

client before you issue a final report?

A. Well, to allow them the opportunity to make comments on the draft.

Q. Yes. I am not suggesting you are going to change it to suit them?

A. Yes.

Q. But you think a discussion with them might help to get a

A. Well, it is really to say, to give them an opportunity of saying, look, we gave you a proposal in January, now here

is the report. Do you have any comments on the report

relative to the Terms of Reference? It is really to give,

you know, the client an opportunity of saying, look, in

your proposal you said you would deal with X, you didn't

actually deal with it in the draft report, would you mind

going back and dealing with it. Or you have dealt with it,

but we don't understand either the conclusion or the

analysis or some aspect of it. To allow that kind of

comment and thereafter for us to submit a final report, as

provided in the proposal of January.

Q. So, what I am trying to get to and just to tease out to

assist the Tribunal here is that so that report in terms

of the work of somebody creating a report to give back to

the Department was probably the purest piece of work you

did. You sat down. You talked to them. You went away and

you came back with your draft report?

A. Yeah.

Q. And I just want to understand what resources you needed to

put into doing that job. Now, we all accept it is not the work of one man, so I just want to understand, what did you draw together in terms of expertise to help you at that point in time?

A. My colleague, Kevin Hannigan, who has participated in, you know, a significant number of projects with me in the last, I suppose, ten years. And the services of Kyran Walsh, who at the time was a senior specialist in finance at the IMI.

Q. And what particular qualifications did they have to assist in this piece of work?

A. Kevin Hannigan, like myself, has a Doctorate in Economics, and like myself his specialism has been with me, and on his own account, you know, an applied economist in the sense of taking the tools of economics and applying them to practical problems of the day. That is what

Q. I think you described what you thought economism was on Friday and you gave a definition of that?

A. Yes.

Q. And the other colleague you mentioned, what was his specialist expertise?

A. Finance.

Q. Finance?

A. Yes. In fact I think in fact, I think, within that, I think, he has written a book on financial ratios. Now, I stand to be corrected on that, but, you know, I think, that is

Q. I am not going to ask you about them anyway. In relation

to the work you were given, would I be right in thinking that a big chunk of it appeared to be concerned with the concept of statistics, understanding them and presenting them in a way that helps people?

A. Applying them.

Q. Applying them?

A. Applying them. Applying them. I mean, I think, if you asked me where was the bulk of the intellectual content, and I don't mean that in a high handed way, but just in terms of the thinking that went in by the consulting team, it was really into the issue of the quantitative, qualitative and, you know, the manner in which those methodologies were used in the manner in which those methodologies were proposed to be used in the original evaluation model document and the manner in which they were applied subsequently.

Q. Now, I just want to tease out a number of things about the genesis and production of your first report, the draft report, and then your response to the questions that you were asked to deal with and give answers to.

In relation to your first report, which issued

A. The 18th of March.

Q. in March sometime, 2003. You had been allowed dig through the information given to you by the Tribunal?

A. Yeah.

Q. And did you request any additional information or just make do with what you had got?

A. I think I used the word 'rain forest' last week to describe what we had got, so we didn't ask for anymore.

Q. You had got enough?

A. We had a sufficiency to discharge the issues that we were addressing.

Q. And effectively, subject to the brief, it was: Please do the needful and sort through this and give us some views on it; is that right?

A. Well, yeah. Within the confines of the your colleague last week spent a lot of time suggesting that we had conducted an audit of the process and I repeatedly said we looked at four areas of the process. And the material that was supplied to us with the briefing document was basically used to explore those four areas.

Q. Yes, I understand that. You made the point

A. And we didn't ask for any additional information.

Q. You made the point that you weren't being asked to re-evaluate, you were being asked to give what you saw as your, I suppose, professional is the best way of putting it, professional opinion on some things they asked about.

A. Yeah, I mean, I think again, I think, I made the point last week that the Tribunal said: Look, we are pursuing this, we are pursuing our own the development of our own thinking and we want an independent sounding board. I don't think they used the word sounding board, but that was the intent of what they were talking about, you know, in these, what they describe as technical areas.

Q. Okay. And when you came to the second report, which was the one in 2005. I think at that point in time the report was the subject matter of a request, a letter that was sent to you

A. In August.

Q. in August of 2004?

A. Yeah.

Q. And it actually asked a series of questions, but it also gave some background material, statements of the parameters?

A. Evidence.

Q. Evidence. I mean, you didn't look into those?

A. No.

Q. You just accepted those as correct, did you?

A. Well, in fact I made the point this morning, like you know, we took them at face value. Where there appeared to be a conflict I pointed out: Look, you know, how am I going to judge a conflict in the evidence.

Q. You did what anybody would do, you were sent the brief

A. Absolutely.

Q. you didn't argue with the brief, you subsequently answered the question?

A. Yeah.

Q. Very good. So this was, and I don't want to belittle the work you did, this was probably more fairly described as a reactive analysis of what you were sent to try and answer the questions put to you by way of

A. When you say reactive, reactive to what?

Q. Well, you reacted to what they told you and the questions they asked you. You tried to put together the answers to the questions?

A. Yes.

Q. And you had the material you had been sent before you prepared your report

A. The first report.

Q. The report of 2003. As I understand your evidence you may or may not have got some limited transcript evidence from hearings which had taken place in the meantime?

A. I think only what was contained in the letter of the 24th.

Q. Yes. So nothing more but the letter of the 24th?

A. No.

Q. Yeah. So the reason I am teasing out the difference between the two reports is because, I think, the first report is a cleaner sort of professional report than the second because the second was corralled more, nothing to do with your capabilities, but simply was more directional in so far as the instructions you had been given were?

A. Well, I would take issue with the word 'directional'. I mean, it was posing specific questions.

Q. Yes?

A. And was seeking a was seeking a response or a report in terms of a reply to specific questions.

Q. Yes. I don't mean it in any pejorative sense?

A. No, I am not taking it that way.

Q. It is a bit like getting a brief and having at the end of it, anything else that occurs to you. Not a nice question.

A. Yeah.

Q. It was easier to deal with it in that it had questions and answers?

A. I don't think it was easier to deal with, you know. In fact from our point of view it was more difficult to deal with. And I will tell you why: As I said this morning, the second report, it wasn't a question of cutting and pasting the material in the first report. While the letter of August said, and I am paraphrasing, words to the effect that most of the material that you are going to need for the second report is in your first report. But I don't think it was sufficient for us, and certainly I took the view that, you know, the way to address this wasn't by just taking the first report and doing a cut and paste job on it to answer the questions. We were forced back into looking at the material that were supplied with the original briefing note, to actually come and answer the question, using the material that, you know, we felt was relevant from the first report.

Q. Indeed. So, the material you had didn't change. You then tried to use what you had to answer the questions. And I understand the difficulty, you couldn't cut and paste, you had to use your own

A. We had to go back in and address the original source material, you know, and confront it with the question that

was being posed.

Q. Now, I want to just turn away from the reports for the moment and see to what extent you had an understanding of how this whole process had unfolded. I think one of the first things that was done in relation to this process was to secure assistance in getting a competition process together. And the very first thing that was done was the appointment of Mr. Roger Pye. Had you ever heard of him?

A. The name was mentioned.

Q. And he was an expert in the designs of these types of competition and he had to suffer selection through the normal criteria when a Government contract is issued and had to comply with the public tender. Sorry, he didn't. I am wrong about that. So, he was somebody you had heard of who had to put his intellectual thinking into the design of the competition. You knew that?

A. I didn't. I his name had certainly been mentioned. The impression that I had was that the evaluation model, which was really the starting point for our analysis, was the work of Mr. Andersen. Now, last week when I was here, at an early stage I raised the question in response to a question from Mr. McGonigal that I didn't understand myself whether Mr. Andersen was part of the Evaluation Team or an advisor to the Evaluation Team, and whether in fact the model report, or indeed any of his reports were his reports or the reports of the Evaluation Team. But really I felt I was dealing with something that, you know, Mr. Andersen had

prepared.

Q. Yes. And you knew that he sorry, not Mr. Pye, but Mr. Andersen, had been the winner of a competition under the appropriate European tender rules to select an outside expert to assist the competition?

A. I don't know whether I was aware of it or not, but, I mean, I would have been surprised if it was otherwise.

Q. And would you have had, and obviously your report tells us you did have, the evaluation of the applications for the second GSM licence in Ireland?

A. Yeah.

Q. And the various copies and how that developed?

A. Yeah, yeah.

Q. And, I think, the other thing you knew was that a team had been put together?

A. Yeah.

Q. This wasn't going to be a Government Minister picking a winner. This was going to be an intellectually capable team working to a design, to ask people to compete to win the chance to negotiate a licence?

A. Yes.

Q. And, I think, you also knew that a series of senior civil servants were going to be asked to form part of that team and use their expertise to work with the competition process to come out the far end with an answer?

A. Yeah. It was unclear to me there are two points there that were actually unclear to me: You know, I didn't try

and clarify them because they didn't impede on my work.

The first was in actual fact whether or not they were what they were actually going to what their conclusion was going to be. In other words I mean, their conclusion in the event was to make a recommendation of what, in today's parlance, would be preferred bidder status.

Q. Yes?

A. Now, you know, I didn't know at the time was that what they were actually charged to do or were they charged to, you know, make a recommendation on who should get the licence. But that didn't affect my work one way or the other.

Q. I am not sure whether it matters one way or the other?

A. It doesn't matter, no.

Q. Somebody was going to be chosen to be allowed try and negotiate the final licence?

A. Exactly.

Q. And you were as interested in the process as to how they ranked the people who applied?

A. Exactly.

Q. There is eleven civil servants who are all of high standing involved in working with the project team, reporting up to secretary of a Department for the purposes of bringing this process across. You knew all that in broad terms?

A. Yeah, certainly.

Q. Now, all of those witnesses have given evidence?

A. Mm-hmm.

Q. And they have all said to a man and one woman that, during the course of the process they were engaged in, they never understood that their will or their ability to work to achieve an honest result through the process was being worked within any Machiavellian way by any third party.

Now, you weren't told that, you couldn't have been at some stages because the evidence hadn't been given, and the brief you had never needed to ask that question. I understand all that?

A. Exactly.

Q. I just want you to know that that was being said. And as I understand the evidence you gave early on Friday was, you didn't stumble across anything in the limited evaluation that you did that would have made you think differently than what each of those witnesses asserted in evidence to this Tribunal?

A. The only observation that I can make on your comment is that, and I made it earlier today, and I made it on Friday as well; what I failed to understand and fail to understand to this day, is why having set out a course, i.e. we are going to do a quantitative evaluation of these applications and follow that with a qualitative one, why they moved from that to the course that they ultimately pursued, which was to drop this quantitative approach. They used the word withered.

Q. I will come back to that?

A. Okay.

Q. And I understand what you say. One of the things that you were asked to look into when you got your first brief or project proposal was, how the concept of IRR, Internal Rate of Return, what had happened in relation to looking at that, thinking about it and how it went?

A. Yeah.

Q. And, I think, one of the points that you made in evidence was to say that you didn't understand why this concept of optimal IRR was used?

A. No, I understood I understand why it was used because the documentation is explicit on why it was used. My point is that that was an inappropriate use of IRR. Now, I will expand on that if you like?

Q. So, you had a professional opinion that in some way the IRR and the evidence about it was misused?

A. Inappropriately used.

Q. Inappropriately used?

A. Yeah. Let me say

Q. Perhaps you could just very shortly explain why you say that?

A. IRR, Internal Rate of Return, is a measure that, as a metric, is used to say something about an investment return. The Evaluation Team used this notion of an optimal IRR as something that they judged would be useful in giving an insight into the extent of which consumers or users of the service would be receiving a good service. Now, I hold the view that it is impossible to use an IRR as an

indicator of that objective.

Q. Were you aware that that concept was something that was particularly debated with Mr. Martin Brennan when he gave evidence before this Tribunal?

A. No.

Q. Would you have been interested to hear his explanation as to why the IRR was used the way it was?

A. Well, interested I think it might have been interesting, but I don't think whatever, you know I think I said on Friday that in, you know, fifteen years as an economic consultant, and longer as a practicing economist, I don't think I've ever seen IRR being used as a metric of to give insight or as an indicator into quality and accessibility of service.

Q. I think you did understand one thing, that they thought if you use the IRR information in the right way you could have some impact on the value that a consumer would get from using

A. Well, that's what I dispute.

Q. Yeah. I know you dispute it. I am not going to be too difficult about that. I just want to understand a different thing in fact. So, Mr. Brennan did talk about, at some length, his view about the IRR. I mean, Mr. Andersen, I think, he is quoted as saying: Wanted us to go for the highest IRR?

A. Yes, that is what I would have done.

Q. Yeah, so there was a debate when that didn't happen,

because Mr. Brennan had what he explained was a concept that seems to be linked to the concept of Public Service or something like supplying electricity. And if you give too much profit to the enterprise it just rips off the consumer?

A. Yeah. And that line of thinking that you are expanding there, that was actually contained in the material that was provided to us, not as evidential material, but in the documentation.

Q. It was teased out and he explained it in some detail and underwent cross-examination. So, the point I want to put to you about IRR, and about many things that are said, and I will come to them, is that you had your opinion, and we know, because you had seen it in what was in the report, and if you accept what I say about what Mr. Brennan said, that he was the author of attempting to use the IRR in what he felt was a more satisfactory way, given at the end of day you wanted a cheap mobile phone system?

A. But, I think I mean, you know, it is an inappropriate indicator of what he says he was concerned about.

Q. So your opinion is, it is inappropriate, and you say you hadn't seen it used that way, but it wasn't a dishonest use of it?

A. It was inappropriate.

Q. Inappropriate, but not dishonest. It is just that you don't agree with the thinking?

A. Honesty or dishonesty implies motivation, you know. I am

not in a position to answer that.

Q. Indeed?

A. I mean, it is an inappropriate my professional opinion is that an IRR is a metric of much like what you have just quoted Mr. Andersen as saying. The highest IRR is the highest rate of return. To use an IRR as a measure of consumer welfare or accessibility of consumer is not a sound use of IRR.

Q. That is your opinion, but you don't have any view as to the you are not suggesting there was any ill motivation flowing from

A. I have no idea of what the motivation was.

Q. another intellectual way of trying to get some benefit out of looking at IRR in a different way?

A. I can't comment on motivation.

Q. Okay. The reason I am asking that is because I don't know if you ever sat down and spent time looking at the competition process. Did you? There is a document that describes how the competition was going to run.

A. I don't know if I have the document or not that you are referring to or if I have seen it.

Q. I will just find it and read the bits out to you. There was a document which was attempting explain to a Cabinet Committee, to the office of Minister of Transport, Energy and Communications, how the competition was going to be operated. And the process was described as one to assist in the process of final selection, and for the purposes of

the record this is a document that bears, I think, a Tribunal Page Reference 000267. And it is one that was dealt with at length during the course of evidence, February '95. And what it was saying is that the highest bidder, I think that is in proposing fees, was not necessarily to be successful. And what was going to happen was to compare applications, effectively?

A. Yes.

Q. So this was not the person who pays the most gets a licence. It was, I think, in modern parlance more of a beauty parade?

A. Well, in fact I addressed the very question that you have raised on Friday when I said, look, the stuff of economics is the allocation of scarce resources to competing ends. Here you had six competing ends competing for a licence. The easiest course would be, hold it up in your hand and say, you know, gentlemen, bid. That is not what happened. You are quite correct. They fixed the price of the licence and had a competition to determine who the best contender would be.

Q. And, I think, on Friday you also said something else; you said: If you have a quantitative analysis it is going to turn out as to how much did I get. And if you do a qualitative analysis it is going to, who is the best or who did the best?

A. Yeah.

Q. And, I think, you would accept with me that this process

was designed to ensure that Ireland which had one incumbent coming out of monopoly mobile phone number to a second provider of telephony services over the mobile phone system; isn't that right?

A. Absolutely. I said, pity we all weren't here on Friday. I said on Friday that the methodology that was set out in the evaluation model, which, I presume, to be Mr. Andersen's document, was in my opinion, you know, as good an evaluation as you would get, and one that I would have identified with in every respect.

Q. And I pointed out to you on the subject of IRR, which in fact isn't interesting this Tribunal anymore for the purposes of its report, but, I think, is informative when asking you to assist today, that you see Mr. Brennan coming with an intellectual concept you don't agree with and you say, this isn't an appropriate use. But I suggest to you in Mr. Brennan's mind it did make sense; if he wanted to ensure that the cost of calls by people using this mobile phone were going to be the right thing, his concept of how you might learn something from IRR may have a place and a part to play. You don't agree?

A. I don't agree.

Q. Yes. And that debate was had and supported by the team?

A. Yes.

Q. You say it is wrong, but the team debated it and said, we understand that, we think that is something that is the use of statistical information, the use of information coming

in is going to help inform us as to who is going to be the best?

A. Well, I accept that you would have thought that, you know that Mr. Andersen, for example, would have said, well, look, if you want an indicator for that you would be better using whatever. I mean, if I were in his shoes I would have said, as he appears to have said, look, an IRR doing this with an IRR is not going to provide you with insight into the issue that you have concern with here. Do this instead.

Q. Well, regrettably we don't have Mr. Andersen to come and give evidence yet, or ever probably. But more importantly, I think, you are agreeing with me that the team who were trying to get this right formed the view that was being suggested

A. Okay, I mean, look, they formed a view. I disagree with the view, we know that.

Q. I think you have said in the past that although you hold some of the opinions you give here, like all of us we have opinions about things, we'll always find some other expert to say, well, there is a different point of view and there is a debate?

A. Yes.

Q. The reason I ask you those questions about that is because I want to suggest something to you: That in relation to the other areas that you investigated and reported on and gave your opinion on, really the criticism that you are able to

achieve was really a similar sort of criticism. You were giving your opinions as to how you think it might have been done, and most of the time those opinions were informed by a lack of understanding exactly how the team, who were looking after the competition, had actually reached decisions, because it wasn't available to be read about in the documentation you had been given?

A. I don't know that I could agree with that. They were opinions formed around you are certainly correct that they weren't formed around an insight into what was going on in that Evaluation Team and the discussions that they were having. You are certainly correct about that. They were informed, really by the economic literature that, you know, as professionals we try and stay in touch with. As I say, the major issue to my mind, you are focusing on IRR, that was one that was to our mind important. The one however, that was most important was this quantitative, qualitative issue. Again, where, you know, a model was set out and, I presume, had been accepted by the evaluation committee or group or whatever, team, whatever you want to call them, which said, look, this is what we are going to do. We are going to go down and we're going to have a quantitative analysis, leaving aside whether we are going to use a metric of IRR or something else to measure accessibility of the Irish consumer or good value for money. We are going to do this quantitative evaluation and we are going to and the documentation doesn't use the

word 'supplement', but in substance that is what they were doing, challenging the quantitative approach with the qualitative. And that is, I said it on Friday, to my mind, you know, consistent with best practice on the literature of using multi module approaches to evaluation. And what I have no insight into is well, that is not strictly true either. They chose to describe the move away from a quantitative to a qualitative as a withering of the quantitative approach. They abandoned the quantitative approach and they gave reasons why they were abandoning the quantitative approach. And by-and-large the reasons that they gave were that they didn't get all the data that they expected. Now, you, and before you, Mr. McGonigal, made statements about the depth of experience and breathe of experience of Mr. Andersen in the specific area of competitions for licences. And, you know, the observation that I make is that a man with such experience setting out a model that I can read and say, yeah, that is what I would have done, and then depart from that and say, but the reason that we are departing from it is because we didn't get the data that we expected. Well, that strikes me as being odd.

Q. You see

A. You know, you can say is it my opinion, it is my opinion. But, you know, that is, you know, strange.

Q. I read through all your evidence in detail from Friday and I looked at it a number of times and I saw you say that.

And what I just want to test with you is the basis upon

which you say it, because, I think

A. The basis upon which?

Q. The basis upon which you say it?

A. On which I say that it is strange that they abandoned it.

Q. Yes?

A. Well, you know well, to reduce it to its most basic, you

know, it seems to me no, seems is too weak a word. They

threw out the baby with the bath water. They had a sound

methodology, a quantitative approach. They articulated

very clearly how they were going to use it, how they were

going to challenge it. And they threw it out or it

withered, because the data that they received wasn't what

they expected, you know.

Q. But they did look at the information they got and they

realised there were problems with it. You accept that?

A. Yes, but there are problems with all information. That is

why they were absolutely front on in saying, we are going

to use two approaches; a quantitative and a qualitative.

They knew that they weren't going to get, and I would do

the same myself, they knew that they weren't going to get

all of the information that they were going to seek. They

didn't say anywhere that having not got the information

they didn't say, well, look, is it valid for us to modify

the quantitative model, or do we go back to these

Applicants and ask them for additional information?

Q. And what you say is that when you read in the evaluation

which was a report prepared by the Department for Transport, Energy and Communications, by Andersen Management international, you don't sufficiently understand what Mr. Andersen was saying about why it had withered away. You can't read in that report sufficient to inform you as to exactly why he was saying that?

A. No, I can't.

Q. That is fine. So we get to a point where again, Hamlet is missing. He could, if he was here, we could ask him these questions, but your main complaint is: I don't fully understand how he got to that position because it is not all

A. Not only him though. I mean, there was as you said, there was a big team of people.

Q. And they have all given their evidence. They believed it had withered away?

A. You know, it is not a bunch of flowers, I think, as I said on Friday. They had an approach set out, you know, this is what we are going to do, this is how we are going to do it.

They I mean, even take it, even taking the most benign view of the modification that they made, they never drew out the implication of allowing it to wither, to use the words that are in there or abandoning they never pulled out the implication, look, if we I mean, seemingly neither Andersen nor the Group collectively said look, what is going to happen if we, if we allow this to wither? What are the implications of it? I couldn't find that anywhere.

Q. You haven't been able to find that anywhere?

A. Yeah.

Q. Did you ever ask that anybody who had been involved in the process was asked that very question so that you could be informed for the purposes of finishing your report?

A. No, I didn't.

Q. Would that not have helped if you were so concerned about it?

A. Well, it was beyond the scope of the Terms of Reference I was working to. What I could put down to the legal team at the Tribunal was that this strikes me as strange.

Q. So, when we read your report we know one of the things you weren't asked to do and wasn't inside your terms was to ensure that whatever needed to be done by way of gathering information to learn was there an answer to withering that you couldn't see, you are not saying that was ever done and you never had that information or never directed

A. No, the report was based on the briefing note and the material that was supplied and only that material.

Q. You see, I don't think there is any disagreement between what I want to tease out with you and what you are saying?

A. No, I don't think there is.

Q. You have you had a very confined role to play, a difficult job to do, there was a lot of documentation and, I think, even in your experience it would have been a big competition?

A. Absolutely, yeah.

Q. And Andersen did, I think, come with something you didn't give him credit for, he had experience in telecommunications and having done

A. And beyond that, the model that was set out, and I said it on Friday, the model that was set out, this is what we are going to do, to my mind, was an impeccable description of a methodology for such an important task.

Q. So

A. They didn't do it though.

Q. So having said, and I understand why you say it, that the bit that did seem strange was the explanation for withering?

A. The explanation for withering and the implications of allowing that to happen. For example, this morning there you heard the exchange between Mr. McGonigal and myself in relation to Paragraph 9, you know, where I had a concern about the weightings. You know, that was an implication of that decision. They abandoned the quantitative approach where they had given lengthy discourse on the weightings and the criteria that were going to be used. They abandoned that. And when they finally finished up in Copenhagen or wherever it was, to come to a final determination on the qualitative approach, it seems to me that they said, well, you know, how do we weight this lot, qualitative criteria.

Q. In relation to qualitative material and the question of weightings, I will come back to that in a moment. But I

understand you to be saying, it's strange that I never could see the full explanation for withering?

A. I didn't see any explanation. Sorry, let me rephrase that.

There is an explanation. I don't see that as being for an experienced individual like Andersen, indeed it doesn't have to be Andersen, you know, I am sure those civil servants have been around similar processes, you know, you get back information, it is not perfect, it is not complete. You know, there were two possibilities: They could have modified the quantitative model and said, look, do we really need all of these indicators and say, well, look, we will struggle on with the data that we have got. Or we will go back and say, look, this is fairly fundamental information, and it ought to be available because, you know, presumably Andersen, you know, this expert with much knowledge of the telecommunications sector would have said, look, we have got it in every other country, why would I ask it in Ireland and not get it. Let's go back to the Applicants and get the information. Neither of those things occurred.

Q. You see and neither did you go back to the Tribunal and say, look, if you want to get a proper explanation for this. You need to do A, B, C, D and E and we should not opine on it until we see that. At the moment we just wonder what the answer was?

A. Who should not opine on it?

Q. You. You have given your views on it, but you couldn't say

whether it was right that it had withered or wrong that it withered. You're saying I just can't see enough to explain it?

A. No, I believed that it was wrong that it was withered. And the reason that it was wrong, that it was withered or abandoned, was because it left that Evaluation Team basically with one approach, the qualitative approach. They had 50 percent in their own estimation. They had 50 percent of the information that they required from the quantitative approach. So, you know, 50 percent of the information is better than no information, no quantitative information.

Q. Not necessarily in a competition where you are running it to get what is going to be best?

A. Okay, if that is the line you want to come at that question, then, you know, taking your point there, if that was the proposition, look, you know, 50 percent is going to give us a biased you are entirely correct that could have been a response 50 percent is going to give us a biased estimate of the quantitative outcome and why not go back to the Applicants and request additional information?

Q. You see, you have never asked that question of anybody?

A. No, I haven't.

Q. You have never said to the Tribunal, look, you should really find out the answer to these five things so I could learn some more information to come up with a sounder view.

This is my preliminary view, I don't understand it, and it is strange. I am not being critical. You did exactly what you were being asked to do?

A. And that is what I did. I said, look, this is strange.

This shouldn't have happened.

Q. You see, the decision to use the qualitative evaluation when the quantitative evaluation no longer seemed efficacious was a team decision which they all discussed?

A. Now, hold on, they had agreed the team decision was that they were going to use the qualitative material from the outset, along with the quantitative.

Q. You said they were going along and they discussed the problems, Andersen described how quantitative would run into difficulty and they had to see where they would get to and what they did was what they agreed to do

A. Correct.

Q. at this point in time. So they did put their minds to it and they had to resolve their problem. I think your reports make it clear on a regular basis that when you get into one of these competition processes and you get into these evaluations, things happen and you have got to work with it?

A. Agreed.

Q. And clever ideas look stupid and stupid ideas look clever.

I think we have agreed that this was a high level group of people sufficiently large, not to be sub-borne by any one person. Would you agree?

A. They were I mean, it was a broadly based experienced team.

Q. Yes. And they came up with the answer that they came up with?

A. They came up with the answer

Q. And they were independent because they were not going to get any benefit you could see out of doing this other than

A. Independent of what?

Q. They were independent of the business of running telecommunications. They were civil servants working for the public good?

A. They were going to award the licence or recommend who should be entertained to that end.

Q. So, I don't want to belittle the work you did, because clearly there was a lot of work done, but I am trying to get it in the context of what happened in this whole process. You basically were brought in to give a quick, because you were under time pressure, review of a series of elements that were taking place in quite a long drawn out complicated process, and did you that?

A. Agreed. Agreed. Contrary to your colleague, Mr. McGonigal, who was saying our work amounted to an audit of the process and I disagreed with that. It is, as you describe it, it was a Terms of Reference with a timescale and within that we carried out the work.

Q. You see, the reason I ask you these questions, Mr. Bacon,

Dr. Bacon, it is probably right, you know. I appear for the Government Departments involved in this, but I also appear for the individual civil servants who sat on the competition process and it is important for them to understand what the criticism is really all about?

A. I can understand completely where you are coming from, and, you know, I would make this observation, you know: The description in, was it the briefing document, no, not in the briefing document, the description of in the letter I received from August which was quoting Brennan and Towey's evidence in relation to the weightings, you know, and I couldn't help feeling well, you know, how in heaven's name, you know, did Andersen, if he was the technical advisor to this group, allow them to get into that position, where they were in Copenhagen, you know, trying to determine what weightings they should use? You know, that is exactly the point I am making; that I can't understand how when that quantitative evaluation was allowed to wither or abandoned, that Andersen or somebody, anybody, didn't say, look, how are we going to add up those qualitative criteria? You know. My sympathy is with the gentlemen you are representing.

Q. I am not sure sympathy is going to be

A. I don't mean it

Q. I think it is a little bit more than that. A debate was had and your reports, because I have read them, indicate: I can't understand from what is recorded about that debate

exactly how they got there. But you have never had the chance to ask or have questions asked directed by you that would probably further inform your mind on it. At the moment you say, I don't see it and, I think, it is strange?

A. Correct, you are right about that.

Q. You see, if we come back to the report of January 2005.

Sorry, I just want to check that is the one I did want to ask about, excuse me?

A. This the question and answer report?

Q. Yes, I just want I may be on the wrong report, just bear with me a moment.

In fact, it is a wrong document, I am sorry. You have two big folders of documentation. You were handed in those.

The document I am looking at is in Book 1, Divider 12 which is examination of final ranking?

A. Yes.

Q. This is the William Fry book.

A. Yes.

Q. Do you have that document in front of you?

A. Yes.

Q. Do you recognise it?

A. Yes.

Q. What do you think it is?

A. Sorry?

Q. What do you think it is?

A. I believe that that is a having submitted the draft report on the 18th of March of 2003, I was looking myself

at the draft report and the Terms of Reference, the proposal of, my January proposal. And I felt that Section 3.3 in the draft report, as submitted, might need to be expanded to meet those Terms of Reference. So, we did this note post the 18th of March and, I think, we supplied that at the meeting of early March where we came to discuss the draft report and where I said that might need to be included in the report. So, it was like it was a supplemental note after the draft report had been submitted on the 18th of March and instigated by myself, having reviewed what we submitted as a draft report and the proposal. So that is what that is.

Q. The reason I ask you about that was, because on the second page of it, in the third paragraph?

A. The third paragraph, the second approach?

Q. The second substantive paragraph. There are numbered paragraphs then. The second and third paragraph. In the middle of that you are just simply saying: "The second approach which, I think, is the number two paragraph above which is: "That a process of discussion took place in which a very large number of issues that arise and the evaluation discussed and a negotiated result emerged". You say: "The second approach appears to be compatible with the text of the report. The problem is that there is neither information on minutes in relation to these discussions. This is the key point in the evaluation. It is surprising that that no information at all is provided

as the nature of these discussions and structure of discussions and various positions that were adopted in all the decision criteria that were ultimately applying. In the absence of this information the consultants cannot comment on the validity of the results on the basis they merged as a result of detailed discussions."

So again, when you are putting it altogether to say this should be in the report, you are coming back to a very straightforward honest analysis; look, on what I have, doing the best I can, here is a report. But there is a lot missing that I really need to try and see. You don't know that they don't exist, you just haven't seen them if they do?

A. Yeah.

Q. And that is why I am asking these questions, because if you are a civil servant who did all this and you are looking at your job of work in the round, it is sometimes difficult to understand how somebody who comes in and is asked to do a specialist job on a chunk of it can appear to be critical.

So, you are being critical intellectually within a confined area of request for your opinion?

A. You know, it is certainly the case that, you know, the work that was undertaken was within a confined Terms of Reference and was not an audit or a re-evaluation of the process. You are absolutely correct about that.

Q. And I need to go further than that with you. I think you have gone further than that yourself. That it is a piece

of work that has been formed by the information given to you by the Tribunal and not informed by everything you would have looked for if you had been trying to re-evaluate and form the view had something gone wrong?

A. Well, we were not trying to re-evaluate.

Q. And you weren't trying to say something had gone wrong, you were just commenting what you saw written down and could glean from what they told you?

A. That is fair comment.

Q. And there is a lot more than that. I am not critical

A. Well, I don't know.

Q. You simply don't know?

A. I don't know.

Q. You don't know?

A. I don't know. There may be a lot more or there may be nothing. I don't know.

Q. Yes, but it certainly leaves you in a situation as an expert that, I can't comment because

A. I think what we have said at a number of points in the course of both reports is on the basis of the information available to us, which you would state in any report.

Q. Indeed. That is why I am asking what, I think, are very straightforward questions about this, because this is a report that has been done for a purpose and it wasn't to say that the civil servants got it wrong?

A. No, look, look, the purpose of the report was to provide technical assistance and knowledge to the legal team of the

Tribunal. That was the purpose under four specific headings.

Q. It wasn't to say the civil servants got it wrong?

A. No.

Q. And it wasn't to say that a wrong result came out the far end?

A. No.

CHAIRMAN: Mr. Shipsey.

THE WITNESS WAS CROSS-EXAMINED BY MR. SHIPSEY AS FOLLOWS:

Q. MR. SHIPSEY: Dr. Bacon, I appear on behalf of Mr. Dermot Desmond. I just have a have a few additional questions to ask you in addition to the ones that Mr. McGonigal and Mr. Nesbitt have asked.

If I can just start with the draft report which you prepared as of March of 2003. That was prepared in response to a specific briefing document that was provided to you by the Tribunal; isn't that correct?

A. That's correct.

Q. And as, I think, you have indicated to Mr. Nesbitt just there, you were confined and you confined yourself to addressing the brief that you had been asked to express an opinion on; isn't that correct?

A. That is what one does.

Q. And I understand from evidence that you have given earlier that you did not have prior experience of having an involvement with a Tribunal of Inquiry; is that correct?

A. Yes.

Q. And insofar as you had court appearances or involvement in litigation in the past, you seem

A. No, that wouldn't be significant.

Q. I think you suggested you had one prior involvement, but you never had to actually come to give evidence in court?

A. Absolutely, yes, yes.

Q. And so far as the majority of your experience is concerned as an economist, would your reputation be as an economist as a person acting in the public sector, for public sector clients or for private sector clients?

A. Well, the practice, you know, breaks out, you know, depending on the period over which you measure it at about less than 50 percent public sector and more than 50 percent private sector.

Q. When you were approached, I think, you said by Mr. Healy, originally to become involved with the Tribunal and to provide some assistance for them, would I be correct in saying that your understanding was that you were being retained as an expert witness?

A. Well, as a consultant.

Q. But a consultant

A. I mean expert witness I am not quite sure what the connotation is.

Q. Well, you can just I am not putting any connotation but you were there to provide

A. Expert advice.

Q. expert advice over and above what the Tribunal felt that

they had themselves?

A. Absolutely.

Q. And you have made it clear in your evidence that you didn't feel that you were either directed

A. Led by the nose.

Q. or led by the nose. And you made it clear that in so far as you are concerned you're around long enough to know when you are being led by the nose. Is that your evidence?

A. Yeah.

Q. Would I be right in saying however, that the Tribunal insofar as the briefing document that they prepared for you is concerned, demonstrated that they knew quite a bit about the evaluation procedure and had a fair degree of understanding about how it had worked?

A. Yes.

Q. And insofar as your involvement or what was explained to you about your involvement with the Tribunal, it was really at the, what I might describe as 'the fringes' where terms of art like internal rate of return

A. Internal Rate of Return.

Q. questions of solvency were being discussed. That it was felt, as it was explained to you, that they needed your input?

A. Yes.

Q. Because you were not, nor could you have been involved in any forensic exercise to determine whether anything illegally or morally untoward had gone on with this

procedure?

A. No experience in that field.

Q. And nothing that you advised in relation to could have allowed anyone to come to such a conclusion; is that correct? Yours was of a technical nature to help people who didn't understand the intricacies of economics and internal rates of return to understand that letter?

A. That is correct, except again to say that, you know, methodology, quantitative evaluation and qualitative evaluation and the interplay between those two methodologies and how they are deployed, and the implications of proceeding with both as was originally envisaged in that model, and then deciding not to go with both.

Q. Yes. But, I think, you know, even a layperson or indeed, even a barrister can understand the difference between something that is quantitative and qualitative. You don't need any particular expertise to know the difference between those two. Would you agree?

A. Well, well, you know, look, there are in general terms you are quite right, but there are specific technical aspects, you know. For example, choosing a scoring range of 1 to 5 and saying well, and we will use whole numbers. So, 3.49 becomes 3. 3.51

Q. Becomes 4?

A. becomes 4. That is a difference of 1, the difference between 3 and 4. On a scale that is running between 1 and

5, that is a difference of 4. That is a 25% rounding

error.

Q. But without being unfair to you, it wouldn't take a lot to

explain that to a barrister or anybody else how that might

have

A. No.

Q. an impact upon a process; isn't that correct?

A. That is quite correct.

Q. Were you asked for a CV when you were approached by the

Tribunal?

A. I can't remember if I was asked for a CV, but one would

have been included in the proposal that we submitted in

January.

Q. Have we seen that CV?

A. Yeah, I think so.

Q. Yes. And did that make reference to your experience with

competitions?

A. I would think so.

Q. Yes. You see, when after your second report was delivered,

after January of, I think, it is was 2005

A. Yeah.

Q. you were made aware that both Mr. Desmond's solicitors

an Mr. O'Brien's solicitors expressed certain views in

relation to your report, expressed in somewhat trenchant

terms in relation

A. Derogatory, I think.

Q. Sorry?

A. Derogatory is the word I would use.

Q. You were asked for your view in relation to those comments; isn't that correct?

A. Yeah.

Q. And at that time there was a very detailed attendance taken by the Tribunal at which Mr. Coughlan and Mr. Healy appear to have been asking you about your prior experience in telecommunications competitions. Would I be wrong in thinking that that was the first time they were finding out that information from you?

A. No. At the outset when I was approached by Mr. Healy and at the earlier I mean the question was, you know, look, we are going to look at this area; is it an area that you are interested in, you know, and it was an area that I was interested in. I had carried out, you know been part of a consortium which carried out four evaluations, not for the awarding of a licence, but for awarding of State funds. I made this point on Friday, in broadband development for Mr. Nesbitt's client, I think.

Q. My question is; was that information imparted to the Tribunal at the start?

A. I believe it was. Because, I mean, I said, yeah, this is an area that I would be interested in. I have got some track in this area of deploying these kinds of methodologies.

Q. Because merely saying that you have an interest in some area as an expert, you might

A. Experience, I said. I had some experience in this area of deploying these methodologies, quantitative and qualitative. That is why I was able to say with such conviction that I felt Andersen's evaluation model was one that I could look at and say, well, you know, that is a fine piece of work. It was one that I could say, well, I did it myself, or participated in a process that did exactly that.

Q. Now, you said you weren't led by the nose by the Tribunal, but it is certainly the case, and, I think, you have agreed, that you were directed by the Tribunal to address very specific areas of concern?

A. Directed? I took issue with that word before on Friday. I said, I wasn't directed to. I was requested.

Q. Requested or instructed by your client to address certain areas?

A. Well, you use the word 'instruction'. I know it is part of the jargon of your profession. We were requested to submit a proposal and we submitted a proposal.

Q. But sorry, it is

A. The area the areas that they wanted assistance with. They told us the areas that they wanted assistance with, if that is what you are asking me.

Q. And they were very specific in relation to that?

A. They were quite specific, yes.

Q. Now, you told Mr. McGonigal you were not furnished with the Terms of Reference of the Tribunal?

A. I don't believe so, no.

Q. But you don't, again I am not being rude to you, I think, you live in County Wexford, you don't live on Mars, you know and knew what this Tribunal was about; isn't that correct?

A. Absolutely, yes, I did.

Q. And you knew it wasn't about whether a particular competition in terms of its Terms of Reference and in terms of the way the competition was evaluated was good from an economic point of view or bad or appropriate or inappropriate from the perspective of an economist; isn't that correct?

A. Sorry, I didn't what is the import of the I didn't know what?

Q. Without looking at the Terms of Reference you knew that this Tribunal of Inquiry

A. Yeah, I knew what the substance of the Tribunal was.

Q. was inquiring into corruption and not anything that was appropriate or inappropriate or valid from the purpose of from the perspective of an economist or invalid from the perspective of an economist?

A. Yes.

Q. So you knew in coming to the Tribunal who were directing the Tribunal proceedings, that they were interested in your involvement, not out of any interest in relation to whether a correct decision was arrived at, in the sense of it being appropriate or inappropriate?

A. Well, no. I mean, I think, when they approached me it was specifically on that point, you know, that they wanted technical assistance with these areas that were of concern to them.

Q. But you knew without looking at the Terms of Reference of the Tribunal, that that had nothing to do with what the Tribunal itself was doing?

A. Well, when you say nothing to do?

Q. That was not what this Tribunal was set up to do. This wasn't a piece of litigation between two rival bidders for a licence; one suggesting that this licence was inappropriately awarded for failure to meet European procurement directives or failure to comply with regulations?

A. No, that is quite right.

Q. And in relation to what you were asked to do, although you have accepted and admitted you don't have that much experience in litigation, you could conceive without knowing anything about Terms of References of Tribunals of Inquiry or court litigation, that it is routinely the case that experts are engaged where there is a dispute between parties

A. Parties.

Q. parties of litigation, where you would be called on behalf of let's say, Orange and somebody else would be called on behalf of T Mobile to say why such-and-such a licence should or should not have been awarded?

A. Mm-hmm.

Q. And would I be incorrect in understanding that insofar as your report was concerned, the type of work and what you were being asked to do fitted more into that than into a Tribunal of Inquiry into alleged corruption?

A. No, on the contrary. I didn't feel it was that. I felt it was the Tribunal team seeking to equip itself with, you know, additional technical support.

Q. Yes?

A. You know, it wasn't I'll go back if I can to the remark Mr. McGonigal made before lunch about a draft report and, you know, that an expert witness comes in and says, yes, he broke his leg in three places, you know, you don't go along and say listen, is that okay? I didn't see myself as giving a technical judgement, if you like, to one party or another party in the Tribunal's deliberations. It was, as I said on Friday, that, you know, the team had said look, we are going down a track ourselves in relation to informing ourselves and coming to a judgement, I think, Mr. Nesbitt's words, mastering a brief, in relation to these areas, we want some independent technical advice and support in those areas. So, I always saw what I was doing as giving, you know as being a report that would be submitted to this technical, to this legal team and used by them.

Q. But it wasn't, as the expression might go, yours to wonder why they wanted that. They were asking you the questions

they wanted addressed and you were providing

A. They were explicit about why they were asking it.

Q. Yes?

A. They wanted independent technical advice from a professional with experience in those areas.

Q. But you didn't know, you weren't told and you didn't inquire as to why they wanted that technical advice or technical guidance?

A. No.

Q. And it was no function of your brief or no function of your instructions to have a view in relation to that, to form a view in relation to that, or to express an opinion in relation to that?

A. No.

Q. Tell me, Dr. Bacon, were you disappointed when you presented your draft report in March of 2003 and you had a follow-up meeting with the Tribunal when you effectively heard nothing from the Tribunal for a very significant period of time after that?

A. No. It would take an awful lot more than that to disappoint me.

Q. Well, even allowing for a very high disappointment threshold?

A. No, I have a low one.

Q. Or a low disappointment threshold on your part, did it not register with you at all, Dr. Bacon, that this was somewhat unusual or strange or

A. It was unusual in it was unusual in the sense that, you know, I have made the point, you know, that my normal practice in producing my process, and I am not unique in the area of economic consultants in doing that, produce a draft report, submit it to the client and get it polished off. I suppose a bit like yourself, you would be interested to see the back of a job and move onto the next one. It was unusual that, you know, you didn't get that draft report completed out and finalised.

Q. And you were paid for the work which was to lead to a final report and that never came about, not through any fault on your part?

A. Yeah, yeah.

Q. And to that extent, and allowing for the fact that it patently takes a lot to upset you or to discommode you, I take it it registered with you at least that you had been paid 42,000, plus VAT for a final report, and the person who commissioned that report hadn't finalised it?

A. Well, yeah. Look, it was not something I was losing sleep over because, you know, the work had been done. It was a confirmation, you know, that you would have been seeking. I wasn't lying there at night saying, God, there is only a draft report there and I am going to have an awful lot more work to do. The report was done in substance. It was handed over as a draft, along with the Terms of Reference and said, look, come back to me and come back to me quickly. They didn't come back to me quickly. They were

frying other fish and I had other fish to fry myself.

Q. And insofar as the fish that they were frying was concerned, I take it that you were aware what fish was being fried?

A. Well, in a very general way, but, for example, I had no idea, no idea that my work was the subject of a case or whatever it was by Mr. McGonigal's client in the High or Supreme Court, none.

Q. Or much later, Dr. Bacon, I think, that is after 2005?

A. But none. I mean didn't take an active interest in the work of the Tribunal.

Q. Did you have any awareness that the draft fruits of your labour were being used

A. No.

Q. to cross-examine witnesses appearing before this Tribunal?

A. No.

Q. in circumstances where those witnesses didn't know of your involvement?

A. No.

Q. I know you have answered Mr. McGonigal in relation to this, but I just have a slight curiosity in relation to something that is referred to in the memorandum, I think, it is of the 10th of February, 2003. It is Tab 6 of the first of the William Fry booklets.

A. Yeah.

Q. And it is the second comment that is attributed to you:

"Aware his report could be used in a subsequent action."

A. Yeah, I mean it is not I don't I mean Mr. McGonigal has raised that. You know, if it is written there, you know

Q. Who wrote that note?

A. Well, it is not my note. I don't know whose note it is.

Q. So, it is one of the lawyers for the Tribunal's note?

A. Yeah.

Q. And you would know the distinction between an action and a Tribunal?

A. Yeah, except that, and I made this point on Friday, I am not sure what I said and I am not sure what is reported, but

Q. If we assume that this record and this report is taken by a lawyer?

A. Yeah.

Q. The probabilities you would like to think would be that what was written down was what you said or at least conveyed the sense of what you said?

A. Yeah.

Q. And you know the difference between a Tribunal and an action?

A. Yeah. You mean a legal action?

Q. Yeah?

A. I am not even sure though was I talking about a legal action. I mean I don't know what point.

Q. Again, in terms of understanding

A. And I don't know even the context. I can see what is written there and

Q. And one way of determining what it is that somebody meant was by having regard to the words that they use. That is fairly self-explanatory. You don't use court action if you are talking about Tribunal, and you don't use Tribunal if you are talking about a court action; isn't that right?

A. Yeah.

Q. I am just wondering, if that is correct and if the probabilities in life are that you were talking about a court action, in what context did your work come to be discussed in relation to a subsequent action, because you knew the Tribunal was talking place, so the Tribunal wasn't subsequent, that was current. So how could your report, if you can assist us, become relevant to a consideration of a subsequent action?

A. I don't know. And I mean the words are attributed to me, so, you know, on face value taking your point, a solicitor took the note, I said it. But, I mean, why would I have said it? I don't know. I am sorry.

Q. Well, again, I am not really wanting you to speculate, but you know, that this is an inquisitorial system rather than an adversarial system. If you don't recall saying it, and if you accept that you understood the distinction between the two, is it not more likely than not that somehow it came up in discussion?

A. Yeah, it sounds plausible, but you know

Q. And does it not demonstrate an apprehension on somebody's part that you had to be careful in relation to what you said because what you said and what you wrote down could, as it were, be in the vernacular of the courtroom dramas, taken down and used in evidence against you in the future?

A. Well, sure, if it is, it is.

Q. That is somewhat prophetic because you are here now, Dr. Bacon, in relation to what you wrote down; is that correct?

A. But sure didn't I say last week that, you know, I mean, you know, when did you ever have an Irish secret? You know, I am doing reports for public sector and private sector clients. I have read many of the reports in the newspapers before I completed them.

Q. Your next involvement then which leads to your second report of January of 2005 comes about as a result of a letter that is written to you in August of 2004?

A. Yeah.

Q. And you have moved on in terms of your involvements between the preparation of the report in March of 2003 and you don't really have much involvement after that meeting in March of 2003; is that correct?

A. None, wasn't it, until a year later or something. There was a meeting a year later, none.

Q. Then, as it were, out of the blue the Tribunal are back on to you and they want you to do

A. Another report.

Q. another report. What I am trying to get some sense from you is; there were certainly questions that were being asked in the letter of the, I think, it was the 30th or 31st of August of 2004 which had not been originally asked. But do I understand you correctly to say that you regarded your second report as being substantively and substantially a completion of what you had been asked to do?

A. No.

Q. So substantively and substantially it was a new piece of work?

A. That is exactly the way I approached it.

Q. And that is why you were proposing to charge the same fee, give or take, for the new piece of work that you had charged for the original piece of work?

A. Mm-hmm.

Q. And insofar as that is concerned, you had in your draft report provided the Tribunal's lawyers with such assistance as you could provide. I mean, it was unlikely that you were going to provide a different - an internal rate of return other than what you had provided in your March report?

A. Well, as a matter of fact we provided nothing on internal rate of return because they had said that that area was no longer of interest to them. So there is absolutely nothing on IRR.

Q. Okay, that's a bad example. There was nothing you know, barristers have this quirk, Dr. Bacon, where at the end of

opinions they say, nothing further occurs, to mean that they have hopefully considered everything. Would you have been able to say at the end of your March 2003 report in relation to the questions that were addressed to you that nothing further occurred to you in relation to those questions?

A. Sorry, sorry, what is the point? What is the point?

Q. I am asking you if your draft report of March 2003 was complete?

A. Yeah. I mean I felt it was complete and that is why I wanted to wrap it up in

Q. And there was nothing further by way of assistance that you could provide to the Tribunal in relation to the very specific questions that they had, I say directed, you say requested you to advise on?

A. When, you are talking about the questions, are you talking about the original questions?

Q. Yes?

A. Yes.

Q. And then when they come back to you in August 2004, lots of water has passed under the bridge, lots of fish have been fried in this Tribunal and you are asked, and this is what I want to get from you, did you have a sense that you were being asked to do a different job in August 2004 or was it the same job

A. No, it

Q. in a different way?

A. It was certainly coming at the material from a different perspective. Like it was, as you can see, and everybody can see, it was a set of questions. You know, in a sense the way the what the first report had done was it had told a story under the areas that, you know, we were requested to provide assistance. It unfolded a narrative report, if you like, a story of how the evaluation process was envisaged, what happened to it, the scoring system, what happened in the areas that the area of IRR and the other areas that we were asked to address. When the letter of August, you know, emerged, it was a set of specific questions.

Q. Yes?

A. So, I think, it was the first report, if you want to call it that, had evolved as a result of a particular way of looking at the material that had been provided with the briefing note. The second request was asking a set of questions which had behaved us to discharge those questions to do, was to go back to all of that material, you know, the report that we had written and the basis upon which it had been written and basically interrogate that data or that material.

Q. The original data?

A. Yes, with the particular questions.

Q. But what I don't quite know is whether you were given additional data?

A. No, other than the material that was contained in the

letter itself.

Q. Yes?

A. Which I alluded to this morning, for example.

Q. So if I understand you correctly; you are being asked in August 2004 to revisit what you had done in 2003 with a view to answering the questions that were being put to you in 2004, informed by the narrative in those questions?

A. Yeah, and also, not just to go back to the report, but to go back to the material upon which the report was based.

Q. All right, but

A. And that is where the work was. That is why I made the remark that, you know, the second report wasn't, you know the judgement that I came to was look, if I am going to do justice and answer these questions, it is not a question of simply going back and doing a cut and paste job on the first report, we are going to have to go back to the data upon which that first report was drawn.

Q. You were going to re-read your brief?

A. Exactly. In the light of what were quite specific Terms of Reference.

Q. Yes?

A. By way of a series of questions.

Q. But you weren't being provided with new documentary material that had arisen between

A. No.

Q. in effect January of 2003 and August of 2004?

A. No.

Q. And yet there was reference in the letter of August 2004 to what, again just to come back to the fried fish analogy, to what witnesses had said in the course of their evidence to the Tribunal?

A. Well, to what some specific witnesses had said.

Q. Specific ones. Specific ones relevant to that which you were opining upon?

A. Weightings, yeah. Weightings and some of the scores.

Q. And it was also made clear to you at this stage, was it not, that whatever about the assistance that you had been asked to provide somewhat in vacuo in 2003, you were now to prepare something that you would have to

A. Which would

Q. defend?

A. Well, which would be ventilated in evidence, I think, is the words that are used in the letter of August.

Q. You would have to stand over what you put in your report.

It was going to be subject to scrutiny at a hearing of the Tribunal. That was your understanding?

A. Look, I have to stand over every report I write, and I approach every assignment on the basis that if I do a report I am going to be standing over the material in it.

Q. Yes, but there is standing over and there is standing over, Dr. Bacon?

A. Okay, you know

Q. And that was made clear to you at the time; isn't that right?

A. Well, it is in the letter.

Q. Yes. And then you met them in November?

A. Yeah.

Q. And we have now some notes which have been transcribed of the discussions that you had with them on the 8th of November and, I think, later on the 18th of November; isn't that right?

A. Yeah.

Q. And that note of the 8th of November which Mr. McGonigal has gone through with you in some detail, is significant for the choice of language in certain respects?

A. What are you referring to specifically?

Q. Well, I am talking about words like conspiracy?

A. What tab is it?

Q. It is at Tab 23.

A. Yes.

Q. And it has words like conspiracy, black box, ex post facto rationalisation; isn't that correct?

A. Standard paraphernalia of the dismal times.

Q. So conspiracy is standard paraphernalia of the dismal times?

A. Well, you know, that is probably incorrect for me to say that. I was thinking about the ex post facto and the thing. The conspiracy issue, that point there was to the best of my recollection this question of, you know our conclusion and the conclusion we furnished was that Table 17, the final table, which is what they are about in

Paragraph 12 of the letter, but in Paragraph 9 also, that Paragraph 17 or Table 17 was the numerical tallying up of I mean, it was represented, I think, in the report, that this was an independent conclusion. Our view is look, it is a re-writing of the same criteria and changing A, B and C. Now, you know, is that, you know, getting the same result from the same set of data, you know, and presenting it as though it were something different?

Q. Dr. Bacon, what I am trying to get at, and perhaps you know or you anticipate what I am trying to get at, whose word was conspiracy?

A. Mine, I think.

Q. But why would you have raised what question of conspiracy?

A. Well, conspiracy in the sense of agreement that Table 17 was going to be the same as Table 16. I mean I explained at length on Friday there that, you know even the juxtaposition of the two tables, Tables 16, you know, comes first and provides A, B, C and a result. You know, there is no way that I can see, you know, I have said this point ad nauseam that you can add letters of the alphabet and weight them and come up with result. And then turn around in Table 17, the next one, and say, you know, they had the result, they had the qualitative result. They had their ABCs. And was it not one of Mr. Nesbitt's clients who will, according to the letter of August, that looked at, looked at it and said, well, you know, how did we get this

result? So they sat down and got Table 17.

Q. Dr. Bacon, when you are sitting down with clients, be they clients who are barristers or clients who are business people, would it be fair to suggest or is it unfair to suggest conversely that you have some sense of what their apprehensions or concerns are in relation to what you are being asked to opine upon?

A. You know yeah, you would.

Q. I mean, it can go from one extreme where you come to a meeting having examined documents and you say, for example, in an extreme case, I think, there was a conspiracy and you are greeted with shock horror and a dumb struck sense that that is what you concluded. I mean that is one possibility. Or you can apply to express a degree of skepticism in relation to a matter, and again without wanting to lead you by the nose, you can pick up in a meeting whether that view that you are expressing is something that might find some community of ideas or shared understanding? I am just wondering when you use conspiracy there, did you get shock horror, or did you get well that confirms what we suspect?

A. I don't think I got either to be honest with you, you know, or I certainly can't recall and would have recalled shock horror, but I can't recall a sense of shock horror resulting from anything that I provided to them.

Q. Again, Dr. Bacon, you are not carrying out your work in a total bubble?

A. No.

Q. You are asked to do specific things and nobody is here

A. Look, to baton down on the point you are talking about, you know, the context I can't remember the precise exact wordings and sentences that I used, but I certainly expressed the opinion that, you know, Table 16 had produced a result. Table 17 came afterwards. Table 17 was certainly capable of generating a result. In my opinion Table 16 wasn't capable of generating a result. And the evidence I had seen from civil servants was that some of them at least were left scratching their heads as well when they looked at Table 16. So there was little doubt in my mind. Table 16 was the first to emerge. Table 17 came afterwards and Table 17, you know, to my mind was well, you know, if you can't see how Table 16 came about, well then, you know, we will give a table that can see how it came about. And it is in that sense if I used the specific word conspiracy that I would have used it. And I wasn't trying to ring a bell if that is the line of your question.

Q. Yes. Because again in so far as your report is concerned, and the report that you presented, I think, in January of 2005, that was never relied upon by the Tribunal in that ultimately the Chairperson decided in September 2005, when you were, as it were, under starters orders to come here to give evidence in relation to it, that it would not be used?

A. That's correct.

Q. And in fact other than such use as was put in

cross-examining witnesses who didn't know that you were involved, and this cross-examination here in relation to the circumstances surrounding the obtaining of the reports and what was provided to you and what you provided to the Tribunal, the work that you carried out and were paid for by taxpayers' money, that is not suggesting you are not entitled to it, Dr. Bacon, but that never saw the light of day?

A. No.

Q. Just in relation to documentary evidence, it might be, Dr. Bacon, that you regard lawyers as having something of a fetish in relation to documents, but it is the raw material that we work with when we are trying to forensically uncover the truth, be it in a tribunal. I take it you have heard the expression "follow the paper trail" in the context of not just this Tribunal, but many tribunals. Was it ever explained to you by your client, and again, insofar as your client is concerned, it is a rather specialist client, because all of your clients were lawyers, isn't that correct?

A. Sorry?

Q. The clients, the Tribunal were all

A. All lawyers, yeah.

Q. So far as the agents of the Tribunal are all lawyers. Was it ever explained to you the importance of document retention in relation to the work

A. No, no.

Q. that you were doing?

A. No.

Q. Was there ever inquiry made of you in relation to whether you had kept notes or documents? Or, is it the case, as I seem to gather from Mr. McGonigal, that when you were written to in October 2007 looking for documents, and you went to the Tribunal, you were told effectively it is a matter for yourself, Dr. Bacon?

A. Yes, I think they were the words. I mean, I sought guidance, do I need to cooperate with this? They said: Look, it is entirely a matter for yourself whether you do or you don't.

Q. And did the Tribunal, independently of Mr. McGonigal's solicitors or Mr. O'Brien's solicitors, for whom Mr. McGonigal appears, apart from the inquiries that were made by William Fry, did the solicitor for the Tribunal write to you and say: Well, it would be better if we had all the documents generated by you or by Mr. Hannigan or by Mr. Walsh, because we have an obligation to ensure that the parties

A. No.

Q. who are here before the Tribunal have available to them that documentation?

A. No.

Q. Nobody said that to you?

A. No.

Q. In relation to your own, and I am not trying to be sort of

pejorative here, but your own lay understanding of the requirement to retain documentation, or even the keeping of that documentation, is it, as Mr. McGonigal or you seemed to suggest to Mr. McGonigal that you have a policy of deleting documents permanently after a job is done, or is it the case that you are perhaps like most of us, that when you generate a document on your computer, after a period of time you don't really know where to find it?

A. Well, that is certainly the case, but I mean, I try and I mean, you know, I try and, you know, keep my computer up to date just as a matter of housekeeping and yeah.

Q. We all can keep our computer up to date, it doesn't necessarily mean that we know where to find documents, and I take it that you are sufficiently computer literate to know that it is actually quite hard to permanently delete documents that are generated on a software package like Word?

A. Yeah, yeah.

Q. You know or you don't know that?

A. I do know that.

Q. And can I ask you then what level of inquiry or what level of investigation did you carry out when you were asked to produce documents, because what I seem to

A. I looked, I looked at files that had the word 'Moriarty' in them.

Q. Yes.

A. It is not I would tend as a matter of practice that, you

know, either the subject matter of the report or the client

name would be...

Q. And is it your evidence, therefore, that insofar as you have produced documentation, you, in relation to your own computer or any computers that you have control over, searched all of the files in that computer under the name Moriarty and printed off all of that documentation?

A. I just looked for it.

Q. Well, assuming, as you say, that you looked for it and you found it, did you print it off?

A. When?

Q. At any stage? Have you done that at all?

A. Have I done what?

Q. Have you gone to your computer? Have you the same computer now that you had

A. Two years ago.

Q. two years ago?

A. Yeah.

Q. And have you gone to that computer and gone to the Word software package in that computer to trace all files and all documents with "Moriarty"?

A. Yeah.

Q. And when did you do that for the first time?

A. When the Tribunal asked me what I had.

Q. Well, when was that?

A. Last year. Autumn, Autumn of last year, Autumn of last year.

Q. And where do you send e-mails from, Dr. Bacon?

A. From a computer.

Q. And do you delete those e-mails?

A. Yeah, I tend to, you know, when I have a lot either in my "sent" files or in my "in box".

Q. And did you search the e-mail files?

A. I did, yeah. Well, sure, I would you know, as a matter of practice, I think, I would delete those every, you know, three months. I can't religiously swear that it is three months, but with that kind of frequency. In fact, I think, I might have an automatic delete in it.

Q. In relation to the way you tracked changes in documents, do you know anything about how you do that, because as I sensed from you, you actually do your own typing on the computer, is that right?

A. Yeah, yeah.

Q. So, if you have a draft of a document and you go into change that document, you are the one that does that?

A. Yeah.

Q. And do you have a tracked change document?

A. Do I have a tracked change of document?

Q. Is that your policy, that you would

A. It is not my policy. Sometimes I would do it and sometimes I wouldn't, you know, and as a matter of practice, you know for example, if I was incorporating, you know, as I said this morning, if I was incorporating changes on foot of a client comment, I might track changes or I would I

would tend to track changes, just to remind myself what I am changing.

Q. And did you track changes in relation to either the March

A. No.

Q. 2003 report or the January 2005?

A. No.

Q. How do you know that?

A. Well, I wouldn't have done because I wasn't it wasn't on foot of well, I wouldn't have done unless the track changes was on automatically. But, you know, where I would tend to track changes, as I said, is where I would get specific client comments or was making changes on foot of a specific client request. But certainly where a draft would be evolving internally in my own head or on foot of colleagues' input.

MR. SHIPSEY: Thanks Dr. Bacon.

CHAIRMAN: Dr. Bacon, I think, there remain two fairly limited exchanges. Do you feel able to try to deal with those?

A. Yeah.

CHAIRMAN: Mr. Fanning.

MR. FANNING: Yes, am I the last questioner, Chairman?

CHAIRMAN: It may be that there will just remain either with Mr. Collins or Mr. Coughlan, something very limited, but as is the practice because of the Terms of Reference, I have kept you to last.

THE WITNESS WAS CROSS-EXAMINED BY MR. FANNING AS FOLLOWS:

Q. MR. FANNING: Yes, thank you, Chairman. Dr. Bacon, I appear for Mr. Lowry, who was the Minister for Communications at the relevant time, and I think you are now aware, and indeed, in light of your answers to some of Mr. Shipsey's questions, you would have at all times been aware that the nexus between this module of the Tribunal's investigations and the Tribunal's Terms of Reference is Mr. Lowry, that is where the GSM module must meet the Terms of Reference?

A. Yes.

Q. And just by way of very brief preamble, just to tell you where I am coming from in asking you questions, because you might, in fairness, wonder. Whilst in one sense Mr. Lowry might at one time might have welcomed this model as an opportunity from his perspective to dispel the myth of any political interference in the GSM2 process, he does have understandable concerns, in my view, as to the manner in which this module ultimately proceeded and your involvement in it, and that is why I want to ask you some questions now. Because vast tracts of evidence about the work of the Project Group have been heard in this module without any real reference to Mr. Lowry and that had very little to do with him. We now know that you were retained by the Tribunal in or about November of 2002, then you are sent a letter and a 22-page briefing note on the 13th of December, 2002. Do you know how many times Mr. Lowry's name is

mentioned in the 22-page briefing note?

A. I don't. Is it mentioned at all?

Q. I believe the answer is none. And nobody bothers to tell us at this stage - this isn't a matter for you - that you have been engaged by the Tribunal. Now, can I ask you at the outset, Dr. Bacon, and I apologise if this line of questioning is in some way obtuse from your perspective, because you have been asked questions on this terrain already today, but a difficulty that, I think, a number of the barristers appearing here for different clients have had, is to try and define your role, and I think it is fair to say you have resisted labels. You have described your role most often in terms of technical assistance that you were providing to the Tribunal?

A. Do you want me to define what I consider my role to be, would that help you?

Q. It would be of great assistance.

A. Yes, I considered that my role was to provide consultancy services in, in under four principal headings, and I have

Q. I don't think we need to go back to those again.

A. Exactly. That is what I consider my role to have been.

Q. Yes. I mean, to say that one provides technical assistance is ultimately an empty formula. I suppose, a consultant engineer, an open heart surgeon or a bin man could all be providing somebody with technical assistance. In terms of defining your role, we know that you are a consultant

economist, and you said to Mr. Shipsey more recently, you elaborated, you said that you were providing independent technical advice, and that is a label that presumably you are comfortable with?

A. Yeah.

Q. Would you have described yourself, if you were at a dinner party in December of 2002, and you disclosed to anybody, I don't know whether you would have done, but if you had disclosed to anybody that you had been retained by the Tribunal, would you have described yourself at that time, in your own words, as an independent expert?

A. Yeah.

Q. And what can I ask do you understand by the term "independent expert"?

A. Somebody who is independent of the process that is engaged in and that has given, you know, input, advice or reportage in, you know, the specified areas.

Q. And frequently outside the specific case of this Tribunal, when you are retained by a particular body to provide a report or do research or carry out some analysis, almost by definition you would be coming to it in your

A. Economic consultant.

Q. As an economic consultant and as an independent party?

A. Yeah.

Q. Providing an independent perspective?

A. Yes.

Q. Now, can I just ask you in general terms; is there anything

that you would feel the need to ensure that you avoided in this type of scenario to ensure that your independence wouldn't be compromised?

A. Sorry, what is the question?

Q. Is there anything that you would feel the need to avoid?

A. Avoid?

Q. Yes.

A. No, no.

Q. No? Well, are there any

A. Well, I am not sure if I understand the question fully.

Avoid?

Q. Yes.

A. For example?

Q. Well, from your point of view let me put the question in a different way. What sort of integrity and values does an independent expert bring when he is asked to prepare a report on a topic?

A. Well, I suppose it is distance from the process.

Q. Distance from the process. What about distance from the client?

A. In what sense?

Q. Well, if one is independent and one is external to the client that one has been retained by, one doesn't necessarily have a coincidence of interests with the client. You mentioned, for instance, in your evidence to Mr. McGonigal on Friday last, that you thought you may have been retained by this Tribunal as a result of work you had

done for the Bar Council. So just to choose one example of a different body outside Dublin Castle that you had done work for.

A. I am not sure that I was retained as a result of work. My suggestion to Mr. McGonigal was that Mr. Healy may have learnt of my existence or work as a result of work I had done for the Bar Council.

Q. Exactly.

A. But I mean, he could have heard it from any other place as well.

Q. Just to choose this as an example. The Bar Council may or may not have had a particular view of the world when they hired you, and they would have asked you for an independent perspective on a number of issues?

A. Yeah.

Q. It would have been no concern of yours ultimately, I take it, whether or not your view coincided with the ^ Bar Council's view of the world?

A. That's correct.

Q. You report and you say, I think X or I think Y, and whether they would prepare you to say X or Y, it is of no concern to yours?

A. And it would be absolutely no different to the situation here.

Q. How do you then, as an independent expert, in this type of scenario, safeguard against the possibility of a perception that you have become too closely aligned with the interests

of the client?

A. By having a report in writing.

Q. By having a report in writing. What level of interaction would you normally have with a party that asks you to prepare a report?

A. Pretty significant.

Q. Significant interaction?

A. Yeah.

Q. And it seems to you, Dr. Bacon, having heard your answers to some of my colleagues, to be a matter of absolute routine and normality that you would have interaction after the time that you had prepared the report, as distinct from before the time you prepared the report?

A. Yeah. I mean, normally, normally I mean, you know, a lot of the interaction with the client I mean, the Tribunal team were not, were not significantly different from any other client I have or have had, in the sense that there is always an urgency.

Q. Yes.

A. You are always doing a consultancy assignment against the clock.

Q. Yes.

A. So, you know, there is going to be interaction. A client will always, you know, I have never been in a position where a client is saying, listen, go off and do that and, you know, come back when you are ready. You know, clients are always saying look, you know, normally there would

be a process of, there would be a formal process of review, for example, with many of the kinds of contracts that were referred to here; the kinds of public sector tendered processes, there would be a formal process of review between the consultant and the client.

Q. Very good. We may be at cross-purposes here. In an answer that you provided a little bit earlier this afternoon to a question which Mr. Shipsey asked, you said that your general procedure was that you would draft a report, submit it to the client, I think for their review, then polish it off, and then you added the phrase, "a bit like yourselves." And the transcript will confirm that phrase.

What did you mean by that, Dr. Bacon?

A. Well, you know, each assignment that I engage in, you know, has

Q. What did you mean, "a bit like yourselves"?

A. A bit like what I would think barristers do.

Q. I see. Well, can I

MR. HEALY: In fairness, put the whole quote, the whole question to the witness.

Q. MR. FANNING: I don't have the benefit of the expensive transcript that Mr. Healy has in front of him coming live.

If Mr. Healy wants to quote it, he can, in full. I am quite satisfied that you used the phrase "a bit like yourselves."

A. The point of substance that I was making was, you know, that, you know, you want to complete an assignment.

Q. Yes. No, no, was "a bit like yourselves" a reference to the way that you understand barristers to carry out work for clients?

A. Not I wasn't consciously referring to barristers.

Q. Well, why did you use the phrase "a bit like yourselves" to Mr. Shipsey?

A. Well, a bit like any professional then.

Q. I see. Because the point I just want to make to you, and it is not a complicated point, is that when barristers, who are independent professionals, are engaged to prepare, say, an opinion for a client, they write the opinion and tell the client you have a good case or you have a bad case. They don't send a draft report to the client, have a meeting with the client and then complete the opinion on receipt of the clients's view. That is precisely the procedure they don't follow?

A. Well, then my analogy was an incorrect one, but again I feel bound to state to you that in the course of providing a draft report to clients, the principal purpose is to allow the client the opportunity before, before the final word is said in a report to see that the draft report complies with the Terms of Reference.

Q. Very good. Well, rather than dealing with this in the abstract and indefinitely, can I turn to a more specific context in which I want to address this issue. You sent a draft report to the Tribunal, I think on the 18th of March, 2003, isn't that so?

A. Yes.

Q. We know then within a fortnight of that date you met with the Tribunal on the 31st of March of 2003?

A. Yeah.

Q. And the best record, and indeed, perhaps only record we have of the meeting of the 31st of March, 2003, is the handwritten memorandum, which appears at Tab 13 of the booklet that has been prepared by William Fry?

A. Yeah.

Q. And we might have a look at those notes again, and I apologise if I seem to be labouring this issue, Dr. Bacon, but there are aspects of those notes that are of significant interest to me.

A. Yeah.

Q. Now, the first recorded comment there is beside the letters JH, which I think, which we assume to be Mr. Healy. It says: "More you read the report the more you see it is impossible, it is impossible to see the result or to work it out." Do you recall Mr. Healy saying something along those lines?

A. Yeah.

Q. You do. And the second recorded comment then, I think it maybe JC, which may be a reference to Mr. Coughlan, he is recorded as saying: "Difference between draft and final reports disturbing"?

A. Yes.

Q. Do you recall Mr. Coughlan making a comment along those

lines?

A. Yeah.

Q. At the end of the minutes of that meeting then, I don't want to go through all of it, you are quoted, if the minute is accurate I am afraid I am looking at it as an excerpt in my own notes. It is the comment: "Everything points to Andersen having been manipulated. He was pushed around, he was the servant of the Steering Group."

A. Yeah.

Q. Now, that is the best record we have of what was said at the meeting, two weeks after your draft report of the 18th of March of 2003?

A. Yeah.

Q. If we can take this step-by-step. What did you understand the purpose of the meeting of the 31st of March, 2003, to be?

A. It would have been to review the draft report.

Q. Yes. And you are quoted at this meeting making a comment that suggests you had a belief that Mr. Andersen had been manipulated?

A. That goes back to the point that I was rehearsing here earlier this afternoon, that I was and remain lost as to why an experienced man would abandon

Q. Yes.

A. you know, the key plank of his methodology.

Q. Well, if you were and remain lost, you weren't expressing yourself in those terms at the meeting of the if the

minute is correct, because you didn't seem lost at all.

You had a solution or an analysis of what happened. You said "everything points to Andersen having been manipulated"?

A. Yeah.

Q. So, can we take it that if the minute is accurate and if you made the comment, it reflected a view that you held at the time that you made it?

A. Yeah.

Q. And would you agree with me, that this must surely have been a very significant view for you to have held in the context of the role you were carrying out and in the context of the Tribunal's investigations?

A. Yeah.

Q. When did you form that view?

A. When I had completed the work, you know. I mean, it goes back to, you know, the point. Again, I will repeat the point and try and expand on it to try to give you some insight into it. The reason that was put forward for the withering or abandonment of the quantitative approach was that there was a lack of data. Andersen had specifically envisaged that he would do additional work.

Q. Dr. Bacon, the question I am interested in and the answer to the question I am interested in is when you formed this view?

A. When I was conducting the, when I was completing the draft report.

Q. Did you form the view then before you sent Mr. Healy by e-mail a 52-page draft report on the 18th of March, 2003?

A. Yes.

Q. Where is the view to be found in the 52-page draft report?

A. I don't believe it is.

Q. Why, if you have agreed with me that this was such a significant view for you to have held and to have formed, did you not think of concluding it in a 52-page draft report?

A. Well, I didn't. I put the evidence that was down there before them and, you know, to the Tribunal team.

Q. I beg your pardon?

A. You know, I put the material that was in the draft report, you know, before the Tribunal team.

Q. I don't know if that is an answer to the question I asked you.

A. Sorry, what is the question?

Q. The question I have asked, Dr. Bacon, is you formed a view, that you have agreed with me a few minutes was a very significant view, in terms of the Tribunal's investigations, it is much more significant than most, if not all, of what is contained in the 52-page draft report. You formed a view that Mr. Andersen was manipulated and that everything pointed to that. You have agreed with me that you formed that view by the time you completed the 52-page draft report, what you haven't answered is the question why was that view not expressed in the draft

report?

A. Well, that is not what the draft report was trying to do.

Q. I see.

A. I mean, the draft report was, to repeat it for the umpteen time in this room, was to provide technical assistance.

Q. I see. So you thought it was appropriate to omit this view from the 52-page draft report, but to express it behind closed doors in a meeting with the Tribunal's legal team?

A. Well, I don't think it was behind closed doors.

Q. Well, in what sense were the doors other than closed, Dr. Bacon?

A. Well, sure, don't you have the notes of the meeting?

Q. We do now.

A. Well, I mean that is not my business.

Q. No.

A. And you are asking the question of me.

Q. But what is your business, and this is why I am focused on it, is why you are recorded as expressing this view at a meeting and not including such an important view in such a lengthy draft report?

A. Because the draft report was, the draft report was there to provide a narrative of the technical process that occurred.

Q. And why weren't you at the meeting on the 31st of March, 2003, solely concerned with technical matters?

A. Well, I was concerned with technical matters and I offered that view.

Q. I see. If we can move on then to the next meeting, that is

the meeting of the 8th of November, 2004. It is contained at Tab 24. We know that by this stage the Tribunal had written to you by letter of the 30th of August, 2004. We know that that letter was to request a further report with the expressed context that it would be ventilated in evidence?

A. Yes.

Q. We know then that you met the Tribunal

MR. COUGHLAN: Sorry, it is an inaccuracy that is creeping into the evidence the whole time. That letter of the 30th of August asked specifically of the feasibility of preparing a report. It didn't request a report, a straight answer. Just to have it accurate.

MR. FANNING: I have no difficulties with that, Chairman.

Q. So there was a meeting then on the 8th of November, 2004, and you obviously recall that meeting, and we will just ask for the minutes to go up of that meeting or the brief notes that we have of it. And there are quotes that are contained in the note that we have that included the phrase that Mr. Shipsey spent some time on with you very recently: "A choice interpretation or conspiracy"

A. Yes.

Q. And then there is a question: "How would we draw up judgement?" that is attributed to you. There is a quote: "Asking us to consider a direct criticism of the process" that is attributed to you. And then there is another quote. And I am just selecting here, rather than going

through it verbatim: "Asking us to criticise. 'Maybe'

could be the answer."

Now, what was the purpose of the meeting of the 8th of

November, 2004, Dr. Bacon?

A. Well, it was as John Mr. Coughlan just pointed out; we were

coming back to say what the feasibility of carrying out a

report, you know, along that would respond to the letter

of August of, was it that year.

Q. But what was this meeting necessary for?

A. To go through the material. I mean, I had indicated in a

telephone call that, look, it is not a straightforward

issue. I mean, the issue for me, and I have made the point

already, and I am not going to make it again, about

paragraph 9 of the letter of the Tribunal juxtaposing

whether the weights were made before the competition closed

or after, and the conflict that was there.

Q. Do you think, Dr. Bacon, that to the extent the note we

have is an accurate record of the meeting of the 8th of

November, 2004, this was an appropriate type of

conversation for you to be having before preparing an

independent report?

A. Absolutely, because what I had to determine was how was I

going to come to a judgement, what was the material? What

material was available? What material would be available?

What material were we to draw upon?

Q. Well, Dr. Bacon, it is a little bit more than that. If you

are using language like "Asking us to consider a direct

criticism of the process"

A. The question

Q. "How would we draw up judgement and a choice interpretation

or conspiracy." If this is typical of the language that

was being passed between people at the meeting, there was a

level of engagement between you and the people you were

meeting that is inconsistent with the notion, surely,

Dr. Bacon, that you were an independent expert?

A. Well, look, with respect, it is not. You know, I have to

come, I have to come to a judgement if I am in a position

to come to an independent judgement.

Q. Yes. And you have said at this Tribunal, Dr. Bacon, that

you are somebody who has been around the block round

enough

A. Absolutely.

Q. to know when somebody is trying to lead you by the

nose, and you are a person with a reputation for

independence?

A. Absolutely.

Q. And at these meetings, Dr. Bacon; the 31st of March, 2003,

and the 8th of November, 2004, did you sense that the

Tribunal's legal team were meeting you with an open mind,

trying to ascertain what your views were as an independent

expert? Was that your sense of their demeanor and

attitude?

A. It was, and what I was interrogating myself about was in

relation to paragraph 9 specifically of that letter, where

you had a juxtaposition of two conflicting I mean, there were two conflicting pieces of evidence: There was the evidence contained in the report, the weightings were done before the competition closed, and there was evidence, apparently that was adduced here in evidence, that no, they weren't. Now, in actual fact, you know, and this is a point I have made, it wasn't a question of going back to the first report and rehashing the first report to give that answer. We went back into the material that was provided to us, and the conclusion that we drew was that, well, you know, they had abandoned the quantitative approach, they were left without qualitative weightings. They didn't have qualitative weightings, and they didn't represent that they had qualitative weightings. They represented that they had quantitative weightings, and that is what they had.

Q. Dr. Bacon, I know you have been in the witness-box for a long day, but I didn't ask you a question to do with any of that.

A. Well, you did, by implication you did, because you have asked me, you know, how did I come to an independent what was I doing rehearsing these issues, and what I was doing rehearsing these issues was determining whether or not I had the wherewithal to come to an independent judgement on the question that was being asked, and the question that was being asked was being posed with reference to two pieces of conflicting evidence.

Q. What I am asking you, Dr. Bacon, is why you are attending meetings with the Tribunal's legal team, listening to views that members of the Tribunal's legal team are espousing and disclosing none of this on the face of either of your reports?

A. Well, you know, I am not I was exploring with the legal team the feasibility of delivering the kind of report that they were seeking.

Q. Dr. Bacon, why did you express views in private meetings with the Tribunal that you did not disclose, or even concealed on the face of your reports?

A. Look, I take exception to the word that I concealed, you know. I have not concealed any part of my involvement with this Tribunal or its work.

Q. I will repeat the question again. You concealed a view that you held. You held a view on the 31st of March, 2003, that Mr. Andersen had been manipulated. You concealed that view, in the technical sense of the term, from both of your reports. Why?

A. Because, because they were technical reports.

Q. You say that Mr. Andersen is manipulated in private session with the Tribunal, but you never bother or feel it appropriate to include this allegation in either of your reports?

A. That is not a technical matter, it is a judgement, and it is my judgement, and it is a judgement that I came to and a judgement that I continue to hold.

Q. I see. Let's just talk a little bit, Dr. Bacon, about your research methodology in the preparation of these reports.

It would appear, and Mr. Nesbitt has dealt with some of this issue this afternoon, that it was never a part of your brief in the first instance, nor was it anything that ever occurred to you, that it would have been of value to meet any of the civil servants involved in the GSM2 process?

A. No.

Q. Did it ever occur to you that your report might be in some way educated, fortified or improved by an opportunity to meet with any of the 11 civil servants that were intimately involved with the process for an extended period of time?

A. No, I thought it might be useful to be able to have a word with Andersen.

Q. I see. But, you see, to the extent that you were writing reports that second-guessed or criticised some aspects of the process, I have to suggest to you that it was unusual and it was inappropriate for you not to have sought the opportunity to meet with and discuss some of your concerns with the people who were explicitly or implicitly the subject of those criticisms?

A. That is your view, it is not mine, and I don't share it.

Q. I see.

A. I mean, I got a sense from Mr. Nesbitt's remarks about what the views of civil servants would be, and, you know, his remarks don't surprise me.

Q. Why don't they surprise you?

A. Well, I think as non-technical experts, they are the kind of questions and issues that they would be about; a desire to I wouldn't expect an Assistant Secretary in the Department of whatever the precise Department is, to know whether an optimal IRR was something that would give a metric on consumer value or awareness in the level of services.

Q. Yes.

A. I would expected him, however, to have that as a, as something he would be concerned about in conducting the evaluation.

Q. I see. I want to suggest to you, Dr. Bacon, that the method by which you prepared your reports was inappropriate as a method to be adopted by an independent witness coming to a Tribunal, a court or any other forum. I want to suggest to you that the meetings that you had with the Tribunal's legal team compromised your independence?

A. I would utterly reject, you know, the idea that, you know, that you are putting forward.

Q. And I want to suggest to you that the work you did for the Tribunal is tainted by the inappropriate methodology?

A. What is the inappropriate methodology?

Q. Of meeting the Tribunal's legal team and discussing the content of the reports before you prepared them?

A. You know, I disagree with you.

Q. I want to suggest to you that your work was done for the Tribunal on a partizan basis and not an independent basis?

A. Look, you can put all these propositions, you know, that you like. You know, I know what I did for the Tribunal and what my colleagues that contributed to me did, you know.

And I said at the outset, when I was questioned by Mr. McGonigal, that, you know, I am around long enough to know if I am led by the nose. And if you think that I can't form or that any technical expert couldn't form a judgement about that process on the quantum of information that was provided, you know, you are mistaken. There was very considerable briefing provided with respect to us being able to provide independent advice under the headings that we engaged ourselves to do so.

Q. Very good. Dr. Bacon, as I said at the outset, the Tribunal's investigation into the award of the second GSM licence is inevitably premised on the possibility of some malign interference on the part of Mr. Lowry with the GSM process, and we have seen today, looking at minutes of discussions you have had, words like "manipulated" in reference to Mr. Andersen. Can you clarify for the record of the Tribunal that you do not make any allegation against Mr. Lowry in that regard?

A. I have not made any allegation against Mr. Lowry.

Q. Good, bad or indifferent?

A. Good, bad or indifferent.

Q. And the quote, if it is correctly attributed to you, about Mr. Andersen having been manipulated, can have absolutely no application to Mr. Lowry, as far as you are concerned?

A. I don't know.

Q. You don't know?

A. Well, how you know...

Q. As far as you are concerned, can it

A. As far as I am concerned

Q. It can have no application?

A. No.

Q. I see. And the word "conspiracy" was also used, and I take

it that you make no allegation against Mr. Lowry in

relation to that either, and that you have no business

linking the word with Mr. Lowry, good, bad or indifferent?

A. That's correct.

Q. And, of course, when Mr. Lowry was examined by this

Tribunal, nothing of this kind was ever suggested to him.

And do you accept how it comes to be that I stand here

today asking you these questions, and that it is deeply

offensive to Mr. Lowry that these words are being used by

you in a process that only through his role is linked to

the Terms of Reference?

A. The words are not used in relation to Mr. Lowry.

MR. FANNING: Yes. Thank you, Dr. Bacon.

CHAIRMAN: Mr. Coughlan?

THE WITNESS WAS EXAMINED BY MR. COUGHLAN AS FOLLOWS:

Q. MR. COUGHLAN: Sorry, Dr. Bacon, just I am not going to

be asking you any questions other than just to clarify a

few matters. Firstly, the letter of the 30th of August?

A. Yes.

Q. That is at Tab 16.

A. 16?

Q. 16, yes. And I think the letter begins: "Further to your recent meeting with members of the Tribunal legal team, I am writing to request a report (or perhaps in the first instance your views on the feasibility of the type of report being requested) dealing with the matters set out below."

So that was the request that was being made to you, isn't that correct?

A. Yeah.

Q. Going to the second paragraph, I think the Tribunal pointed out to you that "A further report is now being requested in the context in which it will be ventilated in evidence.

While some of the material in the earlier report was extremely valuable as a learning experience and in particular in helping the Sole Member to understand and to appreciate the technicalities of evaluation, it would not be appropriate that all of it should be led in evidence."

And then there is specific reference to IRR, isn't that correct?

A. Yes.

Q. Which the Tribunal indicated to you that it was not pursuing in terms of its inquiries?

A. That's correct.

Q. Now, I think the letter continues there: "For example, at least subject to the way in which the evidence"

A. Sorry, where are you, Mr. Coughlan?

Q. It is the same paragraph at the bottom of page 1. "...in relation to the report, a portion of the report dealing with IRR does not appear to the Tribunal to be relevant in the context of potential intervention in the process."

A. Yes.

Q. "Though the views you have expressed suggest a significant frailty in a part of the process, that is a technical frailty, it does not appear, as things stand, to warrant a ventilation in public as evidence of intervention in the process. Of course it become relevant in considering whether the consultant took a sufficient independent line and might be viewed as part of a pattern of such behaviour, but there is a perception, at least at this state, that its prejudicial effect might be greater than its probative value."

A. Yes.

Q. That was an indication to you of the Tribunal exercising care in what was ventilated in public; anything that had a prejudicial effect which might outweigh any probative value, is that correct?

A. Yes.

Q. Now, I think the letter is a lengthy letter?

A. Mm-hmm.

Q. And it asks you in a question and answer series to address the withering away of the quantitative evaluation, isn't that correct?

A. That's correct.

Q. You were furnished with all the information and all the documentation about the evaluation methodology, isn't that correct?

A. That's correct.

Q. It also asked you to consider the question of the scoring, isn't that correct?

A. Yeah.

Q. Or the

A. Yeah.

Q. And it also asked you to consider questions in relation to financial matters?

A. Yeah, certain aspects.

Q. Certain aspects of them, very limited aspects?

A. Yeah.

Q. You said on Friday that it was made clear to you that you were not conducting a review of the evaluation, isn't that correct?

A. That's correct.

Q. And at all stages in this letter what you were being asked is to address discrete technical issues?

A. The same technical issues.

Q. The same technical issues?

A. With the exception of IRR.

Q. With the exception of IRR, for the reasons stated?

A. Yes.

Q. And at the back of that letter you were furnished with a

book of appendices, Volume 1, if you just see that?

A. Yes.

Q. And there is set out the further documentation which was sent to you with this letter

A. Yeah.

Q. Over and above that which you had received when you were when the draft was requested first requested, isn't that correct?

A. Yes.

Q. Now, there is some duplication in that. We can see the evaluation model and matters of that nature. But what is significant, Mr. Bacon, is you were sent portions of the transcript of the evidence of Mr. Martin Brennan and Mr. Fintan Towey, and you were informed in the letter that this represents the evidence of these two civil servants in relation to the withering away

A. Yeah.

Q. Of the quantitative evaluation, isn't that correct?

A. Yes.

Q. So you were furnished with that information or that evidence?

A. Yeah.

Q. And it is dealt with in your report?

A. Yeah.

Q. Now, your report is contained at Tab 30?

A. Yeah.

Q. And whilst it runs to some 28 pages, it deals with the

three issues which you have been asked to address: The
withering away of the quantitative evaluation

A. The scoring.

Q. the scoring, and certain financial matters, isn't that
correct?

A. Yes.

Q. And you deal with all of those in that report?

A. Yeah.

Q. Which you furnished to the Tribunal?

A. Yeah.

Q. Which was furnished to everybody represented here today,
and their views were sought in relation to it. And I think
you have seen the response of Mr. O'Brien in the first
instance, Mr. Desmond, and that was it, I think, isn't that
correct?

A. Yeah.

MR. COUGHLAN: Thank you very much for your attendance,
Dr. Bacon.

CHAIRMAN: Mr. Collins, is there anything you want to
raise?

MR. COLLINS: I don't think my client would thank me if I
launched into a series of questions.

CHAIRMAN: It only remains, Dr. Bacon, for me to thank you
for your assistance over the last number of days. On foot
of the matter which was mentioned by Mr. McGonigal, the
Tribunal will no doubt receive correspondence and will be
in touch as soon as anything material transpires. Thank

you.

THE TRIBUNAL CONCLUDED