THE TRIBUNAL RESUMED ON THE 13TH SEPTEMBER, 2005 AS FOLLOWS:

CHAIRMAN: Of the limited remaining matters relating to the Tribunal's public sittings, the most substantial is the balance of evidence that requires to be heard in relation to the GSM aspect of inquiries. Of the comparatively few remaining witnesses who require to be called, one of the most substantial is the witness Mr. Michael Andersen, who was the principal of the consultancy Danish firm retained in the course of the running of the competition as consultants. In the course of the considerable period leading up to very recent times, the Tribunal has been engaged in extensive dealings with a number of entities in a context of seeking to obtain the evidence of Mr. Andersen. There have been dealings both with the Irish Government, with Irish and Danish solicitors who, in fact, acquired Mr. Andersen's entity under a different name. There have also been dealings with the lineal successor of the Department of Communications, Marine and Natural Resources with a view to persuading Mr. Andersen to attend, and there have been considerable dealings with Danish solicitors retained by the Tribunal to advise on the feasibility of a proposal that Mr. Andersen's evidence should be taken by the Tribunal in the courts of Denmark. It appears that a lot of these energetic endeavours have fallen upon stony ground, and of a series of requests that were successively made by Mr. Andersen as preconditions to

his giving evidence, the one that was most recently prominent was his seeking the granting of an indemnity from the Irish Government. Considerable correspondence, meetings and dealings have taken place on the part of the Tribunal with the representatives of the Government, and by letter from the secretary of the Government early last May, it was intimated that the Government was not disposed to the granting of an indemnity to Mr. Andersen as sought. There remain ongoing efforts on the part of the Tribunal to try to procure the evidence of Mr. Andersen, who is unequivocally acknowledged to be a highly important witness; but at this juncture, it appears improbable that the Tribunal will be able to bring Mr. Andersen here to testify.

It is in the context of this that the Tribunal, following correspondence with interested persons by letter of the 3rd August last, requested that such interested persons, through their legal advisers, make written submissions to the Tribunal addressed to the issue of the consequences that might follow upon the nonavailability of Mr. Andersen as a witness. It was requested in that letter that today would be listed for dealing with those submissions, but that in the first instance, it was sought that the interested persons would furnish submissions to the Tribunal by Wednesday last, the 7th September, whereupon these written submissions would be exchanged between the parties, and any further matters requiring to be addressed

dealt with orally today.

Submissions have been received. In the first instance, on the 1st September, a submission was received from Messrs Kilroy's, the solicitors retained by Telenor, part of the winning Esat consortium. Whilst I shall not attempt to do justice to the submissions by the other than the most truncated summary, it is probably fair to say that the essence of that Telenor submission was to the effect that Mr. Andersen was so crucial and importance a witness, transcending even such witness as Mr. Brennan in importance, that it was imperative that the Tribunal hear and have available to him that evidence in order to reach just conclusions and report adequately on the entire aspects comprised in the GSM module.

In addition, in the course of that Telenor submission, the solicitors made some constructive submissions or proposals as to further efforts that the Tribunal should take to seek to procure the attendance of Mr. Andersen, and the Tribunal has certainly had due regard to those.

Following the receipt of that submission, a submission was received from the solicitors to Mr. Michael Lowry, and whilst that submission was not as lengthy as the submission that was received yesterday from Messrs Fry's as solicitors to Mr. Denis O'Brien, it is, again, on very truncated summary, probably fair to say that not only did both those individuals join in urging that Mr. Andersen was an absolutely essential witness to the ongoing or proper

conclusion of the hearing of the GSM aspect of evidence, but they further urged that in the context of such matters as what was argued to be the absence of any matters justifying findings critical of the outcome of the process and the duration of time that matters have proceeded, that in the aggregate, a stage has now been reached in which the Tribunal should simply abandon the further hearing of the GSM module.

A further submission was received in the latter part of last week from Mr. Michael MacGrath and Mr. David Kennedy, who have been retained by the Attorney General as counsel for the public interest, and in their written submission, it was urged that whilst Mr. Andersen was undoubtedly an important witness, that having regard to the jurisprudence of the courts and the Terms of Reference, that notwithstanding his importance as a witness, the Tribunal ought not to desist from concluding the evidence relating to the GSM and making appropriate findings and recommendations by way of report.

The final submission was one that was received yesterday from the Department that has now inherited the portfolios formerly colloquially described as DTEC at the time of the licence competition, and this was to the effect of somewhat reserving its position as regards further oral or written submissions, but emphasising the efforts that it had made, as the Department that had been retained Mr. Andersen in the first instance, to persuade him to attend to testify.

Having received those submissions, the Tribunal has, to the maximum extent of its ability within the time possible, sought to see that the individuals who made the submissions had due sight of those made by other persons, and the primary basis upon which I have convened today's hearing is to hear from the barristers representing the individuals involved as to what repercussions each of them may feel should follow upon consideration of the other submissions that have been received.

What I anticipate doing, because time is undoubtedly of the essence, is that when I have heard such matters as are submitted today, I will seek to provide a ruling on the matter at the very earliest possible opportunity, and by that I mean before the end of next week at the latest; and in the course of posting that ruling on the Tribunal web site, I would propose, so that all interested persons have sight of them, to append the full text of submissions that have been made in written form already.

So on that basis, I would propose, roughly, in the sequence in which the written submissions were received, to invite such further assistance as counsel feel they may be able to afford in this matter.

On that basis, Mr. Fitzsimons, perhaps as you were first into the ring, so to speak, I'd better just hear from Mr. Hogan first.

MR. HOGAN: Sorry, Mr. Chairman, I apologise for intervening at this stage.

As you are aware, I appear for Mr. Dermot Desmond, and we have a submission to make in respect of the matters at hearing today, but it is, I regret to have to say, one which entirely reserves our position because of the failure to disclose certain documentation to our client in a timely fashion, perhaps at all. Now, I am in your hands, sir, as to when you would like to hear me, but I really would like to be heard on this matter.

CHAIRMAN: Well, I certainly won't be shutting you out today, Mr. Hogan. I am aware of some correspondence, I think, within the last 24 hours, which obviously have been considered by the Tribunal lawyers, and perhaps at a later stage in the course of today's hearing, I will take the opportunity of hearing from you further.

MR. HOGAN: If it pleases you.

CHAIRMAN: And perhaps just for purposes of record, Mr. MacGrath, I should note, it is the case that yourself and Mr. Kennedy have been briefed by the Attorney General to represent the public interest.

MR. MacGRATH: Yes, Chairman. Thank you.

CHAIRMAN: Mr. Fitzsimons.

MR. FITZSIMONS: Thank you, Mr. Chairman.

As you have already indicated, Mr. Chairman, written submissions have been made on behalf of Telenor to you, and were submitted by us within the time limit that was specified.

Just by way of, really, not terribly important comment,

those submissions may appear to be a little stylistically rough in parts. We were very anxious to meet the deadline imposed by the Tribunal, and if we had more time we might have been able to produce a somewhat more streamlined version. But having said that, we have made our submissions, and all of them of course stand.

Our submissions, of course, are made in relation to the factual situation, and we have made extensive legal submissions as to the implications of proceeding in the circumstances that the Tribunal have indicated exist.

To assist us in preparing our submissions, the Tribunal did make available to us quite a body of documentation, and I must say for that, we were very grateful, because it did throw a lot of light on the overall situation vis-a-vis Mr. Andersen and has been of assistance to us in understanding precisely what has happened.

Having said that, there are some items in that body of documentation that do, in our view, open the door to perhaps the taking of further steps. One, again, possibly not terribly relevant aspect of the documents can also be mentioned.

I want to go straightaway just to refer to a single document. And it's probably the only one I will refer to; we have referred to it in our written submissions. It's a letter from the Tribunal to Ms. Carol Plunkett of Landwell Solicitors, who I think was acting for Andersen Management International. It's dated the 26th March, 2003. Just to

put that in context, Chairman.

This module, at least the investigation into the licence module, commenced back in January sorry, in December, 2002, Mr. Coughlan on the 3rd December commenced nine days sorry, twelve days of opening the Tribunal the summary of the Tribunal's investigations at that time.

Mr. Brennan then gave evidence for a lengthy period, into January and February of 2003. And this letter is dated Mr. Loughrey then gave evidence in February 2003, as did Mr. Fitzgerald. And those were the only witnesses who were heard at that point in time. Of course Mr. Brennan was recalled on a number of occasions subsequently.

This letter is dated the 26th March, 2003, and if I could just read it out. It's a short letter.

"Dear Mrs. Plunkett. I refer to recent correspondence. I am writing once again to seek your client's assistance in this matter" that's Mr. Andersen, of course.

"The Tribunal has had an opportunity of further examining the AMI report relied on in the course of GSM 2 licensing process in Ireland.

"From the Tribunal's current reading of the report, it would appear that much of the analysis is unsatisfactory. Moreover, the Tribunal has obtained some expert assistance for the purpose of scrutinising the report, and this has confirmed the Tribunal's tentative view that the report appears to be flawed in a number of ways, and indeed may contain a number of seriously fundamental flaws.

"The Tribunal is anxious that your client AMI/Merkantil Data should be afforded a full opportunity of responding to any queries concerning the report, and in particular, in circumstances in which conclusions may be reached which may reflect poorly on the authors of the report.

"I would be obliged, therefore, if you could ascertain whether your clients are prepared to reconsider their decision not to assist the Tribunal."

Now, the two aspects of this letter that I wish to briefly focus upon is the reference in it to the fact that the Tribunal had, at that point in time, in March 2003, the disclosure, that it had obtained some expert assistance for the purpose of scrutinising the report, and also the reference to the fact that the Tribunal had, at that time, a tentative view, had formed a tentative view that the report was flawed in a number of ways and could contain a number of seriously fundamental flaws. And this view of course was formed at a point if time when most of the witnesses had not been examined, evidence had not been taken.

Now, the other documents furnished by the Tribunal have disclosed to us that at that point in time, indeed in that month, presumably some days before this letter was written, that the Tribunal had received a report from a Mr. Bacon, who was an economist, and the Tribunal clearly was in correspondence with Mr. Bacon in January, 2003, and there may have been drafts, we don't know about that, of

Mr. Bacon's report furnished in the interim period, even when Mr. Brennan was giving evidence. We don't know about that, but that can be explored with Mr. Bacon when he gives evidence.

Now, we were to say, Chairman, my clients, Telenor, of course, were not compellable witnesses; they came to Ireland seeing it as part of their civic duty as participants in this process to assist the Tribunal in its investigations. They did think that the matter would be over in a few months. That hasn't happened, and that's just the state of affairs that exists, and that has to be accepted. But Telenor did so, of course, on the basis that there would be total disclosure and that its witnesses, when they came to give evidence, would be informed of any relevant factors that could be relevant to the evidence that they might have to give.

Now, ironically, in that context, this further investigation is of assistance because when the Telenor witnesses came to give evidence in relation to this process, they were, to their astonishment and indeed to our astonishment, bearing in mind that this is a public inquiry, subjected to and I am choosing my words carefully extremely vigorous cross-examination. My clients, then and since, have never been able to understand why such an approach was taken to them. We now understand. The Tribunal was cross-examining them on the basis of an expert's, an alleged expert's report that was apparently

extremely critical of the process and that had influenced the Tribunal into taking a view in relation to the process before my clients witnesses were examined at all.

So at least the disclosure of these documents allows us to give an explanation to our clients as to why they were treated in this way when they came willingly, not under compulsion, to assist this Tribunal in relation to the matters at issue.

But of course there is the other side to that failure to disclose the existence of this report. Chairman, we do not know the circumstances under which this report was obtained. There is a proposal document with the papers of January 2003. We do know that Mr. Bacon is an economist. We are not aware this is of course something that can be teased out in the cross-examination of him that he or his colleagues have any expertise in relation to the process such as the one at issue. We do not know who they spoke to in connection with the preparation of the report. We do not know what documents were given to them by the Tribunal to assist them to prepare their report. We do not know if there were submissions from disappointed underbidders made to the Tribunal, in documentary or other form, that were copies of which were provided to them. We do not know if they interviewed the personnel or representatives of disappointed underbidders when preparing the report. We do not know what they did.

We do not know, but there is no indication from the

reports, whether or not they interviewed Mr. Andersen. And in that context, I pose the question: How could they possibly prepare an expert's report or be informed that they could prepare an expert's report without interviewing Mr. Andersen?

Now, of course, the Tribunal has had undoubted difficulties, and this is clearly revealed in the correspondence in getting Mr. Andersen here, and that's why we are here today; but presumably Mr. Bacon would have not have had the slightest problem of getting on a plane and flying to Denmark and speaking with Mr. Andersen and going through the entire process with him. The documentation we have been given reveals that at that point in time the Tribunal was making payment to Mr. Andersen in respect of expenses, indeed fairly substantial payments at that time, and presumably there would have been no difficulty about the Tribunal equally paying any additional expenses for the few days or day or two or three that Mr. Bacon might have required to speak to Mr. Andersen in Denmark.

So we don't have an explanation for that. It may be that he was told not to speak to Mr. Andersen, but if he didn't speak to him, and all of that, as I say, can be explored when he is in the witness box.

We do know, of course, that Mr. Bacon is an economist, and I am sure is indeed an expert economist, but equally we know that Mr. Andersen, and this is established beyond doubt, is an expert in the field of the process that is at

issue, and indeed I think there is evidence in the documents to the effect that he has overseen 124 of these processes throughout the world, and he has I think there is evidence also, so far as it's admissible, to the effect that he has acted for the Irish State in relation to other quasi-similar processes, and there is no suggestion, as far as we know, that he has not carried out his duties perfectly fairly and adequately and properly and expertly in relation to those processes, and no evidence of any disappointed underbidders making any complaints against him.

So, sir, it's in that context that Telenor finds itself disappointed that these matters surprised and disappointed were not put in the public arena before now; that in particular, these reports were not made available to the report of Mr. Bacon was not made available to the parties, to the State, which of course has an absolutely fundamental interest in it, having regard to the huge claim that is made against them in proceedings in existence.

You will recall that Mr. Andersen's statement was read out back in January, 2003, at a point in time that on the 28th January, 2003, to be precise, his report, that is in Book 39 and why wasn't Mr. Bacon's report put on the record at that time so that it could be taken into account and addressed by all of the witnesses who gave evidence subsequently? Instead no doubt we will have an

explanation for that in due course, but I am just making these points at this stage because in our submission, in terms of fairness, really, the entirety of the process that has taken place since that time carries with it a fundamental defect in terms of fair procedures.

I have referred to the vigorous cross-examination of witnesses, our witnesses, and indeed State witnesses, Mr. Brennan and Mr. Towey, etc., and that was presumably influenced to a very considerable degree by the contents of the Bacon reports. Now, they had no opportunity to know of course just for the purpose of inquiry the case that was being made against them, or the basis for it. Had they known it, had they had that report, they may have been able to defend themselves. But however, I don't want to get into those details, because Mr. Andersen is the person at issue today.

We have it's been made available we have now had the opportunity of reading through Mr. Bacon's report and supplementary report of 2005, and on our analysis, 90 percent of the matters addressed by Mr. Bacon are matters that would have to be addressed by Mr. Andersen if the Tribunal is going to be able to deal with it. And we have a problem here because and we don't know where we stand, or indeed where any party stands, because it appears as of March, 2003, on the basis of Mr. Bacon's report, the Tribunal had formed a view before the evidence of witnesses of heard, and without Mr. Andersen being involved, he being

the person who was in charge of the process, and we have dealt with that in detail in our written submissions; he was the expert. Mr. Bacon was simply an economist doing his best from his particular expertise viewpoint. And if Mr. Bacon's report is to be addressed, it must be addressed by Mr. Andersen. And of course it hasn't been addressed by any other witness because they never knew about it, were never informed of it, and indeed, strictly speaking, they should all be recalled and should have an opportunity to deal with the entirety of what Mr. Andersen says insofar as it's relevant to anything they were asked.

So, sir, for this reason alone, we submit that Mr. Andersen is an essential witness to the process. And if he is not going to be here and if you are going to proceed, that, as a result, no adverse findings in relation to the process can fairly be made. We proceed, of course, on the basis of the fundamental assumption that you have, since March 2003, removed from your mind the view that you had formed then, because we have to assume that, having regard to your position, and that the Bacon report will not be used as, if you like, the Moriarty Tribunal Bacon Report, because the Oireachtas did not request Mr. Bacon to conduct an inquiry. You were requested to conduct the inquiry, and the Oireachtas hardly expected another party to be employed to conduct the inquiry and then not disclose it until this late stage because this issue has arisen

Now, sir, we still say, and we have said in our

submissions, that Mr. Andersen is an essential witness if constitutional requirements of fair procedures are to be followed. But even leaving aside the Constitution, as a matter of common sense, if you, sir, have to conduct an inquiry into the process, how can you form any conclusion without hearing from the expert who was in charge of the process? The Constitution isn't really relevant here. The Oireachtas requested you to carry out a straightforward inquiry as to the facts. And this is the vital, the principal, the key witness as to the facts. Without him, how can there be any credible finding of fact in relation to this process? In our submission, there can't be such a finding.

Now, is it too late? I appreciate that the Tribunal has taken the view, and of course it knows a lot more about the situation vis-a-vis Mr. Andersen than we do, and we respect the Tribunal's position fully in that regard, and we make submissions on the basis of the knowledge we have been able to glean from the documents that have been provided. Now, we have been furnished some additional documents this week, and these include two copies of letters from the Danish lawyer, Mr. Engell, correspondence of May/June, 2004. Now, our reading of those letters, and indeed the previous exchanges with Mr. Engell, is that Mr. Engell is very hopeful that Mr. Andersen could be successfully examined before a Danish court, albeit by a Danish lawyer appointed by the Court, but with a Tribunal counsel with

him, and that the Danish lawyer would be perfectly happy, and the Court would be happy to permit any question that the Tribunal would wish to pose to be put to Mr. Andersen. We read that correspondence. The Tribunal of course has perhaps a wider perspective has been very optimistic in that regard. We had thought that the earlier correspondence left fully open the door in that regard, and we consider that on the basis of it, or we submit that on the basis of it, that Mr. Andersen is still available to the Tribunal via the Danish courts. If the Tribunal wishes to take that route, and of course you, sir, could travel to Denmark to attend and listen and take notes and observe Mr. Andersen's demeanour, etc., etc. Their correspondence reveals that that process could be initiated or could have been initiated some years ago within three to six months. There is a suggestion that Mr. Andersen might seek to avoid answering some questions and might seek to delay the process, and that could have taken two to three years if we went through the different courts. It's obviously a factor that comes into play, and I respect, of course, that situation. But the Tribunal won't know unless it tries, unless it goes to Denmark, makes the application and then see what happens. It's inconceivable, in our submission, that the Danish courts would not be totally supportive of the Irish courts and a Tribunal such as this. Denmark is a member of the European Union, and this Tribunal is investigating corruption, and it is the policy of the Union

to seek to stamp out corruption in all Member States. And in our submission, it's inconceivable that there would not be total cooperation from the Danish authorities and the Danish courts in relation to Mr. Andersen.

So, Mr. Chairman, in that context, we say we submit that Mr. Andersen is available to the Tribunal, and that his evidence should be taken in the Danish courts.

Now, we are we have made a number of other proposals in our written submission in relation to insurance, etc. This relates to Mr. Andersen's request for an indemnity. I think if you can permit me to simply rely on our written submissions in that respect, Mr. Chairman; I don't want to waste your time. But they are serious options, and in our submission, they should be explored further. The Tribunal did open correspondence with Mr. Andersen's lawyer on the insurance issue. There is one letter raising a question, but there appears to be silence after that; the matter was not pursued at all, certainly with Mr. Andersen. So that might assist on that front.

And of course I should have said, before referring to insurance, that that issue arises because Mr. Andersen indicated that he, before coming over here, he would wish to have an indemnity to give evidence. Now, Mr. Andersen is being advised by Danish lawyers. He is coming to a different country to give evidence where the process that he is supervised is under examination, and he would be coming to Ireland in the knowledge that the Tribunal had,

in March, 2003, taken a view in relation to his process; the Tribunal had taken a view that the process, on the basis of expert assistance and its own efforts, was flawed in a number of ways and may contain a number of seriously fundamental flaws. In this letter, Mr. Andersen was informed that the Tribunal had expert assistance. He wasn't informed that this was simply expert assistance from an economist. So far as he was concerned, it could have been expert assistance from leading world experts in processes such as that at issue.

Now, we don't know, but in my respectful submission, Mr. Andersen was being advised by lawyers who, in considering the content of this letter, would undoubtedly, lest they be seeking indemnities in another form at some other stage, would undoubtedly advise him to seek an indemnity because there were experts and there is a Tribunal saying that his process, the one that he was in charge of, contained seriously fundamental flaws.

Now, if that inference, analysis is correct, there is nothing unreasonable in his seeking an indemnity, even though at first sight, if there was no explanation, it might sound irritating an objectionable. Now, it's not clear to us that the Government was informed of this possibility that Mr. Andersen had been led to believe that his report was seriously flawed, his process, and this may have provoked his request for an indemnity. If the government was so informed, it may well have taken a

completely different view in relation to the granting of an indemnity. It's not clear to us from the correspondence with the Government that the Government was put in the picture in this respect; that it may have been the Tribunal's actions that provoked this request for an indemnity.

But be that as it may, this Tribunal was deputed by the Oireachtas to carry out an investigation into the process. Mr. Andersen is clearly, in our submission, and by inference the Tribunal, from documentation and comments, appears to accept that. The Government, in our respectful submission, should have taken the view that the indemnity should have been granted. Now, we fully appreciate the reasons that have been given by the Government are cogent reasons, but from my clients' perspective, my clients have come to Ireland, without compulsion, to assist the Oireachtas, the Irish State, in this inquiry, and my clients are entitled to expect this State and this Government to ensure that their efforts have been fully respected and their cooperation has been fully respected in a manner that would ensure that this inquiry could manifestly and transparently be shown to be fully conducted in a totally fair and comprehensive manner. Without Mr. Andersen, that simply that objective cannot be achieved, and my clients are left in a situation where, having cooperated since this process started, are left feeling and looking rather foolish, to put it mildly, if

Mr. Andersen's evidence is not taken.

Now, in the circumstances, we would therefore urge the Tribunal to again approach the Government and to point out to the Government that it may have led Mr. Andersen to believe that his process was seriously flawed. It did not inform him that the only report was a report from an economist, and that this may have provoked his request, on the basis of legal advice, for an indemnity, and that the Tribunal might have created this situation, and that the Government should, again, revisit the issue and take the decision in the light of this new information to provide the indemnity that Mr. Andersen requests.

So, Chairman, our basic position on this topic is that Mr. Andersen is available. He can be brought here. He should be brought here. And without his being brought here, in our respectful submission, the inquiry into the process is one that basically cannot be carried out or completed in a credible manner as requested by the Oireachtas.

We have made our legal submissions in the fair procedures context and I am not going to go over them.

And I should say in that context, sir, we are not for one moment saying that the Tribunal has not made efforts, extensive efforts and there is not extensive correspondence between Mr. Andersen and his lawyers on this issue. There is. But we simply express the view that matters further steps could be taken to achieve the desired objective. And

we appreciate that the Tribunal has an extremely difficult task, and it's not just examining this issue; it's examining other issues as well and that it has a great deal of work to do.

If, Chairman, notwithstanding our submissions, you ultimately take the view that you should proceed, at least to finish the module after all, you have pointed out there is just a few bits and pieces left to deal with then of course the question would arise as to how you deal with the evidence, and of course you have the assistance in that context of the submission made by My Friend's counsel for the public interest. And as I read their submission, what they say, effectively, is that you should proceed and basically do the best you can, having regard to applicable principles of fair procedure, etc.

And of course in that context, and this ties in with our submissions, if you decide to simply finish off the module for the sake of completion, the question arises of what do you do then in considering what view you should take? What decision-making process do you enter into in relation to the facts, having regard to all applicable principles of common sense and constitutional law? In that connection, it is, and we have so submitted, that the absence of Mr. Andersen means that it really is not open to you to make any adverse findings in relation to the process; that the inquiry process suffers an irreversible fundamental flaw that makes it impossible for you, applying principles

of justice and fairness, to make a decision one way or another in relation to the process. That may be highly unsatisfactory from your point of view and from the point of view of the Oireachtas, if you were to report to such effect, but these situations do arise. And of course you will no doubt seek to apply all applicable principles of fair procedures.

But the Government decision of course comes back into play in that context. That situation could be obviated by a revisiting by the Government of their decision not to provide an indemnity and reversal of that decision. In those circumstances, Mr. Andersen could be here and his evidence could be taken, tested, and it would enable full and proper testing of the evidence of all of the other relevant witnesses.

Those are my submissions.

CHAIRMAN: Thank you, Mr. Fitzsimons.

Mr. Hanlon?

Very good. Mr. Fanning.

MR. FANNING: May it please you, sir. I may begin by saying that having listened carefully to your opening remarks, I am not entirely clear upon the basis which I should be proceeding this morning, on which the Tribunal expects me to proceed, and the other counsel, to the extent that I am being asked to respond in the course of this oral submission to the written submissions of the other parties, I'd have to suggest that that's a totally impossible task,

as I have only personally received those written submissions this morning. I understand that they were delivered around the time of close of business yesterday, and it's simply not been open to me in the time allotted to come to grips with the Telenor submission or the submission of Mr. O'Brien.

As will be seen, sir, from my written submissions, I don't confine my submission this morning to the issue of Mr. Andersen's unavailability. My client, Mr. Lowry, has a broader set of concerns, and it seems to me that this morning is the most appropriate opportunity available to me to address those to the Tribunal solely relating

CHAIRMAN: Well, Mr. Fanning, I think what I had indicated is that there is no question of interested persons being deprived of the submissions, but for factors of time and expedience, what I had proposed is I will hear any additional matters over and beyond the written submission this morning, and when I come to publish promptly a ruling on the matter, I will append the full text of your written submissions, so nobody is going to be deprived of that. But I am anxious, for purposes of getting on with the matter, that there simply not be a practice of going seriatim through the written submission. This is a practice that isn't adopted in the High and Supreme Court any longer, and in the context of the complaint that you make to which matters have gone on here, I don't propose to adopt it here.

MR. FANNING: Begging your pardon, sir, but if I understand you correctly, you are perhaps suggesting that I am not in a position to deliver the oral submission in the manner that I intend to.

CHAIRMAN: I have indicated, Mr. Fanning, I have received a careful submission from you that will be taken fully into account, that will be posted on the Tribunal web site along with any ruling. I have indicated, as I did to Mr. Fitzsimons, who didn't seem to find it a particular problem to deal with, that the primary purpose of inviting the assistance of counsel this morning is to hear such further matters over and beyond the submission as may occur to counsel or may arise from sight of the other documents compiled by other practitioners.

MR. FANNING: Firstly, sir, I will be continuing. Secondly, sir, I will be continuing on the basis of that ruling under protest, and I do so on the following basis, sir: Considerations of time and expedience cannot be paramount here, in circumstances where the Tribunal hasn't sat in respect of the GSM module for a period of time of almost 18 months, and considerations of perhaps the elapsing of extra 30 minutes or 60 minutes should not deprive me of the opportunities of reading anything I want into the record.

And secondly, sir, it is absolutely inconsistent with the manner in which this Tribunal has heretofore proceeded with its public hearings that people wouldn't be allowed to read

out prepared statements. Mr. Coughlan read out an Opening Statement at the commencement of the GSM module for seven full sitting days, spanning in excess of 28 hours. If considerations of time and convenience were at the utmost, at that stage, Mr. Coughlan's opening submission could simply have been appended to the Tribunal web site, and we could have skipped those seven days of public hearings.

With that in mind, sir, I turn now to the oral submissions that I do seek to make. And I seek to submit this morning, on behalf of Mr. Lowry, that his constitutional rights have been irretrievably breached by the Tribunal in the manner in which it has conducted the GSM module to date. I submit, sir, that the Tribunal has uncovered no relevant evidence, after 131 days of hearings on this module on the awarding of the GSM licence, that could cause it to report in a manner that is relevant to or materially implicates its Terms of Reference.

I submit, sir, and in this respect I am echoing the comments of Mr. Fitzsimons, that as a matter of practicality, and as he put it, common sense, the Tribunal is unable to satisfactorily complete the present GSM module and make any relevant findings of fact in the absence of Mr. Andersen.

I will further submit, sir, that as regards the constitutional requirement for fair procedures, the absence of Mr. Andersen at this point, if he is indeed to be absent, will fatally compromise what I will describe as the

in re Haughey rights of Mr. Lowry, given the manner in which Mr. Andersen has been relied upon by the Tribunal at different stages of the GSM process, notwithstanding that he is now seemingly unavailable to give evidence.

And finally, sir, I will make a submission, and I believe it's an important submission at this juncture in the Tribunal's proceedings, and it is a submission to the effect that there are clear inferences now to be drawn from the correspondence from the Secretary General of the Government which has been opened to all of the parties, and further from transcripts of recent Dail debates, which I do not propose to open in the manner that I have excerpted them in my written submission; but I will say that there are clear inferences, from both the correspondence from the Government and from recent Dail debates, that this Tribunal is losing the support of both the Government and the Oireachtas for its work, and I'll be suggesting that that is a powerful consideration in favour of the submission made on behalf of Mr. Lowry that it should, forthwith, cease its inquiry into the GSM module process.

As you know, sir, my written submission opens by quoting the Terms of Reference of the Tribunal at some length, and I obviously don't propose to read those out to the Tribunal. The Terms of Reference of the Tribunal were approved by Dail Eireann as far back as the 11th September 1997, and one week later, on the 18th day of September 1997, by the Seanad, an instrument effecting the Tribunal

was established at the end of that month, almost exactly eight years ago from where we stand today.

The Tribunal sat for the first time on the 31st October, 1997. It was not until the 30th July, 2002, Day 155 of the public hearings of this Tribunal, that you, sir, as Sole Member, announced that there would be full public hearings into the awarding of the GSM licence to Esat Digifone, and you, sir, on that date described this aspect of the Tribunal's work as being a Tribunal within a Tribunal.

Public hearings commenced, sir, on the 3rd December, 2002, in respect of this module. Mr. Coughlan, as I have already said, offered an Opening Statement that spanned almost two weeks, or seven full days of public hearings; and to date, I think 131 full days of transcripts are devoted almost exclusively to the GSM issue. Yet, Friday, 2nd April, 2004, almost 18 months ago, was the last day of evidence that was devoted to the GSM issue.

Mr. Lowry's position at earlier stages, sir, has been that if not quite welcoming the Tribunal's determination to proceed to a full investigation of the GSM process, he at least saw it, and to a certain extent still sees it, as an opportunity to dispel what he regards as the very unfair clouds of suspicion that have been circulated in the connection of this matter.

Sir, the 18-month delay between the last GSM hearings at the commencement of April 2004 and where we are now, to the best of my knowledge, has never been explained by the

Tribunal in correspondence with my solicitor by any reason other than the unavailability of Mr. Andersen to give evidence. And I'll be suggesting that a hiatus of 18 months that has occurred is in itself indicative of the centrality that the Tribunal itself affords to Mr. Andersen's evidence that is now not going to be available.

Mr. Lowry, who I act for, does not doubt for a moment, sir, the sincerity of the Tribunal's efforts to ensure the presence of Mr. Andersen to give evidence, and I say that without any reservation whatsoever. But from the perspective of Mr. Lowry, sir, the long delay, the 18-month delay that has been superimposed now on previous earlier delays in this matter being investigated by the public hearings is highly unsatisfactory for a number of reasons. And the first point I make, sir, is that the case for the Tribunal, such as it was, was opened in a proper manner by Mr. Coughlan in his Opening Statement in December, 2002. It is now almost three years later, and Mr. Lowry has not been called upon to give rebutting evidence. And I don't criticise the fact that he has been left till the end. It was agreed in informal discussions with the Tribunal that he should logically be the last witness in this module, and I don't criticise that at all. But it is cumulatively, from his point of view, an unacceptable situation that highly damaging inferences about him are sent into the public domain, from the time of Mr. Coughlan's Opening

Statement in December, 2002, and here we stand almost three years later when cumulatively, the procedures adopted by the Tribunal have deprived him of the opportunity to give evidence to rebut those matters.

And it's submitted that as a consequence, the procedures of the Tribunal have, perhaps unwittingly and unintentionally, amounted to interfere with Mr. Lowry's constitutional right to a good name.

Secondly, sir, I submit that Mr. Lowry's right to cross-examine other witnesses has been rendered virtually obsolete by the manner in which this Tribunal has conducted its affairs. And you will see from my written submissions, sir, that I have offered two examples. Mr. Fitzsimons concluded his cross-examination of Mr. Denis O'Brien on the last day this Tribunal sat in December 2003. It's now September 2005, and Mr. Lowry hasn't had the chance to cross-examine Mr. O'Brien and put some important propositions to him, because Mr. O'Brien, in the intervening year and nine months, has never been re-called by the Tribunal to give evidence. Similarly, there is been a delay in respect of Mr. Boyle, another significant witness, who left the Tribunal last April, 2004, and has yet to return. And whatever the true meaning of Mr. Lowry's constitutional right to cross-examine other witnesses, I have suggested quite firmly, sir, in my written submission, that when the Supreme Court most recently reviewed this issue in the decision of O'Callaghan

v. Mahon and Others where they articulated a very full meaning of the right to cross-examination, they couldn't have been foreseeing a situation where a party to a Tribunal, whose reputational interests were very much at stake by its deliberations, would have his right to cross-examine witnesses postponed for periods in excess of a year as their evidence was left hanging, seemingly, indefinitely.

And, sir, you will see from my written submissions that I have quoted three of the judgements from the Supreme Court in the leading decision of Maguire v. Ardagh dealing with the proposed procedures of the Oireachtas Committee established to investigate the Abbeylara siege, and there are quotes from Chief Justice Keane, Mrs. Justice McGuinness and Mr. Justice Hardiman, which are contained in my written submission, which I say demonstrate that the Supreme Court surely has a very different view of the right to cross-examine, and places a premium on the right to cross-examine being an immediate right, immediately available to a party after the conclusion of a party's direct evidence, and not postponed for an inordinate period, in excess of a year, as has occurred in this case.

It is submitted, sir, that cumulatively the procedures adopted by the Tribunal which have permitted this state of affairs to occur have self-evidently constituted a breach of Mr. Lowry's right to cross-examine, and it's not understood how the Tribunal proposes at this late stage to

remedy this infringement of Mr. Lowry's constitutional rights.

I also, sir, have what I say is an understandable concern about Mr. Lowry's ability in a practical sense to offer meaningful and reliable evidence at a remove of now a decade after the critical watershed of October 1995, when Mr. Loughrey announced to Mr. Lowry that the competition process had concluded. That level of delay mitigates against the ability of anybody to give effective evidence.

Moreover, sir, I have a difficulty with the fact that my client, alone amongst the parties here, is a current elected public representative. He has been a TD for North Tipperary consecutively since 1987, and since the establishment of this Tribunal in 1997, he has had to offer himself for re-election to the people of that constituency. And it's a source of some considerable dismay, sir, that the Tribunal continues to sit in judgement over him for such an extended period of time when he continually has to face an electorate.

I also make a submission, sir, that in light of Mr. Lowry's relatively limited resources compared to the other parties here, all of whose resources, in the case of Telenor, Mr. Desmond, Mr. O'Brien and the various State interests involve, extend into the millions and hundreds of millions of euro. Mr. Lowry is a private individual with resources nothing like that of the other parties here, and he is materially disadvantaged, sir, by the ongoing delay in the

conclusion of this module. The Tribunal's legal team, it has been reported in the Dail, have been paid 15 million euro for their work on this Tribunal alone. Those are figures that Mr. Lowry can scarcely comprehend, and certainly can't discharge to his lawyers. And I have a concern, sir, that a Tribunal which has now, in cumulative terms, extended over a period of eight years, materially disadvantages him in such a way that he has been deprived of an effective right of legal representation.

Before turning, sir, to the specifics of the nonattendance of Mr. Andersen, it is submitted on behalf of Mr. Lowry and I think you, sir, fairly paraphrased what I'm going to say in your opening, and I gather it's also echoed in the submissions delivered on behalf of Mr. O'Brien that the overwhelming weight of the evidence thus far has been to the effect that Mr. Lowry not only did not but could not have interfered with the outcome of the process.

And I have relied, sir, and I won't read them out at this stage, on quotes from the evidence of Mr. Martin Brennan and Mr. John Loughrey, two individual Departmental witnesses, the Chairman of the Project Group and the then Secretary General of the Department respectively. And in my respectful submission, the evidence of Mr. Loughrey and Mr. Brennan is such that it is unambiguous that no interference could have occurred on the part of the minister, even if he were so minded, in the awarding of the GSM licence. And in stark terms, sir, I do submit that for

the Tribunal to make any finding on the GSM module that would adversely implicate its Terms of Reference, not only would the Tribunal have to disregard the evidence of Mr. Loughrey and Mr. Brennan, in all reality, calling a spade a spade, the Tribunal would have to characterise their evidence as in some way either unreliable or inaccurate. And it's submitted, sir that there is no basis, apparent to any of the parties here, surely, upon which the Tribunal could make such a dramatic finding. Accordingly, sir, it's submitted that the evidence already heard by the Tribunal in relation to the GSM process is of such a weight and consistency that it is unthinkable, after 131 days, that the Tribunal could in fact reach a positive finding in terms of subparagraph (g) of its Terms of Reference, which is the subparagraph that seems to me is most clearly implicated by the present module.

And I further submit, sir, that if I am correct on that, the Tribunal must have an obligation to Mr. Lowry to conclude its investigation into the GSM process and to absolve him from any suspicion of wrongdoing as soon as it is in a position to do that. The Tribunal has no general entitlement to investigate the licence award per se. It can only do so insofar as it is pursuing a line of investigation that leads inexorably to some mala fides act on the part of Mr. Lowry. And it is particularly important, I say, that the Tribunal does not delay in respect of the reputation of a current public

representative, who is anxiously awaiting an unambiguous statement from the Tribunal that he did not and could not have interfered with the result of the licence application process. And it is submitted that that point must surely have been reached some time ago.

And you will see, sir, my written submission offered a kind of question in mid-air, and that is that it is not apparent to Mr. Lowry or his legal team upon what possible theory or factual basis the Tribunal could have for sustaining its public hearings, and to a certain extent, that lacuna, in our understanding, has now been cured by the disclosure of Mr. Bacon's reports, of which I was not aware when I wrote my opening submission. I have only when I wrote this written submission, sir, they have only been made available to my solicitor in recent days, as I understand matters.

And I wonder, why was the 2003 submission not furnished and not opened in evidence, as Mr. Fitzsimons already submitted? I'm at a loss to understand that. When were we notified, sir, that Mr. Bacon would be a witness giving evidence? In all my discussions with your counsel, in all the correspondence that I have read emanating from the solicitor, I have never heard Mr. Bacon's name, over 131 days. He has been like a ghost, from our perspective, and yet it now appears the Tribunal has all along been working on the basis of views offered by Mr. Bacon and that has been driving the Tribunal's inquiry.

Sir, with respect, at various times the Tribunal has

offered assurances to the parties here that it will reach no conclusions until all the evidence is heard, and then and only then will the Tribunal consider the totality of the evidence.

Sir, it seems to me that that is something of a tautology, that the Tribunal is conducting an open-ended inquiry and is reaching no conclusions as time goes on. It's an empty formula to rely on it because it provides no guidance as to what witnesses are necessary or what evidence must be heard in the first place. An investigation cannot be conducted without an hypothesis, and now, at the 11th hour, it's been disclosed to us that the Tribunal has, seemingly in part at least, for a very long time, had a hypothesis, and yet that hypothesis has not been disclosed to any of the parties, including Mr. Lowry.

If the Tribunal has had a theory that it's been working on all of this time, it has not been adduced in evidence, and it has not been capable of being tested or rebutted.

Turning now to the specific issue of the nonavailability of Mr. Andersen, it seems to me, sir, that the Tribunal itself, in its correspondence with the Government, has been at pains to point out the absolute centrality of the role played by Mr. Andersen in the process. And we know that he was the consultant upon whom the Project Group relied for guidance at all stages, and he is the witness who would have an incomparable understanding of the process that led to the award of the licence to Esat Digifone, because he

was ultimately its architect.

And in correspondence to the Secretary General of the Government, the Tribunal has been on record to say that Mr. Andersen played a very significant role in all aspects of the competition and especially the valuation process. And the Tribunal has said to Mr. McCarthy, the Secretary General, that the Tribunal anticipates that Mr. Andersen will be able to be of considerable assistance should he give evidence. The Tribunal has made a request of the Government that Mr. Andersen be afforded the full indemnity that he seeks in order to facilitate his giving evidence, and the Tribunal has been at pains to point out to the Government the possible consequences of that indemnity not being granted, which are clearly the possibility that the Tribunal may be unable to complete its hearings in respect of this module. That possibility was suggested in no uncertain terms by the Tribunal to the Government in correspondence to Secretary General McCarthy. The Tribunal said, in their letter of the 14th January, 2004, and I quote: "At least one of the witnesses to the Tribunal, Mr. Denis O'Brien, through his counsel, has indicated that in the event that Mr. Andersen does not give evidence, he may wish to make certain submissions concerning the capacity of the Tribunal to reach any conclusions in the absence of Mr. Andersen's evidence."

So let there be no doubt but that the Tribunal has explicitly warned the Government of the very serious

consequences of the failure to provide an indemnity up to and including the inability of the Tribunal to complete its evidence and reach any conclusions in respect of this module.

There is a series of correspondence that has been furnished to Mr. Lowry that demonstrates further investigations in relation to the likelihood of a successful application to the Danish courts. And ultimately we have seen that the Tribunal wrote again to Secretary General McCarthy this year, on the 18th April, 2005. And this letter stated in no uncertain terms that the Tribunal had now formed the view that there was no realistic prospect of the Tribunal persuading Mr. Andersen to give evidence without the indemnity sought, and further, that there was no likelihood of success were an application to be made to the Danish courts to have Mr. Andersen's evidence to be taken in that jurisdiction.

And by a letter of the 4th May, 2005, Secretary General McCarthy responded on behalf of Government and conveyed the unambiguous decision of the Government not to grant an indemnity to Mr. Andersen, cognisant of all the matters that the Tribunal had outlined in its correspondence.

On behalf of Mr. Lowry, I say that a number of consequences flow from the Government's refusal to grant the indemnity sought by Mr. Andersen in the knowledge of the matters that the Tribunal had corresponded with the Government about.

Firstly, it appears that the Government is less concerned

about this Tribunal being unable to complete its mission than it is about the other implications that it refers to in its final letter of the granting of the indemnity. The Government has effectively made a choice, and that choice is that it is willing to compromise the investigations of this Tribunal because it believes other considerations militate against granting the indemnity. But it can't be lost that the Government has made a choice, and it has declined to grant the indemnity sought by the Tribunal. It's further submitted on behalf of Mr. Lowry that the Tribunal must, at this point, recognise what Mr. Fitzsimons called the common-sense limitations that are placed upon the investigation in terms of the findings of fact that could conceivably be reached, and it is submitted that in the absence of Mr. Andersen, it is not reasonably open to this Tribunal of Inquiry to reach findings of fact that there were interferences by the Minister with the work of the GSM Project Group that affected its outcome. And I submit that this alone deprives the Tribunal's investigation of any continuing vitality or purpose, when measured by the yardstick of its own Terms of Reference. Moreover, sir, the absence of Mr. Andersen fatally contaminates the fairness of the procedures adopted by the Tribunal thus far, albeit unintentionally, because Mr. Andersen's position and understanding of matters has been relied upon by the Tribunal throughout the GSM module and has informed the investigation of the Tribunal that

have brought the hearings to present stage, and I cite examples in the body of my written submissions.

And, sir, following on from that, it would perhaps be the case that if Mr. Andersen's evidence was purely formal, entirely uncontroversial and simply taken as read by all the parties, that we could get over this hump in the road, but that's not the position. In fact, it's apparent from the transcript of Mr. Coughlan's opening, which I quote at length in my written submission, that the Tribunal itself, never mind any of the other parties, does not accept certain aspects of Mr. Andersen's version of events, and sees matters very differently from him.

And in that regard, Mr. Fitzsimons has caused the opening of a letter to Ms. Plunkett in Landwell Solicitors on the 26th March, 2003, where the Tribunal sets outs its views that the process was fundamentally flawed. So it's not the case that everybody is singing off the same hymn sheet. Mr. Andersen's evidence is purely formal, and the absence of his evidence is only a minor logistical issue that has to be overcome. Mr. Andersen is a significant and controversial player in all of this. And it's quite clear from the passages opened by Mr. Coughlan in his opening that the Tribunal has leaned heavily on Mr. Andersen, has had at least four private meetings with him, and has received four different explanatory memoranda from him that have informed its thinking at different stages. And yet we know from the letter of the 26th March, 2003, that at least

at one stage if the Tribunal's position has changed, we are not aware of it but at least at that stage the Tribunal had serious concerns and queries over the position seemingly taken by Andersen and AMI. And records of these four meetings and four memoranda referred to by Mr. Coughlan have been in the possession of the Tribunal throughout the GSM module and have been relied on at times in the hearings.

But even though that is the case, it's quite apparent that the Tribunal regards Mr. Andersen's contribution as incomplete, even leaving aside the question of his unavailability to give evidence, because Mr. Coughlan explained, on the 10th December, 2004, Day 160, that the Tribunal has furnished him with what I'll for ease of reference call a notice of particulars setting out 55 different matters that the Tribunal sought Mr. Andersen's assistance upon, and to the best of my knowledge, that Notice for Particulars remains unanswered.

So, accordingly, the Tribunal has now reached a point where its investigations and work to date on the GSM module are heavily reliant on Mr. Andersen's contribution and assistance, yet that assistance is incomplete, and further, Mr. Andersen will not now come to give evidence. His shadow is everywhere, yet his evidence can't be obtained, much less scrutinised and tested.

And it is accordingly submitted on behalf of Mr. Lowry that the Tribunal has no option at this point other than to

accept but that its inquiry as the Terms of Reference insofar as the Terms of Reference of the Tribunal can plausible be concerned has reached a dead end.

Finally, sir, I have referred to the attitude of the Government and the Oireachtas to the Tribunal at this stage. And I have to suggest to the Tribunal that the inescapable conclusion to be drawn from the correspondence of Secretary General McCarthy is that the Government is less perturbed by the making of a decision that may compromise the ability of the Tribunal to complete its investigation than it is by the other considerations referred to in the Secretary General's letter of the 4th May, 2005.

And in short, it's submitted on behalf of Mr. Lowry that what comes across from the Government's correspondence is that the Tribunal should either go to Denmark to pursue Mr. Andersen, fruitless and all as that task may ultimately be, or in the alternative, if Mr. Andersen's absence compromises the Tribunal's ability to report, so be it.

The Tribunal has made a request of the Government that established it, and the Government has refused that request. And it's submitted on behalf of Mr. Lowry that that alone raises some rather searching questions about the continuing mandate of the Tribunal in this area.

The Government established the Tribunal in September 1997. Included in its Terms of Reference was the request that it report to the Clerk of the Dail, on an interim basis, not

later than three months after its establishment or the 10th day of oral hearings, whichever should occur first. So it should be noted that it was considered by the drafters of the Terms of Reference of the Tribunal that it was a matter of some doubt whether three months of calendar time or ten days of oral hearings would be reached sooner. In fact, Day 10 of oral hearings took place on the 5th February, 1999, almost 18 months after the establishment of this Tribunal. So it's accordingly clear, in my respectful submission, that the Tribunal has at all stages taken a much longer period of time to carry out its functions than the Government or Oireachtas that established it must have intended.

It was presumably not, sir, in the contemplation of the Oireachtas, when the Tribunal was established in September 1997 and asked to report on an interim basis, either within three months or after the first ten days of oral hearings, that no report, interim or otherwise, would have been produced eight years later, in September, 2005.

And I submit, sir, that the Terms of Reference, when read as a whole, make it abundantly clear that the mandate of this Tribunal was to conduct a short and focused inquiry dealing with the net question of whether any Government decisions made by Mr. Haughey or Mr. Lowry were tainted by financial links with the beneficiaries of those decisions.

And it's instructive to recall, sir, that the Tribunal was asked to make broad recommendations, apart from reaching

its primary conclusions and findings of facts, on six different areas which are referred to at subparagraphs (k) to (p) of the Terms of Reference. And with the utmost of respect, sir, it is evident, simply by reading the statute books, that by 2005, the Tribunal's function in respect of each of those six areas is now redundant, because in the intervening period between 1997 and 2005, legislation in each of those six different areas has been enacted: in relation to the funding of political parties, the enforcement provisions of company law, the independence of Revenue Commissioners, the role of the central bank, and the effect of legislation of professional accountancy bodies. Each of those areas has seen the Oireachtas abandon its wait for the Tribunal's recommendations, notwithstanding the Terms of Reference of the Tribunal, and go ahead and legislate anyway.

Furthermore, sir, I have relied at length in my written submission on a quote from the then and now Tanaiste, Ms. Mary Harney, on the Dail debate in commending the proposed Terms of Reference to the House. And in that Dail debate, Ms. Harney said that we could not engage in a broadly based fishing expedition. And I don't feel the need to set it out in full, but I think it's apparent from the terms of what Ms. Harney said to the Dail on that occasion that the Government did not envisage a Tribunal that would endure for a period of eight years.

I have also set out a much more recent and lengthy

transcript of Dail debates from the 18th May, 2005, of this year, and I don't propose to open those or read those into the record. They are in the body of my written submission. But the nature of those recent exchanges between, on the one hand the Taoiseach, and the leaders of the two principal opposition parties, Mr. Kenny and Mr. Rabbitte, it is submitted, speak for themselves. The Taoiseach has told the Dail that it was not his intention, in establishing this Tribunal, that it should endure for the length of time that it has, and the two leaders of the principal opposition parties have expressed, I think it's fair to say, outrage about the cost and duration of the Tribunal.

It is submitted on behalf of Mr. Lowry that however uncomfortable reading the transcripts of the Dail debates make for the Tribunal, there is a strong suggestion at this stage that emanates from any fair reading of the Dail debates that this Inquiry is losing the support of Dail Eireann for its endeavours. And when one adds the very public criticism that this Tribunal has received in the Oireachtas to the patent lack of support for its request of Government for an indemnity for Mr. Andersen to facilitate the present Inquiry, in my respectful submission, it is difficult to resist the conclusion that whilst obviously and properly remaining entirely independent in the exercise of its functions, this Tribunal may in fact have effectively lost the support of both the Government and the

Oireachtas at this point.

And I say, sir, that this is a pressing consideration that argues in favour of the submission made here, which is that the appropriate course for the Tribunal is now to wind up its inquiry into the GSM licence; and in the alternative, sir, if the Tribunal believes that I am wrong in all of this, the Tribunal has an option to make it quite clear that I am wrong fairly quickly.

If the Tribunal is confident that my submission is unfounded, it is urged on behalf of Mr. Lowry that the Tribunal ought now to seek a renewed mandate from the Oireachtas, including the power for itself to grant the indemnity to Mr. Andersen of the Tribunal's own motion, and that would seemingly resolve the problem, as the Oireachtas would presumably, whether by way of resolution or legislation, have the power to grant such an indemnity.

If the Tribunal, on the other hand, is unwilling to approach the Oireachtas and make that request of it, it is surely reasonable for a party such as Mr. Lowry to take the Tribunal to be conceding at this stage that it would not expect to receive support for such a request.

None of what I have said, sir, is intended to in any way request the integrity, commitment or bona fides of either you, sir, as Sole Member, or the Tribunal's legal team.

But a party appearing before the Tribunal like Mr. Lowry, who has been waiting for the Tribunal's deliberations over him for a period of eight years, I believe, sir, is

entitled at this point in the proceedings to advert to the very real context in which the Tribunal seemingly proposes to continue its hearings before the Tribunal reaches any final determination as to whether it's appropriate to do so, when a fork in the road that has been caused by the apparent unavailability of Mr. Andersen presents itself as it has done here.

CHAIRMAN: Thanks, Mr. Fanning.

Mr. MacGrath?

MR. MacGRATH: Good afternoon, Chairman. I appear with Mr. Kennedy on behalf of the Attorney General, representing the public interest.

Chairman, in line with the ruling this morning and your observations, it is not my intention to reiterate what is in the short written submissions which have been made on behalf of the public interest, but merely just to point out one or two points which come to mind in light of the submissions which we have been furnished by the Tribunal and which have been submitted by other parties here.

I think, in the first instance, it is apposite for me to reiterate what was pointed out by counsel for the public interest at an earlier stage of this Tribunal's hearing, that it is not the function of counsel for the public interest, nor indeed is it appropriate for the counsel for the public interest to refer to or to deal with or in any way attempt to comment upon the evidence or the state of the evidence which is before the Tribunal. That is

entirely a matter for you, sir, as the Sole Member of the Tribunal charged with discharging the function entrusted to you by the Oireachtas. That is the first point which I would wish to make and to reiterate.

Therefore, insofar as the submissions, I say, which have been made by the various parties are concerned, touching upon the various factual aspects, that is not a concern of the counsel for the public interest, and I don't intend to refer to any of the submissions in that regard.

Now, I will be very brief, Chairman.

It strikes me that there appears to be, looking at the various submissions, that there appears to be implicit in some of the submissions that the continuance of the hearing of evidence in this module inexorably and inevitably will lead to the breaching of constitutional rights of the various parties who are before this Tribunal and whose activities are being investigated.

In my respectful submission, that is not necessarily the case. There are, in my respectful submission, a number of issues, and that is that it is in the interests of the public and in the public interest that the Tribunal should investigate in as thorough manner as possible the issues which it has been charged to do by the Oireachtas.

Now, the fact that a witness might not be available or indeed might be deceased, it is submitted, is not a ground upon which the Tribunal should take a view that it should stop all its inquiries. However, Mr. Chairman, and I think

this is important, that in the context of investigations and further investigations, the Tribunal has to be mindful in coming to its determination that the constitutional rights, including the constitutional rights which have been referred to by the various parties, expounded in the Haughey case, that all of those are given due consideration when it comes to the question of any determinations which you may wish to come to, Chairman.

So therefore, Chairman, in my respectful submission, and on behalf of the public interest, it is not in the public interest that the Tribunal should immediately cease any further investigations. It is in the public interest, Chairman, that the Tribunal concludes its investigation, and it is thereafter a matter, in my respectful submission, Chairman, for you to determine and conclude the effect that you should give to the evidence you have heard, if it transpires to be the case that Mr. Andersen will not be available to give evidence at any stage and in the light of the absence of such evidence.

And fundamentally, Chairman, I have no doubt, and I think all parties can assume that in discharging your function, you will have due regard for the constitutional rights of all those before you.

CHAIRMAN: Mr. McGonigal, it may be that you'll be a little time; would you prefer to start a little later?

MR. McGONIGAL: It might be easier, for the interests of the Tribunal, if I started later, but I have no difficulty

in starting now, Mr. Chairman. I am in your hands.

CHAIRMAN: Well, we might as well go to ten to one, then.

MR. McGONIGAL: The first thing I want to say, Mr. Chairman, is in relation to the submissions themselves, and particularly the documentation upon which the submissions are based.

Effectively, there has been correspondence between the Tribunal and ourselves in relation to documentation which we have been seeking to enable us to prepare these submissions and which was partially responsible for the delay in getting the submissions to the Tribunal. That correspondence, although it has been going on for a number of years in relation to Mr. Andersen, began to focus in late August of this year, and at the present stage, as of today, there is still documentation which we believe is important in relation to the issues which are being considered by the Tribunal which have not been furnished, and apparently, the Tribunal has now taken the position that it is refusing to furnish them.

And just for the record, can I just draw Your Lordship's attention draw the Chairman's attention to our letter of today's date, which was in reply to your letter of the 12th, yesterday:

"In relation to our client's various requests for information, documentation from the Tribunal regarding the nonavailability or otherwise of Michael Andersen, AMI, to attend at the public sittings of the Tribunal, we note that

the Tribunal is now refusing to provide the following documentation, despite our client's repeated requests for them, being;

A) a copy of the letter of instruction with enclosures sent by the Tribunal to Mr. Engell", who is the Danish lawyer engaged by both the Government and the Tribunal, "pursuant to which Mr. Engell's upon of 6th May, 2004 was based; and secondly, without prejudice, copies of all correspondence between the Tribunal and Mr. Engell prior to 6th May, 2004."

And we note further in that letter, Mr. Chairman, that:

"While the Tribunal has proposed to provide some of the material listed in Categories 1 and 2 of a previous letter, what we are specifically seeking are copies of all letters of instruction provided by the Tribunal to Peter Bacon & Associates, including full copies of all materials provided and all other correspondence between the Tribunal and Peter Bacon & Associates; and secondly, a copy of the letter from the Tribunal to Peter Bacon & Associates dated 30th August, 2004, with enclosures, as referred to at page 1 of Mr. Bacon's report, dated January, 2005."

The obvious implications of previous statements is the Tribunal is refusing to provide some of these document falling into these categories. The Tribunal, Mr. Chairman, has not as yet provided any explanation for the basis of these refusals. It is unclear to us on what basis the Tribunal can actually refuse to provide these documents,

particularly in light of the fact it that provided other documents falling in the same categories. The policy of selective provision of materials by the Tribunal is a matter of some considerable concern to my client. And this concern is all the greater considering the Tribunal's previous commitment to provide all documents sought in our letter of the 26th August.

We have reserved our rights in relation to taking High Court proceedings seeking an order directing the Tribunal to furnish these documents. And quite frankly, Mr. Chairman, I am reluctant to have to go to court again in relation to obtaining documents. I believe these documents are relevant to considering issues which are before you, and I am inviting you, Mr. Chairman, to review that decision and enable the documents to be furnished and to allow us to address you further, probably in written form, if necessary, if anything arises specifically from those documents.

It's unnecessary for me to say that because this is a public Tribunal and we are in a public stage of the Tribunal, I believe the position is that any issue which is before the Tribunal in a public session, we are entitled to all documentation which goes towards that issue.

The second matter that I just want to draw attention to is that in relation to the other submissions which have been furnished to the parties, unfortunately due to lack of time, and it's no fault of the Tribunal's, we have been

unable to consider them in depth, and whilst scanning them, there are matters in some of the submissions that we would adopt, and in ease, I think it's only proper to say that I would fully endorse everything that Mr. Fitzsimons has said this morning, and also Mr. Fanning.

While I don't take on board everything that Mr. MacGrath has said, and I find it interesting, I think it misses the point in relation to the stage at which this Tribunal has reached.

The Tribunal has effectively reached what one might call a crossroads, in the sense that for the last four years, the Tribunal has been inquiring into the GSM licence. The basis of that inquiry was always premised on the fact that Mr. Andersen and the other members of the AMI team would be giving evidence. That's abundantly clear from the way in which the conduct of the Tribunal proceeded from Day 1.

The fact that Michael Andersen, and apparently the other AMI witnesses, are not now available puts the Tribunal in a position where it is unable to properly inquire into the GSM process. And the reason for that is simply because the person who was fundamentally responsible for creating and overseeing and policing the process is not now available for any consideration by the Tribunal.

In one sense it doesn't matter whether the work of Mr. Andersen was good or bad. What fundamentally matters is he is not available. And this, in our respectful submission, isn't simply a matter for the Tribunal. It is

in fact a matter for the Dail. The Terms of Reference of this Tribunal were set up by the two Houses of the Oireachtas, and any issue which came within those Terms of Reference was anticipated that it would be investigated in full. And indeed Mr. Dermot Gleeson, on behalf of this Tribunal, in Desmond v. Moriarty, and latterly Mr. Brian Murray in O'Brien v. Moriarty, both relied on the image of crawling over the wires of an electrical system to see where, if any, faults may lie.

And perhaps both of the quotations in relation to that are apposite in relation to looking at this Tribunal, because if you now issue a report in relation to GSM, it is difficult to see how you can properly satisfy, if it needs to be satisfied, any concerns of the public once you state, which you would have to state, that the main person and team are missing, so that this examination is based upon that this report is based on that premise.

And the problem about that is that although this Tribunal has operated on the basis that it is not making any allegations, although it appears to be identifying criticisms as referred to in one of its letters, it's difficult to see how any justifiable allegations of any kind or criticisms of any kind can be made against any person or group of people in relation to the GSM process.

And that, in a sense, seems to me the fundamental problem for the Tribunal. I don't see a difficulty, and I don't understand why people do see a difficulty, about reporting

to the Dail at this moment in time the problem, the fundamental problem which has now arisen, because as other persons have already pointed out, it is the Dail that can solve this problem. Not the Government, in my respectful submission; it is the Dail. The Dail can grant the indemnity. The Dail can say there is no need to go further than you have already gone. But they are the people who are, in a sense, paying for this Tribunal. They are the people who set it up in the first instance. They are the people who are capable of determining whether or not there still remains an issue of public confidence, and they are the people that can guide us in that sense into the future, if there is to be a future.

Those are, in a sense, by way of being preliminary remarks, because I want to try and say to the Tribunal that so far as Mr. O'Brien is concerned, when the Tribunal was first set up in 1997, Mr. O'Brien at that time would have had no inkling that he would be being inquired into indirectly as a result of the GSM process; and effectively, since 2001, and we are now in 2005, Mr. O'Brien has been constantly involved one way or the other with this Tribunal. And in one sense, if that had been continuous, one could have no complaint; but unfortunately, and it's proper to point it out, that that period includes a period of 17 months when the Tribunal hasn't sat at all in relation to the GSM licence. It includes a period between June, 2004, and April, 2005, following a request by the Government to get

evidence on Commission, and when you wrote to us and said you were getting evidence on Commission, that no evidence on Commission was got.

So the position of Mr. O'Brien is, in a sense, that he is held before the Tribunal, or within the Tribunal, and is not being given any indication of the reasons why he is here at this stage, has not been given any indication of the procedures that will now be followed, and these are all matters which are of concern to him. And the way we put it is very simply, in the executive summary of the submissions, we have identified eight paragraphs of complaint which I think are worth referring to.

And the first one is "that since no evidence of any wrongdoing in respect of the competition for the second GSM phone licence has been heard to date, the Tribunal should recognise and accept that its inquiries have alleviated any public concern that may have existed about the award of the second mobile phone licence, and should state publicly that it does not propose to proceed any further since it is satisfied no wrongdoing existed. Such a decision by the Tribunal would mean that there would be no necessity to hear any evidence from Michael Andersen or from any other individual."

And it seems to me, Mr. Chairman, in comment, that if you reject that submission, it is incumbent on the Tribunal to indicate what it is that it is inquiring into which is now of concern to the Tribunal.

Should the Tribunal believe that it is entitled to proceed with any further inquiries into the GSM model notwithstanding the absence of any evidence of wrongdoing, the Tribunal needs to consider whether it is in fact acting within its Terms of Reference which require it to inquire into whether Mr. Lowry made any decision whilst holding ministerial office to confer a benefit on a person who has paid him money.

The evidence of Michael Andersen and the AMI team is sought by the Tribunal for the purposes of inquiring into the evaluation process. There is no evidence of any interference by Mr. Lowry in this process, and consequently, this part of the Tribunal's inquiry is not justified. Mr. O'Brien submits that in the absence of any evidence of interference by Mr. Lowry, the Tribunal should not continue on a fishing expedition for the purpose of auditing the second mobile phone competition. That was not what the Oireachtas asked it to do. The Tribunal would only be entitled to do so if there was evidence of interference in the evaluation process by Michael Lowry in response to payments he had received.

Thirdly, Mr. O'Brien submits that the Tribunal has breached his constitutional entitlement to fair procedures in the manner in which it has inquired into the evaluation process and the competition for the second mobile phone licence. The Tribunal has stated in a letter to AMI's solicitors dated 26th March, 2003, that it believes AMI's evaluation

process was fundamentally flawed. It also indicated that it believed that it was in a position to report such a finding. Its belief that the evaluation process was fundamentally flawed has been derived from expert assistance that the Tribunal has obtained, principally from Mr. Peter Bacon. Mr. O'Brien has only recently been furnished with these reports of Mr. Bacon. The existence of these reports were not made known by the Tribunal, nor were they made available to any of the representative parties or to any of the witnesses during the evidence heard to date. These reports have never been introduced into evidence, and Mr. Bacon has not been available for cross-examination.

Mr. O'Brien submits that the procedure whereby the Tribunal seeks to undermine the evaluation report of AMI in the absence of the evidence is fundamentally a breach of fair procedures.

Mr. O'Brien submits that the failure of the Tribunal to procure the evidence of Mr. Andersen through the Danish court system is unreasonable in that it is irrational.

Legal opinions have been obtained by both the Tribunal and the Government revealing that his evidence could be sought through the Danish court system. The Government recommended that the Tribunal seek his evidence in this manner. No valid explanation has been furnished by the Tribunal as to why it did not pursue its initial plan to seek his evidence in Denmark.

Mr. O'Brien submits that the failure of the Tribunal to take any steps to procure his evidence, particularly during the past two years, is a breach of Mr. O'Brien's entitlement to fair procedures. Its failure to initiate such a process is inexplicable, considering the general acceptance that Mr. Andersen's evidence is crucial.
And I do consider that of some importance, Mr. Chairman, in this sense, that you wrote to the Government bringing the Government's attention to the fact that Andersen was unavailable and seeking his indemnity. The Government indicated what it thought the Tribunal should do. The Tribunal appeared to accept that. It wrote to us and told us that you were going to get evidence on Commission, and the initial steps were never taken. And what concerns me is that the Government's indication to take evidence on Commission seems to have been based inter alia in the belief or opinion that it was in the public interest that evidence on Commission be taken. And my reason for saying that is because in the letter indicating that evidence should be taken on Commission, the Government indicated that counsel for the public interest should be kept aware of what was happening in relation to that application. So it seems fair, for the moment in the absence of the Government, to draw an innuendo conclusion that the Government was, in the public interest, saying that evidence should be taken on Commission, and, therefore, from that point of view, it seems to me incumbent that the

Tribunal must have done that. And its failure to do that is, in my respectful submission, difficult to understand.

Mr. O'Brien submits that the failure of the Tribunal to procure the evidence of the other AMI witnesses is also unreasonable in the sense of irrational. The Tribunal has previously stated that it intends to secure the assistance of other AMI specialist consultants as witnesses to the Tribunal, but it appears that no steps have been taken in recent times, if indeed at all, to procure any of the other crucial witnesses.

Mr. O'Brien submits that the failure of the Tribunal to make any real efforts to secure the evidence of the other AMI specialist consultants who were involved in the GSM process, namely Michael Thrane, John Bruel, Ole Feddersen, Marius Jacobsen, Tage Iverson and Mikkel Vinter, is again a breach of Mr. O'Brien's entitlement to fair procedures.

Mr. O'Brien submits that the failure by the Tribunal to secure the 300-or-so documents relating to GSM which are in the possession of AMI is also a breach of his entitlement to fair procedures.

Now, very little attention, Mr. Chairman, has been paid to the apparently paid to the other AMI witnesses, and yet it is clear from the AMI correspondence that the Tribunal has held that they were tendered, in a sense, by AMI as being persons who may have been in a position to fill some, if not all, of the gaps that were being created by Michael Andersen.

The other matter, which is equally of concern, is the fact that in a Tribunal where documents have been so important, that 300-or-so documents which are in the possession of AMI have not been sought and there is no indication from AMI that those documents are being refused or withheld for any good reason, or any reason at all.

Mr. O'Brien further submits that the delay of the Tribunal in concluding its inquiry and/or continuing with its inquiry has again breached his constitutional rights. The inquiry in the second mobile phone licence involving Mr. O'Brien has now been proceeding for three years, and no public sitting of the GSM module has ever taken place since April 2004. No explanation has been furnished for the delay, and the effect of the delay is that Mr. O'Brien's cross-examination of Tony Boyle, a representative of Persona, which plays a central role in the second GSM competition and the genesis of the allegations in respect of same has been delayed for over one and a half years. To delay cross-examination is effectively to deny a proper cross-examination. No explanation has ever been furnished by the Tribunal as to why it has postponed the cross-examination for a year and a half, and it is submitted the effect of the delay to deny Mr. O'Brien an adequate cross-examination of Tony Boyle is a breach of his constitutional rights.

But it's quite clear, Mr. Chairman, that in my respectful submission, that some explanation is required in relation

to the delay of the GSM process, and there is nothing in the papers which have so far been furnished to us that gives such an explanation. It has been repeated time and time again at us and to us, through correspondence and otherwise, that this is a matter of urgent public importance. And in my respectful submission, the meaning of "urgent public importance" has taken on a meaning which requires a new definition for the English language insofar as Tribunals are concerned. It's difficult to believe that a matter which may have been perceived to have been of urgent public importance in 1997, or indeed in 2001, could still be considered to have that title attached to it in the circumstances, particularly where there have been substantial delays.

Mr. O'Brien submits that the Tribunal is obliged to inform him at this stage what procedures it intends to follow in order to afford him his re Haughey rights. No allegation has been made against Mr. O'Brien. If a report containing adverse findings of Mr. O'Brien is to be generated, he must be given an advance opportunity to rebut the findings in that report.

He submits that the Tribunal is obliged to inform him of the procedures it intends to follow so that he is aware of when he can avail of these rights. The failure of the Tribunal to advise him of its procedures is a breach of fair procedures.

That also is important, Mr. Chairman, because if the

Tribunal is to determine that the Tribunal can proceed with the GSM module in circumstances where substantial evidence is no longer available, it seems to me absolutely vital that Mr. O'Brien, and indeed all of the parties, are entitled to know the basis upon which the Tribunal considers it important to continue with its inquiries by stating the areas of concern that it may or may not have and why it has those areas of concern, having regard to the amount of evidence that has already been given.

And that is made against the background of the Terms of Reference, which clearly indicate that at a certain point in time at the end of its private inquiry, a Tribunal can make a determination to go into public hearings; and if one reverts back to the time when that decision may have been taken in respect of GSM, it would have been taken at a time when Andersen was anticipated that he would be available. That situation now having changed, it seems to me that it is important that the Tribunal should clarify, in a fairly detailed way, where it stands in relation to the evidence which is presently before it.

The last one is in the alternative, Mr. O'Brien submits the Tribunal should revert to the Oireachtas to inform it that an indemnity for Mr. Andersen/AMI has not been provided by the Government, and that its query into the second GSM module cannot be concluded or completed fairly without the evidence of Mr. Andersen/AMI. The Oireachtas could vote through the grant of the indemnity sought.

CHAIRMAN: Is it now a convenient time for to you break for lunch, Mr. McGonigal?

MR. McGONIGAL: Yes.

CHAIRMAN: Very good. Five past two.

THE TRIBUNAL ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CHAIRMAN: Mr. McGonigal.

MR. McGONIGAL: Mr. Chairman, one of the preliminary matters which I think should be stated at the outset for as something that, in any ruling which you may ultimately give, requires complete clarification, relates to not just the purpose of this sitting in the sense of hearing submissions relating to the unwillingness of Mr. Andersen to come, but to the view or otherwise that the Tribunal may or may not have formed already by reason of his unwillingness.

There can be very little doubt that throughout this Tribunal, Mr. O'Brien has urged very strongly on many occasions that the evidence of Andersen and the other specialist consultants was essential to assist him to vindicate his reputation and also the integrity of the awarding of the second mobile licence, and that importance was also recognised by this Tribunal, apparently, on many occasions, which I'll refer to in a moment.

But in a letter on the 16th June, 2005, the Tribunal informed Fry's that Andersen would not be available to give evidence. And they stated in a letter of the 27th July

that the nonavailability of Mr. Andersen is not something, in the Tribunal's view, that would preclude it from proceeding with its inquiries.

And again on the 25th August, 2005, the Tribunal says:

"The Tribunal has reached no final conclusion concerning the consequences of Andersen's nonavailability and is awaiting the submissions of all persons affected by the Tribunal's inquiry and not merely your clients' submissions before proceeding to a determination on the matter.

Subject to the foregoing, the Tribunal's provisional view is as stated, that while Mr. Andersen is an important witness whose evidence would be of considerable assistance to the Tribunal, as is apparent from the Tribunal's endeavours to secure his assistance over a protracted period, it does not consider that his evidence is so crucial as to preclude the Tribunal from making findings of fact pursuant to paragraph (g) of the Terms of Reference".

Now, it was a result of those two letters that we wrote to the Tribunal on the 28th July of 2005 and indicated that rather than clarifying the issue, this most recent letter only serves to further confuse the matter. The Tribunal's letter of the 16th June, states: "It is clear that there is no realistic prospect of compelling Mr. Andersen to give evidence either in Ireland or in Denmark."

This was the first time that the Tribunal indicated to us with any degree of certainty what the position was in relation to Mr. Andersen's availability. This is despite

the fact that we have been making inquiries consistently on the matter for over two years, both in correspondence and at public hearings of the Tribunal.

We responded to this letter on the 20th June, 2005, and sought clarification from the Tribunal as to what it believed were the consequences of Mr. Andersen's unavailability to give evidence in respect of the ongoing GSM module.

On the 25th, we were informed by the Tribunal of its intention to resume public sittings for the purpose of completing its inquiries into the circumstances surrounding the grant of the second GSM licence to Esat Digifone Limited. No reference whatsoever was made in this letter to the issue of the nonavailability of Michael Andersen.

We responded on the 26th July and again sought clarification from the Tribunal as to what it believed were the consequences of Mr. Andersen's nonavailability. The Tribunal replied, stating that "The Tribunal has made a further effort via the Department to encourage Mr. Andersen to attend".

With respect, rather than clarifying that issue, this has only served to confuse the matter in light of the information conveyed to the Tribunal's letter of the 16th June. Either Andersen is coming or he is not.

In light of the Tribunal's comments that it intends to resume public sittings for the purpose of completing its inquiries into the circumstances surrounding the granting

of the second GSM licence to Esat Digifone, it would seem clear that the position is that Andersen will not be available to give evidence, and that the Tribunal intends completing the GSM module in his absence.

Whilst the Tribunal does concede that the likelihood of his attendance is remote, we should be obliged if the Tribunal would confirm the position definitively. Notwithstanding the lack of clarity, we have now advised our client to proceed on the basis that Andersen will not be available to give evidence before the Tribunal. Obviously this raises serious issues in respect of the Tribunal's inability to complete its queries into the granting of the second mobile phone licence, let alone its ability to report in relation to same. Serious questions are also raised in respect of the manner in which the Tribunal has attempted to introduce material relevant to Andersen and its pivotal role in the licence process, and question witnesses in relation thereto.

In the final paragraph of the Tribunal's letter, it is correctly noted that our clients' counsel indicated at the end of July 2003 that he wished to make submissions in respect of the nonavailability of Andersen. This indication was made on the 15th and 16th June, 2003, when he requested that the Sole Member would set aside some time to debate the issue prior to the 2003 summer break.

Upon making that application, the Sole Member stated: "I accept, Mr. McGonigal, that these are matters that do need

to be considered and argued and discussed and ruled on, and that it is important that this be done expeditiously.

Perhaps, rather than give any initial remarks or views of my own, I'll leave it until a convenient and proximate vantage point that the matters can be addressed, but I am likewise of a mind that these are aspects that need to be considered."

He went on to indicate that he would prefer to receive some preliminary submission to indicate the nature of the application so as to enable him to interest fully a suitable time to consider same. He provided an outline submission on the 23rd July 2003. Notwithstanding the fact that counsel stressed our client's strong desire to be given an opportunity to make the submission prior to the long vacation, the Sole Member declined to provide the opportunity sought. This was despite the fact that the Tribunal discontinued public sittings a full week prior to the end of term.

We wrote to the Tribunal expressing our concern at this turn of events on the 5th August, 2003. In that letter we noted our understanding that we would be afforded the opportunity to make our submissions immediately upon the resumption of the Tribunal's public sittings in autumn 2003. We also called upon the Tribunal to notify all parties represented, as well as the representatives of the public interest, of our intention to make the submission.

At a private meeting with counsel for the Tribunal on the

9th October, 2003, Mr. Healy SC mentioned to our counsel that there had been an amount of communication between the Tribunal and Michael Andersen in relation to his availability to give evidence before the Tribunal. It would seem apparent from the Tribunal's letter of the 16th June that this communication was the first occasion since late 2002 that the Tribunal had made any attempt at contacting Mr. Andersen to persuade him to give evidence. We sought details of this communication as a matter of urgency, so as to allow us to consider whether it would appropriate to make the submission as previously indicated to the Tribunal.

Mr. McGonigal made our position clear to the Tribunal on the 14th October, Day 239, and strongly reiterated our desire to make the submission. The Sole Member declined to hear a submission, and adjourned the matter until the 21st October, 2003.

The Tribunal wrote to us on the 17th October, stating:

"There is no point in setting time aside next week for canvassing submissions that may be made in relation to Andersen, as it appears likely that he will now be available."

"In reliance on this statement and the statements made by Mr. Healy on Day 240, we decided against proceeding with our submission. However, it soon became apparent that the position in respect of Andersen was not as had been conveyed to us by the Tribunal in a letter of the 17th

October and counsel for the Tribunal on Day 240. We sought further clarification from the Tribunal on the issue of Mr. Andersen's availability on the 23rd October, 2003; 31st October, 2003; 13th November, 2003; 27th January, 2004; 30th April, 2004; 15th June, 2004; 30th June, 2004; and the 7th July, 2004.

"On the 9th July, 2004, the Tribunal informed us that it was in the process of applying to the Danish authorities for an order compelling Mr. Andersen to make himself available to be examined in Denmark. This letter concluded with the commitment to keep us informed of the progress of this matter.

"Having heard nothing further, we wrote again to the Tribunal on the 15th October 2004, the 15th December 2004, and the 12th April 2005. The first confirmation that we received that there was no realistic prospect of compelling Mr. Andersen to give evidence, and hence indicating his likely nonavailability, was the Tribunal's letter of 16 June, 2005.

"In all the circumstances, we believe that the most appropriate course of action is for the Tribunal to set aside a day prior to the proposed recommencement of public sittings on the 20th September to have this matter fully debated and ruled upon by the Sole Member. We would respectfully suggest Tuesday, the 13th September, as the appropriate date, and we should be obliged if the Tribunal would confirm its willingness to hear submissions on this

date.

"I am taking the liberty of copying this letter to the various interested parties, as well as to the Attorney General representing the public interest, is to allow those parties an opportunity to prepare their own submissions and partake in this debate. As regards the making of a short written submission, we rely on the short written submission as forwarded.

"In the event that the Tribunal is unwilling to make time available for submissions and debate as set out in the preceding paragraph, it is, however, our client's right to apply to the High Court for the appropriate reliefs in relation to the procedures adopted by the Tribunal and also in relation to the consequences arising from the nonavailability of Michael Andersen to give evidence before the Tribunal. We trust that such a course of action will not be necessary and that we will be hearing from the Tribunal with the confirmation sought."

And here we are today making these submissions against a background where the Tribunal has indicated provisionally that it sees no difficulty a) about proceeding with the hearing of evidence in relation to the GSM process, and potentially doing a report, despite the unwillingness the availability of Mr. Andersen.

So Mr. O'Brien has in fact made detailed submissions in relation to this and is very concerned that the Tribunal should indicate clearly where the Tribunal is at in

relation to its procedures, with a view to clarifying what I would respectfully submit is confusion in relation to the attitude that the Tribunal may or may not have in relation to the unwillingness of Mr. Andersen coming to give evidence.

We have set out in our submissions the steps that we believe should now be taken in the light of the unavailability of Mr. Andersen. However, they are subsidiary to the fact that we believe that the GSM licence inquiry should effectively be wound up, and that the Tribunal should report to the Dail that it is unable to complete its inquiries by reason of the unwillingness of Mr. Andersen, and also by reason of the fact that to date no evidence of any interference by Mr. Lowry has been elucidated in relation to the GSM process.

Trying to place the application in respect of Mr. Andersen in the AMI context, it's important to remember that prior to commencing its public hearings, the Tribunal engaged in a preliminary inquiry to determine whether sufficient evidence existed warranting a full public inquiry into the second GSM licence. At the end of that preliminary inquiry, it was anticipated that the Tribunal might have indicated the nature of any allegations derived from that preliminary inquiry, and the evidence it proposed to call in relation to it, and the witnesses it proposed to call.

The Tribunal did furnish us with a list of witnesses and a list of statements, but has never, even to this date,

identified any allegations; indeed, quite the opposite.

The Tribunal has indicated time after time that there are no allegations being made against Mr. O'Brien or against any other party.

It's difficult, therefore, to understand why it is not true to say that the inquiry into the second GSM licence is being conducted to a large extent in the dark, and particularly so far as my client is concerned, because he is not aware, nor has he ever been made aware, of anything that is untoward about the GSM process.

On the 23rd January a discussion took place between yourself, Mr. Chairman, and myself following on something that was said by Mr. Healy, and I think it's useful to remember what that was. It was said, "Arising from what Mr. Healy has just said, may I inquire as part of the Tribunal's case, are they suggesting that Mr. Lowry in some way had an improper relationship or acted improperly within the subcommittee meetings in the process which has now been described? Because if it is not, I don't understand the relevance of a lot of this questioning."

In reply, Mr. Chairman, you said: "Well, nothing of that sort, as I understand it, is remotely being suggested. The facts are merely being inquired into, and as matters now stand, all I understand is being tested by Mr. Healy is his inquiry of Mr. Brennan as to views or rulings that were taken at different stages of the successive presentations. Could it be that this may have had some degree of influence

on the eventual outcome of the competition?

"Mr. McGonigal: But not as a result of anything which Mr. Lowry did if I understand him correctly, am I right in that?

"Chairman: There is no suggestion of that from evidence that's been made available to the Tribunal to this date."

That interchange, Mr. Chairman, took place in January of 2003. And we would submit that after three full years of public inquiry, our client my client is entitled to be informed of any allegations being made by the Tribunal. The Tribunal determined, on foot of its preliminary inquiry, that there was sufficient evidence justifying proceeding to public hearings in respect of the award of the second GSM phone licence.

What the Tribunal should now do is set forth what it believes should be any allegations which it says entitles it to continue with a public inquiry into the GSM licence. If that is done, then my client is in a position where he can properly defend himself against any of those allegations by way of cross-examination, by calling witnesses, or otherwise.

The problem that arises in relation to this is one which has been flagged by Mr. Fitzsimons: that if the Tribunal intends to, assuming it is allowed to produce a report that reflects negatively on my client in any way, the Tribunal hasn't indicated how it proposes to afford Mr. O'Brien the fundamental rights or the re Haughey rights which he is

entitled to. This is a matter which we say requires urgent clarification.

The failure of the Tribunal to outline these procedures it proposes to follow is in itself, in our respectful submission, a breach of fair procedures. The basic unfairness of it is evident from the fact that Mr. O'Brien currently has to cross-examine witnesses, effectively, in the dark. Should provisional adverse findings be made against Mr. O'Brien in a draft report, the Tribunal should be aware that we would be entitled to cross-examine all those individuals whose evidence form the basis for the provisional adverse findings, and the failure of the Tribunal to outline its allegations means that the Tribunal will most probably be faced with the farcical situation that any evidence supporting adverse findings will be subjected to further lengthy cross-examination.

At this stage, Mr. Chairman, we are entitled to know if this Tribunal is to continue with the GSM process, the allegations, the witnesses and the evidence which the Tribunal says it may rely on. And we say that is absolutely fundamental.

So far as continuing with the evaluation process, and if the Tribunal takes the view that it should not terminate its inquiry into the GSM module, it should, in our submission, take all the necessary steps to procure the evidence of Mr. Andersen and the other specialists consultants from AMI.

In the course of his opening, counsel for the Tribunal outlined the issues that the Tribunal intended to inquire into in the GSM licence. This showed that the Tribunal intended to examine in detail the evaluation model and process, together with the result of that evaluation. The result enabled Esat Digifone to be awarded negotiating rights in relation to the grant of the licence. There is no doubt that Andersen and his AMI team played a pivotal role in the evaluation process and the eventual result.

The importance of Andersen and his AMI team have been recognised by the Tribunal, first of all, in its letter of June 19th June, 2001, when you wrote that the Tribunal apprehends that you may be able to provide it with assistance in connection with its inquiries concerning the second Irish GSM licence, and in particular, in connection with the setting-up of and the conduct of the competition to evaluate the bids for the licence."

On the 7th February, Michael Andersen and Michael Thrane had a private meeting with the Tribunal. On the 12th February, following the meeting, the Tribunal wrote "I wish to thank you and your clients on behalf of the Sole Member for attending the meeting at Dublin Castle on Thursday last which the Tribunal found to be highly informative and of considerable assistance."

On the 10th April 2002, the Tribunal wrote: "In particular, it appears to the Tribunal, from a detailed consideration of the documentation to hand and from replies

to its inquiries received from civil servants and others involved in the evaluation process, that it may not be possible to divine from the documentation alone how the final evaluation result was arrived at. As you will appreciate, a clear understanding of this process is central to the Tribunal's inquiries, and the Tribunal believes that the most effective and expeditious way of arriving at that understanding is now to meet with your client together with Mr. Towey and Brennan in order to help the Tribunal with these issues."

Again on the 20th November, the Tribunal wrote: "In requesting the assistance of your client the Tribunal is not seeking to substitute you client for AMI but rather to rely on his own personal involvement in the process, and it is his personal ability to respond to queries concerning the process and documentation in the possession of the Tribunal that is of value."

On the 30th November 2002, the Tribunal wrote: "You will be aware that Mr. Andersen is an extremely important witness to enable the Tribunal to be able to examine aspects of the evaluation process, and in particular recollect the treatment of financial aspects of the various applications."

In relation to evidence given to the Tribunal, on Day 173, Mr. Brennan, the Chairman of the Departmental team, said: "I have a sense in which the Tribunal is now trying to get me to fill the gaps caused by the fact that Michael

Andersen seems not to be available, and that's putting me in a difficult position because I don't have access to the records."

He went on "It indicates that at that meeting a significant amount of work was going to be done on market development, tariffs, roaming, marketing aspects, financial aspect, management dimension, management aspect. Do I understand that you are a member of most of the sub-groups dealing with those terms?

"I think Mr. Fintan Towey is a member of all of them, I think. I don't know whether I was or not. I sat in on most of them. The financial I probably didn't sit in on, but I couldn't say that for sure. I mean, this was another one case where Andersens had records, it would help" i.e. the 300 documents which have not yet come to hand.

"But even if I sat in, I don't think I was in a leadership position because of my chairmanship of the Project Group, in the sense that different people had probed different matters in detail. I think, for example, it may have been obvious from the presentation meetings that the role of Maeve NicLoughainn was to focus on certain aspects on application and she should have led us when those came up for discussion in Copenhagen. My recollection is that in all cases, the driver of the discussion was first based on the view of the consultants."

Again Mr. Brennan said: "I am virtually certain that the quantitative valuation was carried out almost exclusively

by Andersens".

On Day 130, he said: "I mean, we have been around this a few times now. I can't give you any more information about it. I do appreciate the difficulty the Tribunal has by not having access to the consultants at this stage, but as I said once or twice before, I can't compensate for that."

On Day 228: "I must be communicating badly today. I am still trying to get across the message that in my mind, it would have been impossible to get a result from this competition respecting the descending order of priority without weighing. Now it may well be that Andersen International were of a different mindset. It may well be that they were focused on their own original model, which may have been designed without weighting. I said here before and I am saying now again, I can't compensate for the fact that he won't come and answer. All I can tell you is that is what I thought at the time, what I was thinking at the time."

There is no doubt that the issue of the absolute centrality of Andersen and the AMI team in this process has been repeated time and again by many witnesses from the Department of Transport, Energy and Communications and from the Department of Finance who have give evidence in public. It's never been contested the absolute centrality of Michael Andersen and his AMI team.

On the 14th January, 2004, you, sir, wrote to the Secretary General of the Government in relation to the evidence of

Michael Andersen and you stated, inter alia, that "He", Michael Andersen, "played a very significant role in all aspects of the competition, and especially in the evaluation process is not in doubt."

You went on to suggest some of the issues arising from the potential nonavailability of Michael Andersen and the AMI team, and although not being exhaustive, they included:

"1. It doesn't appear that the State insisted that Mr. Andersen obtain or put in place any insurance to cover his role in the second GSM licence.

"2. Mr. Andersen provided services to COMREG and its predecessor. It would appear that no insurance was put in place to cover his work with COMREG or COMREG's predecessor.

"Mr. Andersen therefore would appear to have been in no different a position to that of any other civil servant who would of course, absent any impropriety, be entitled to an indemnity from the State.

"The Tribunal anticipates that Mr. Andersen will be of considerable assistance should he give evidence. At least one of the witnesses to the Tribunal, Mr. O'Brien, through his counsel, has indicated that in the event that Mr. Andersen does not give evidence, we may wish to make certain submissions concerning the capacity of the Tribunal to reach any conclusions in the absence of Andersen's evidence. While the Tribunal believes it may have the power to put in place certain arrangements regarding

Andersen's costs, the question of indemnity for Mr. Andersen and/or Merkantil Data would appear to be clearly outside the ambit or power of this or any tribunal.

And lastly, you said, Mr. Chairman, that "The public interest will obviously have to be involved in these discussions, in light of the implications it may have for the cost of the work of the Tribunal and the capacity of the Tribunal to fulfil its remit."

So far as the inquiry in relation to the GSM process is concerned, we would suggest that at no stage has the Tribunal indicated why it is inquiring into the evaluation process and the result of the GSM2 competition. The Terms of Reference of the Tribunal require it to inquire into whether any payments were made to Michael Lowry, and if so, whether any acts or decisions were taken by Lowry on foot of such payments.

There is no evidence that the evaluation process conducted by Mr. Andersen and the other project teams were in any way interfered with, and that was recognised, as I have already drawn your attention to, on Day 172.

The Tribunal has at no stage stated that it is looking into the award of the second GSM licence in order to determine whether the competition for this licence was interfered with as a result of actions by Lowry. It is for this reason, again, that the Tribunal should state publicly why it is inquiring why it is intending to continue with its inquiries into the evaluation process created and managed

by AMI.

We would submit that in the absence of any evidence indicating that the evaluation process was interfered with by Lowry, the Tribunal's inquiry into the evaluation process is outside its Terms of Reference. And in our respectful submission, an explanation should be given at this time by the Tribunal.

Dealing with the AMI report, the evaluation carried out by AMI is described within the written evaluation report dated 25th October, drafted by AMI, upon which the result of the GSM2 competition was based. The Tribunal's view of this report was set forth in a number of its letters, and in particular its letter of the 26th March 2003 to solicitors for AMI.

On the 30th November, 2002, the Tribunal wrote to Michael Andersen's Danish lawyer and stated: "There is a very real potential that negative conclusions would be drawn concerning Mr. Andersen's involvement and the involvement in the process. It is only fair to warn you that this is a risk that this type of conclusion could be drawn in the absence of the evidence of your client, of the evidence of AMI Merkantil Data in connection with the process."

Now, I draw particular attention to that quotation, Mr. Chairman, because that quotation appears to pre-date the Bacon report, which was March of 2003, but it demonstrates that the Tribunal seemed, on what evidence it's not clear, to be forming a view in relation to

Mr. Andersen's involvement and the involvement of the process. The Bacon report is a date of March 2003, but on the 26th March, 2003, the Tribunal stated "The Tribunal has had an opportunity of further examining the AMI report relied on in the course of the GSM2 licensing process in Ireland. From the Tribunal's current reading of the report, it would appear that much of the analysis is unsatisfactory. Moreover, the Tribunal has obtained some expert assistance for the purpose of scrutinising the report, and this has confirmed the Tribunal's tentative view that the report appears to be flawed in a number of ways, and indeed may contain a number of seriously fundamental flaws. The Tribunal is anxious that your client should be afforded a full opportunity of responding to any queries concerning the report, and in particular, in circumstances in which conclusions may be reached which may reflect poorly on the authors of the report."

It's fair to say that the Danish solicitors representing AMI wrote to the Tribunal on the 12th May and pointed out that the Tribunal had failed in that letter to identify the seriously fundamental flaws, and the Tribunal doesn't appear to have dealt with that issue in any reply, nor has it dealt with it in this Tribunal.

On the 1st April, 2003, during the course of Mr. McMahon's evidence, counsel for the Tribunal made an unannounced statement, based apparently on expert assistance, which was described at the time as a sort of "It's not an Opening

Statement, but it's to some extent a statement of the status of certain aspects of the review being conducted by the Tribunal as of this moment."

This statement took up the entire day, and the transcript of the Supplemental Opening Statement offered an in-depth analysis as to the direction taken by the Tribunal in inquiring into the evaluation process. It dealt with various critical issues, including the evaluation model, the evaluation process, the development of the qualitative and quantitative criteria, and the weightings issue. That transcript is of critical importance in understanding the direction of the Tribunal's inquiries. And a brief summary of those can be found at page 8 of the transcript.

This statement by counsel was a presentation by the Tribunal of the result of its private analysis of the evaluation process. It is now apparent that this presentation was based on expert reports that had been furnished to the Tribunal, and in particular, the report of Peter Bacon & Associates dated March, 2003. This report and no reports were forwarded by the Tribunal to Mr. O'Brien or, as I understand it, to any of the other parties or witnesses, nor indeed was there their attention ever drawn to the existence of that report.

The Tribunal subsequently cross-examined 16 civil servant witnesses with questions that clearly sought to undermine and call into question the evaluation process, based, presumably, on the Bacon report. This was done in the

absence of any public evidence being adduced on the alleged flaws in the process and was evidently based on expert assistance obtained by the Tribunal in private, and which was never furnished to my client or, as I understand it, to any of the other interested parties. This Supplemental Opening Statement, when combined with the letter of the 26th March 2003 to AMI's solicitors, indicates the Tribunal had reached a tentative view on the evaluation process, and that this can be reported on in the final report, even though no evidence supporting such a finding has been introduced in public.

We believe this is most extraordinary and untenable.

Mr. O'Brien has recently become aware that the Tribunal has had in its possession a series of expert reports in relation to the GSM competition. Most of these were not brought to his attention and only came into his possession as a result of this current application in respect of Mr. Andersen. A list of these reports and the dates upon which they were generated and given to Mr. O'Brien's solicitors are set forth. And there are three reports listed, one by Moore McDowell and Rodney Thom of UCD, although I understand we got a letter this morning saying that the Tribunal did not have regard to that, because I am not sure they didn't have it or they didn't have regard to it; it's not absolutely clear.

Secondly was the report of a review of specified elements of the tender appraisal process used in the award of the

second GSM licence, dated March, 2003, furnished to Mr. O'Brien on the 1st September, 2005. And then evidence in response to specific questions arising from a review of the tender process used in the award of the second GSM licence dated January, 2005, which was furnished on the 16th March, 2005.

We have also outlined the reports from Mr. Andersen as to when they came into existence, and most of them were furnished to us in November 2002, except for one dated the 20th July, 2001, which wasn't circulated by the Tribunal.

It seems to Mr. O'Brien that what the Tribunal regards its function as is effectively including an audit of the competition and evaluation process that was managed by Michael Andersen and his AMI team, and we are submitting that it has no relevance unless it can be linked to interference by Mr. Lowry in return for payments, as identified in the Terms of Reference.

The Tribunal has never identified the issue as to whether the licence was awarded properly, whether the competition was carried out properly, or whether there was any interference with the process. In fact, the inquiry into the second GSM module has proceeded on the basis that the Tribunal inquiries into the areas like an audit for the purposes of determining whether any inconsistencies or flaws can be deciphered. The central issue in the GSM module of the Tribunal is whether or not the licence was properly awarded to Esat Digifone Limited. Mr. O'Brien has

on endless occasions submitted that Esat won the competition fairly and was the best contender. Mr. O'Brien believes that Mr. Andersen, the AMI team and the rest of the Project Team were of a similar view. In fact, Mr. Andersen has publicly stated that the quality and consistency of Esat Digifone's application with regard to the extent and content of the information provided is amongst the absolute best that AMI have seen during the many evaluations that AMI, at that time and since then, has participated in. Furthermore, he stated that it is also the opinion of AMI that Esat Digifone objectively, and after taking into consideration the issues of criticism mentioned below, handed in the best application as against the other applicants according to the evaluation criteria in their descending order of priority. In AMI's opinion, the evolution result nominating Esat Digifone as the winner, thus, was and is the right result.

Indeed, at a private meeting with the Tribunal on the 20th February, 2002, Mr. Andersen stated he had never seen a bid as well documented as that of Esat Digifone. He further apparently stated that the evaluators were impressed with Esat Digifone's preparation. He noted that AMI would categorise bids of being of three categories: off-the-shelf, local touch, and pre-implementation. Mr. Andersen confirmed that Esat Digifone's was very much in the latter category.

The above crucial evidence unavailable in the absence of

Andersen or any members of the AMI team would, in our opinion, be of considerable assistance in seeking to establish to this Tribunal that Esat Digifone's bid was the best, and that it properly won the competition. It is apparent, unfortunately, the Tribunal is currently of the opinion that AMI's evaluation process, which resulted in the competition being won by Esat Digifone, contained unsatisfactory analysis confirmed by its private expert reports.

This, in our submission, places Mr. O'Brien in an unfair position, and he identifies the unfairness as follows:

"1. The experts who have criticised the AMI report, whose criticism has been unconditionally accepted by the Tribunal, have not given their evidence in public and have not been made available for cross-examination. Mr. O'Brien was only furnished with the principal report of Peter Bacon on the 1st September, as a result of specifically seeking these reports from the Tribunal. Mr. O'Brien is also aware that the line of questioning of the civil servants on the evaluation process may have been derived, at least in part, from a report prepared for Persona.

And that is subject to the letter which we received from the Tribunal this morning.

Secondly, the Tribunal has no had the opportunity of hearing the evidence of Andersen and other members of the AMI team who would confirm the assessment of the evaluation provided, which was, that "in general, and based on the

information that was then and as of today is available to AMI, it is the opinion of AMI that for the part of the tender process that AMI was involved in the process was in the main carried out in a professional and correct manner."

Thirdly, although the Tribunal is prepared to seek expert assistance, resulting in criticism, it did not furnish Mr. O'Brien with these reports so that he had an opportunity to challenge these hidden views. It is worth noting that the bid submitted by Esat had previously been independently and rigorously assessed by one of the world's leading independent consultancy firms, PA Consulting, before being submitted. This independent assessment recognised the excellence and quality of the Esat Digifone bid.

As I have indicated, we only received the Bacon report on the 1st September, 2005, as part of this application, although it had been prepared in March 2003. However, a second Bacon report, dated January 2005, was given to O'Brien's solicitors on the 16th March, 2005. The status of these reports has never been clarified or explained, and the confusion as to their purpose is evident in the Tribunal's letter to Fry's enclosing the second report, where the Tribunal says: "Please find enclosed copy of a report obtained by the Tribunal from Messrs. Peter Bacon & Associates. The Tribunal has not as yet conclusively determined whether to deduce the contents of this report in evidence but, in the first instance, would be much obliged

for your client's comments, if any, on the report."

It appears the appalling prospect that the Tribunal believes that it can report that the evaluation process was fundamentally flawed, based on expert assistance not tested in public hearing. Furthermore, my client is faced with the appalling prospect that a Tribunal established to inquire into payments to Mr. Lowry would reach a conclusion that the evaluation process conducted by Mr. Lowry as Minister was fundamentally flawed. Even if one accepted that the evaluation process was fundamentally flawed, there is absolutely no evidence that those flaws, real or otherwise, were deliberate or were created for the purpose of awarding the licence to Esat Digifone as a result of any interference by Mr. Lowry.

However, any reader of a report would necessarily conclude that the fundamental flaws were in some respect linked to payments to Mr. Lowry. Mr. O'Brien submits that no public report should issue on the matter without hearing evidence from Michael Andersen and his AMI team and other experts relevant to the evaluation process.

We have submitted that the Tribunal should seek to obtain Mr. Andersen's evidence through the Danish court system under the procedure outlined in the opinion of the Danish lawyer. This course was recommended to the Tribunal by the Government in its letter of the 17th June, 2004. And the end of that letter, the Government says that "The financial exposure of the State arising from such contingent

liability is also material... Bearing all these factors in mind, the Government has taken the view that it would be both prudent and appropriate that all available legal procedures be exhausted before it makes a decision on the grant of an indemnity.

"Perhaps you would arrange for your counsel to communicate with counsel for the public interest the state of progress of any such court application that is commenced in Denmark."

On the 28th June, 2004, the Attorney General wrote asking two questions. "1: How long does it take to get a hearing from the Danish courts? Is it possible to get an expedited hearing?"

And secondly: "What information or facts have to be relied on by a witness before he can plead self-incrimination or before he can refuse to testify on the grounds advised in your opinion dated March 2004?"

In reply to the Attorney General, Chief State Solicitor, on the 2nd July, it was stated by the Danish lawyer "That a request from the Moriarty Tribunal to examine Andersen must be made through diplomatic channels. A request should be sent to the Irish Embassy in Copenhagen to be forwarded to the Danish Ministry of Foreign Affairs which will be forwarded to Danish Department of Justice which will forward the request to the local court where Mr. Andersen is domiciled. Based on information received by the Danish Ministry of Foreign Affairs, as well as from the Danish

Department of Justice, I expect this process to take approximately one or two months.

"When the request is received by the local court where Mr. Andersen is domiciled, it will depend on the schedule of that particular court when a hearing can take place. I would expect that a hearing may be completed within four to six months.

"In relation to the second question, the Danish Administration of Justice Act provides not specific rules as to what kind of information or which facts must be presented by the witness to the court if the witness refuses to give testimony. The court will decide based on each question and the witness's objection whether or not the witness may refuse to answer."

On the 18th June, the Tribunal wrote to Mr. Andersen's lawyers and stated that: "The Tribunal now proposes to consider making an application through the relevant Danish Ministry for an order from the Danish courts compelling your client to testify before the Danish court in relation to his role in the second GSM licensing process".

And on the 19th July, you wrote to Fry's saying, "Having taken the advice of Danish lawyers, the Tribunal is in the process of applying to the Danish authorities for an order compelling Mr. Andersen to make himself available to be examined in Denmark."

And on the 19th June, you further wrote to Mr. Pals, Mr. Andersen's lawyer: "I refer to previous correspondence

which I mentioned the Tribunal was considering making an application to the Danish authorities to compel Mr. Andersen to give evidence in Denmark. The Tribunal has instructed Danish lawyers to apply to the Danish authorities for the appropriate order. Whilst the process of making an application to the relevant authorities is in train..." etc.

"The position as outlined in those letters appears to be at odds with the actual position which existed. The Tribunal appears to have taken no steps as regards making an application to the Danish authorities. If the Tribunal believes that the Government does not have sufficient authority such that it should follow its recommendations, it is submitted that the Tribunal should revert to the Oireachtas to determine whether the Oireachtas, as the creator of the Tribunal, will grant an indemnity, or whether it wishes the Tribunal to proceed to seek the evidence of Mr. Andersen in Denmark irrespective of the delay that this may cause.

We submit that the Tribunal, although it has made efforts to obtain the evidence of Andersen, must invoke the Danish court procedure. It is noteworthy that the Tribunal appears to have taken steps up to October 2004 to inquire into the Danish court procedure; thereafter, it stopped, and determined that no application should be brought because it was likely to be unsuccessful, although to date there is no evidence of such a decision having been taken

by the Sole Member.

It should be noted that the Government stated in its letter of the 17th June, "Perhaps you'd arrange to communicate with counsel for the public interest the state of progress."

The Tribunal has even gone so far as to write its own negative opinion on the matter in which it asked the Danish lawyer to agree. In the light of the opinions of the Danish lawyer, the recommendation of the Government, and the obvious importance of Andersen and his AMI team, it is, in our submission, extraordinary that the Tribunal is refusing to seek his evidence in Denmark.

This, in our submission, raises questions as to the Tribunal's bona fides towards my client and fuels his fear the Tribunal simply wishes to conclude the Tribunal with a report that condemns the award of the licence.

We submit that the duty which is owed by the Tribunal is, in the first instance, to carry out the directions of the Government which has a majority in the Oireachtas because,

1) the recommendation of the Government that the evidence of Andersen should be sought in Denmark was, in our submission, made in the public interest.

Secondly, the recommendation of Government that the evidence of Mr. Andersen should be procured in Denmark was made in recognition of the right to fair procedures that parties before the Tribunal have.

Thirdly, the Tribunal informed Mr. O'Brien's solicitors

that they were taking steps to procure the evidence of Andersen in Denmark, and consequently the Tribunal should stand by what it agreed to do.

And fourthly, the Government recognises that Andersen and his AMI team, who devised and conducted the evaluation process, must be available to have a complete and fair inquiry.

In relation to the other AMI witnesses, I have set out in our submission in a detailed fashion the letters and material furnished by Andersen and his lawyers as to the usefulness which Michael Thrane, John Bruel, Ole Feddersen, Marius Jacobsen, Tage Iverson and Mikkel Vinter may be able to give to the Tribunal.

As far as we have been able to ascertain, there certainly appears to be no correspondence from the Tribunal to any of those people seeing if they would be willing and available, and also trying to ascertain to what extent, if at all, they might be in a position to assist the Tribunal as well as or in place of Mr. Andersen.

The Tribunal itself has, on numerous occasions, recognised that availability and the importance of those other witnesses from AMI. There is no evidence that any of them are looking for an indemnity, and there is no evidence that they will be unavailable to give evidence in respect of the evaluation process. There has been no explanation, good, bad or indifferent, as to why their evidence has not been sought, and it seems to us that as an added step, efforts

should be made to see what the position is in relation to the willingness, availability and otherwise of those witnesses.

It's unnecessary for me to go through Portions 8 and 9, because they are mainly legal submissions, and they have been reiterated time and time again

Subject to one quotation which I don't think has been used before, but I do think it is something that this Tribunal should consider, which is page 40 is a statement by the Chief Justice Keane in the Orange Communications case, where he said that "I have already emphasised the importance in a case such as this of the High Court recognising that the Oireachtas has entrusted the impugned decision to a body with a particular level of expertise and specialised knowledge for which the least is the capacity which the court has not to draw on such specialised knowledge, as the Director did in this case, by retaining the services of AMI. I have no doubt that wholly insufficient weight was given to that aspect of the case, both in the judgement under appeal and the submissions addressed to this court on behalf of Orange."

And it seems to me that regard should be had by the Tribunal in considering all aspects of the GSM process.

A matter which I do want to draw the Tribunal's attention to in the submissions is the issue of delay. We say delay arises in respect of two areas.

First of all, there is the general delay in relation to the

inquiry into the GSM module, and secondly, there is specific delay in respect of seeking to procure the evidence of Michael Andersen. We have drawn attention to the Terms of Reference that the Tribunal should report, on an interim basis, not later than three months from the date of establishment. And while the Tribunal has now been in operation for eight years, there has been no substantive interim report on any module, particularly the GSM module, other than an initial interim report which was made initially within the three months indicating at that time the parties and the progress.

The Tribunal has now been in operation for eight years, and the delay in the conclusion of its inquiry is having and has had a significant and detrimental impact on the international business reputation and operations of Mr. O'Brien. Since the establishment of the Moriarty Tribunal, Mr. O'Brien has become involved in the mobile phone business in the Caribbean through the company Digicel Caribbean Limited. Its business operation, including its applications for licences in various territories in the Caribbean, have been continually questioned by regulatory and other authorities as a result of what is presented as alleged wrongdoing being exposed by a Tribunal in Ireland. Repeatedly, through his counsel and solicitors, Mr. O'Brien has sought to inform the Tribunal of the damage it is causing to his reputation and business interests. We believe this has fallen on deaf ears. None of these have

been recognised and have been effectively dismissed with the anodyne statement the Tribunal is not making any allegations. Unfortunately, the Tribunal is not held to account by any institutions of State, and consequently leaves it as free to protract this inquiry for as long as possible, without having to consider the damage it may be causing to Mr. O'Brien or anybody else.

If the Tribunal had inquired into the GSM module in an efficient and speedy manner, the inquiry would be over, and a report would have been available long before now.

We believe that the delay of the Tribunal is inexcusable. During the course of the hearings into Doncaster Rovers, it was suggested that the Tribunal was prevented from continuing with its inquiry into the GSM module because of Mr. O'Brien's challenge to the Doncaster Rovers module. Notwithstanding the assertions of counsel that there was nothing to stop the inquiry into the GSM module continuing, no public evidence in respect of the GSM module has been adduced since April 2004. Mr. O'Brien submits that the Tribunal should explain what appears to be its inexcusable delay in continuing with the GSM module for a period of 17 months.

In relation to the procuring of evidence of Mr. Andersen, Mr. O'Brien submits that nothing has been done by the Tribunal between October 2004 and April 2005 in respect of procuring this evidence. In light of the statement from the Danish lawyer that such evidence could be procured

within a matter of four to six months, it is simply inexcusable that no steps had been taken by the Tribunal to initiate a Danish court application. Mr. O'Brien submits that a full explanation should be provided by the Tribunal for this inexcusable delay in seeking to make an application for the evidence of Mr. Andersen in Denmark, particularly in light of the clear directions in this regard as given by the Government.

Even at this stage the Tribunal must recognise the ongoing damage that its endless inquiry at this stage, running at eight years, is causing. At some stage, somebody must say "Stop." Somebody, sometime, must bring this inquiry to an end fairly and properly.

Mr. O'Brien has, to date, spent in the region of ï¿½6 million in retaining professional advisers to defend his reputation before the Tribunal. While Mr. O'Brien is a wealthy individual, no person, including Mr. O'Brien, should be placed in a position that such costs are necessary, particularly in the light of the Tribunal's excessive delay in carrying out its mandate.

It is submitted that the position enjoyed by counsel for the Tribunal, who are paid on a monthly basis, when contrasted with Mr. O'Brien's position of having to incur such significant costs over a four-year continuing period without any provision to recover costs on an interim basis, is unfair.

In conclusion, Mr. Chairman, Mr. O'Brien submits that the

absence of any evidence of wrongdoing in respect of the competition and evaluation process means that its inquiry should now stop. There is no evidence of wrongdoing justifying further inquiry. The Tribunal should report that the competition was clean and the best bid won. The Tribunal should recognise that in the absence of evidence from Mr. Andersen, the inquiry into the GSM cannot be completed and should now be stopped before further unnecessary damage is caused to Mr. O'Brien's constitutional rights.

Further and in the alternative, he submits that in the absence of any evidence indicating that the evaluation process was interfered with by Mr. Lowry, the Tribunal's inquiry into the evaluation process is outside its Terms of Reference. The Tribunal should explain why it proposes to continue with the inquiry into the evaluation process.

Further and in the alternative, Mr. O'Brien submits that the procedure it is following and intends to follow in respect of the evaluation process is unfair. He submits that the Tribunal should clarify what line of inquiry it is pursuing in respect of the evaluation process. It believes that the evaluation process was interfered with if it believes that the evaluation process was interfered with which Mr. Lowry, then this should be stated and the evidence for this interference should be introduced in a public hearing. Simply because the evaluation process contained flaws does not mean that it merits inquiry by the

Tribunal unless it can be linked to interference by Mr. Lowry.

The Tribunal should take further steps to procure the evidence of Mr. Andersen and the other AMI witnesses. And in particular, the Tribunal should revert to the Oireachtas advising it of the absence of Mr. Andersen and his request for an indemnity and asking them to indicate what steps should now be taken.

Equally, the Tribunal should inform Mr. O'Brien of the procedures it intends to follow in concluding this inquiry.

Those are my submissions Mr. Chairman, and I have taken perhaps the unnecessary time to read most of them out. While you may feel that was in disrespect of your ruling, it in fact should be borne in mind that this is the first time in 17 months that Mr. O'Brien has had an opportunity of saying anything publicly to this Tribunal. He engaged his lawyers to prepare the written submissions, and he believed it was important that they should be dealt with fully and openly in the public forum. He didn't feel that it was appropriate or sufficient that they simply be attended appended to a ruling by you, regardless of the nature of the ruling.

There is a public element to this Tribunal. It should not be forgotten. There is a public interest. Now and again the public are reminded of the amounts of money that they are paying for this Tribunal. It seems only right that Mr. O'Brien should have and take the opportunity of opening

in depth and in full his written submissions.

May it please you, Chairman.

CHAIRMAN: Thanks, Mr. McGonigal.

Mr. Nesbitt?

MR. NESBITT: May it please you, Mr. Chairman.

The submissions that have been led to you today are instructive in one way, I would submit, Mr. Chairman. I think everybody who has said something has been left in something of a vacuum. And that vacuum is because we don't know what this Tribunal proposes to do about the place it has reached. These public sittings are to hear evidence and have it tested. And heretofore every part of the GSM module has been prefaced by a very helpful indication by your legal team as to how what's going to occur will be orchestrated, the procedures of the Tribunal. And everybody has attempted to work within those.

The brief submissions that we have made to you are premised on the difficulty that we find ourselves in. We don't know what this Tribunal proposes to do to come to the end of this public-sitting module, and it's our suggestion that one way of getting there and looking after everybody's interests would be to have your legal team indicate what they propose to do about the position that has been reached.

The manner in which the Tribunal has operated heretofore appears to have presupposed that every witness that the Tribunal felt might be called to give evidence would turn

up. Given the length of time the Tribunal has been running, that probably was optimistic, and we now learn that Mr. Andersen, through his own decision, appears not to be going to come.

There has been substantial evidence given, and my clients, the Department, and the many civil servants who have come to give evidence, have put themselves into the witness box and have opened themselves to being asked questions and being cross-examined, and we say there is a wealth of evidence before this Tribunal to allow it conclude what it thinks is an appropriate position in relation to the process so far as the Department is concerned and those witnesses that gave evidence are concerned. It's a matter of the utmost disappointment that Mr. Andersen, for reasons that are never fully clear to us, is choosing not to come to give evidence, because that's what he has done. And the Tribunal should work on. Maybe some difficulties arise, and maybe the manner in which the evidence which has been given to date falls to be considered must be considered carefully by the Tribunal and its legal team, but the important thing is that can be done. But what we need to know as people who are being brought before the Tribunal is, what does the Tribunal propose to do about that? And I don't mean to be critical of where we have reached so far. But I would ask that this part of the Tribunal operate like all the other parts; that the Tribunal tell us what to do, not ask us what to do. And then we can make such comments

and make such submissions as are appropriate. Maybe none will be necessary; maybe some would be.

And I'd be asking you, Mr. Chairman, to seriously consider ask your legal team to put together a proposal as to how this module will be ended, that be delivered to those who are interested in the module, and they can make submissions as may be appropriate. If you feel it's necessary to have a further public hearing in relation to those submissions, so be it. But that would lead to a situation where the module was in a position to end.

And somewhat paradoxically, of all the witnesses who have given evidence on behalf of my clients, or civil servants who have been involved in my client, there has been none who has not supported the view that the process was honestly operated, that nobody seek to suborn them, and the decision that came out was a decision that they understood to be the appropriate result of their joint aspirations.

So the absence of Mr. Andersen or the attendance of Mr. Andersen, although being of interest, doesn't change the position of my client's witnesses who have come and give evidence, saying "This process worked, and there is nothing wrong with it".

Now, there is other people here today who have broader parishes than I have to represent, and they have made their submissions as best they can to the Tribunal. But I do sense a sense of not quite knowing where to go in some cases because they are not sure what this Tribunal wants to

do. That shouldn't be the case. This Tribunal should be indicating what it proposes to do and asking for submissions from them. I don't mean that in a critical way. I say it because having been asked to sit with my colleagues and try and prepare a set of sensible submissions to make today, that was a difficulty we ran into, and we found ourselves being uncertain as to where the best place to go was, to be as useful and constructive as we can be, to allow this come to an end.

So I would ask you, Mr. Chairman, to let us understand what is proposed to allow this module end, to finish taking evidence that is of appropriate probative value and can be used by the Tribunal to reach whatever decision it is going to reach. And that range of decision could be anything from, "Well, we have done the best we can, but we can't get to an end" to, "I can form an opinion, and this is where I have got to; I think these are likely to be the facts".

But what we are entitled to do, Mr. Chairman, is to know what is the process that is going to be applied to us, and then we can say something sensible about is it a good, bad or indifferent process, and the matter can come to an end.

The witnesses who have given evidence on behalf of the Tribunal have opened themselves to substantial comment in the media, as one would expect from a public Tribunal. They are now seeing somebody who is used in the course of examination as possibly being a source of some evidence that might be given in the future, not coming to the

Tribunal. The Department has done its best to persuade Mr. Andersen to come, and I think you very fairly indicated that in the words you said at the beginning of this module. But at the end of day, there has to be an end. And I would be inviting the Tribunal to indicate what it proposes, allowing us make any comment that is appropriate to ensure that the proceedings are fair, and that as quickly as possible, this GSM module come to an end.

CHAIRMAN: Thank you, Mr. Nesbitt.

Mr. Hogan, strictly speaking, I suppose your application falls outside the remit of the submissions sought. Are you proposing to make a general submission, or are these the matters in respect of which Mr. Shaw wrote to the Tribunal solicitor yesterday in regard to certain documents?

MR. HOGAN: Well it is both matters, sir. And I should preface my remarks by saying that we had in fact a submission prepared, but by reason of the developments which I was about to allude to in my submissions, we didn't think it appropriate to put in a submission, for those particular reasons.

But with your leave, sir, I would propose to make a submission to you now which would incorporate some of the matters alluded to by Mr. Shaw in his correspondence. And it's really to make about three points in roughly fifteen minutes or so.

CHAIRMAN: Well, I'll certainly facilitate you in that, Mr. Hogan. It was merely insofar as the documentary issue

may be partly distinguishable from a general submission, I would have been anxious to see if any voluntary endeavours between the parties may have assisted in resolving that particular situation before committing myself to giving a ruling on it, in the context of the letter only arriving yesterday. It did seem something that I would be anxious to see if you could be facilitated, and that an opportunity to perhaps discuss it with other persons involved might be helpful in that regard.

MR. HOGAN: Well, I am very grateful, sir, and I trust you won't mind me saying that with the greatest respect, we consider that somewhat belated, inasmuch as one of the submissions I'd be proposing to make to you now, sir, is there has been a very significant breach of fair procedures so far as my client is concerned.

But perhaps, with your leave, sir, I would make my submission, and then in the light of that, whether now or subsequently, if anything else arises that would be of assistance between the Tribunal and Mr. Desmond's legal team, that can be taken up.

CHAIRMAN: Very good. Proceed.

MR. HOGAN: If you please, sir.

In many ways, sir, I can't hope to improve on the very powerful and, if I may say so, quite telling submissions that have already been made by many of my colleagues, all of whom have spoken, if I may say so, with customary elegance and precision this morning and this afternoon.

And it's really to make three points that I can't really hope to improve on what they have said.

But the first thing that I would respectfully wish to draw to the attention of the Tribunal is this: that, as Mr. Fanning so powerfully pointed out to you this morning, and as has been echoed by other of my colleagues as well, that one must have regard to the Terms of Reference which established this Tribunal. Because paragraph 1(g) makes it absolutely clear that this is not a free-standing inquiry into the award of the second GSM licence, although on many occasions, and even to this day, the impression could be created that this is precisely what the Tribunal is doing. Instead, the Oireachtas very carefully and very precisely said that the function of the Tribunal, under paragraph 1(g), is to see whether there is any act done by Mr. Lowry qua minister which amounted to malfeasance or corruption or untoward action on his part.

In this regard, one must, I think, observe that it is quite immaterial that the second GSM competition was not as full or complete, or that there was defects, or that it could have been done better. Even if all of those things be true, and I'm not for a moment to be taken as conceding that it is true, but even if all of those things were true, it would be absolutely nihil ad rem to the functions of the Tribunal. Even if everything that Professor Bacon said in his various reports of which more in a moment even if everything that he said was correct, it would be absolutely

and quite irrelevant to what the Tribunal is empowered and enjoined to do by the Terms of Reference.

In my respectful submission, that is so self-evident, but one poses the question: Why is that so? The answer, very simply, is this: that this Tribunal can only inquire into the second GSM licence insofar as there are allegations or even suggestions that it has been corrupted or compromised in some way by the actions of Mr. Lowry.

And I echo a point that has been so tellingly made by many of my colleagues this morning and this afternoon. Unless I am greatly mistaken and with great respect, I do not believe that I am unless I am greatly mistaken, there is simply no evidence that has been adduced to date, in the 130-odd days which the Tribunal has sat on this particular module, which suggests even remotely that there has been any evidence of a compromising of appropriate professional and ethical standards in relation to the running of the competition.

And if I am wrong in that, can somebody, I respectfully ask, point out to us what that evidence conceivably is?

Now, I say that that is a fundamental point which is so often lost sight of in this Tribunal, but it's relevant to today's application.

Now, against what again to pose the question, what is today's application all about? It is about the absence, doubtless profoundly regrettable, of Mr. Andersen, who doubtless can give important evidence in relation to the

running the way in which the competition ran. But, in my respectful submission, this entire business, with the greatest possible respect, has an Alice in Wonderland quality about it, for this reason, that nobody is suggesting nobody has suggested and nobody could suggest that Mr. Andersen or AMI behaved other than in a thoroughly professional fashion. Nobody is suggesting or nobody could suggest that there was any question of impropriety on their part.

So therefore, all that Mr. Andersen will be coming to give evidence about is in relation to what Mr. Bacon regards as apparently flaws or unsatisfactory features of the second GSM licence. But, in my respectful submission, and certainly at this stage, 130-odd days into the module, it would be quite that is quite irrelevant to the functioning of the Tribunal, and this is quite irrelevant, certainly at this stage, to the capacity of this Tribunal to arrive at a conclusion.

And I respectfully echo the calls that have been made by various parties this afternoon that at this stage, the Tribunal should simply wind up and come to a conclusion on this particular module. Because it is clear, beyond peradventure to everybody, that there is simply no evidence that the integrity of the Tribunal was in some way being the integrity of the competition was in some way being corrupted.

If, for example, there was some suggestion, bizarre almost

as it might be, and certainly overwhelmingly improbable, but if there was even some suggestion that there was an allegation against AMI or Mr. Andersen, then perhaps in that situation one could say, "Well, let us hold fire until Mr. Andersen comes to give evidence, because at last, after 130 days, we may finally have the evidence which shows which is directly or even indirectly referable to paragraph 1(g) of the Terms of Reference".

But there is no such suggestion. I do not understand any suggestion being made by the Tribunal that evidence of this kind could conceivably be led, or will be led, or that it's any part of the Tribunal's case.

And instead it would appear that the Tribunal's the Tribunal is presently engaged in a quite different process of examining the second GSM licence procedure to see whether not whether there was any corruption, not whether there was any suborning of the members of the Competitive Evaluation Team, or anything of the kind, but rather to see whether or not the process was conducted up to best international standards, or whether this bit was flawed or that bit of the evaluation could have been improved.

As I have said earlier, and I think Mr. Desmond's legal team has submitted both here and elsewhere, that type of evidence, in our respectful submission, is wholly irrelevant to the function which the Tribunal is required to discharge. And it is against that background, sir, that

I say that at this stage, the Tribunal should simply bring the GSM process to an the GSM process, this module, to an end, on the basis that further hearings would, with great respect, be a waste of public resources. It would result in a further waste of public time and energy in pursuing a matter where there is a sort of a Holy Grail here of an allegation of corruption, but simply there is no evidence has been adduced to date, nor is it in any way likely that any such evidence could conceivably be adduced. And at this point, 130 days onwards, it is, in our respectful submission, incumbent on the Tribunal at this stage to bring this process to a halt; to say, as has been said by Mr. Fanning and others, that Mr. McGonigal, that the process is clean and there is simply no evidence whatsoever of any corruption or impropriety of any kind whatever.

All of that, sir, is really by way of preliminary to a point that I was more fundamentally going to make today, which is this: that the reason why we have not made our submissions in writing to the Tribunal is that I regret to say that I must protest in the strongest possible terms that we consider there has been a manifest breach of fair procedures so far as Mr. Desmond is concerned. There is an echo, I think, of this in some of the submissions that have been made by my colleagues, but really, I must protest, I regret to have to say, in the strongest possible terms to the way in which the procedures have been conducted. And

there is really two aspects of this which to which Mr. Desmond takes very serious and grave objection. The first is this, is that it now is clear as many of my colleagues have pointed out to you, and I won't weary you by repeating this objection but it's now clear that the Bacon report was in the possession of the Tribunal since March, 2003. My clients, for example, gave evidence over a year later, and yet we did not have possession of the Bacon report, even though it clearly has been to date influential in some of the thinking on the part of the Tribunal. And with great respect, we cannot understand why the Bacon report was not disclosed to all relevant parties when it was first produced to the Tribunal in March, 2003.

And there is a second matter which equally, in our respectful submission, amounts to a very serious breach of fair procedures, and it relates to the dealings between the Tribunal and its legal team and Mr. Andersen.

Now, we, as you know, sir, we had prepared submissions by the end of August, but it is only since the 1st September onwards again, regrettably, in dribs and drabs evidence has come into our possession, courtesy of the Tribunal, which shows that the Tribunal had dealings with Mr. Andersen and that among those dealings, inferentially at least, must have been discussions in relation to the position of my client. I say "inferentially at least" because it's clear that among the documents which were sent by the Tribunal to Mr. Andersen, and Mr. Andersen's lawyer

in Copenhagen included the letter of the 29th September 1995, and Donal Buggy's report. They clearly relate to the position of Mr. Desmond and IIU.

Now, to date, we don't know what was said between the Tribunal and Mr. Andersen in relation to this and other matters, even though it is clearly pertinent and relevant to my client's situation. And the reason we don't is because of a confidentiality agreement between Mr. Andersen and the Tribunal.

And in our respectful submission, that confidentiality agreement cannot, as a matter of Irish law, override or qualify or derogate in any way from my client's fundamental rights to fair procedures, and in our respectful submission, we are entitled to this information. The failure on the part of the Tribunal to disclose it, or even to disclose its existence, amounts to, I regret to say, a manifest breach of fair procedures, and it is a matter that my client and his legal advisers will, if necessary, take up with the Tribunal in relation to this particular matter.

Now, in this regard, the breach of fair procedure is compounded, again I regret to say, by the delay which many of my colleagues have also alluded to. There has been it's been pointed out the last public sessions of the Tribunal in relation to this module took place in April, 2004. My clients gave evidence in March of 2004, and there is certainly one matter in relation to one witness which bears very directly on Mr. Desmond, and yet it seems that

that witness has not yet been recalled, and there has been a somewhat mysterious delay between April 2004 and September 2005. And I have to say, sir, against that background, again, it is really very difficult to understand or justify the fact that the Tribunal at all stages had in its possession the Bacon report, the latest or original version of which was only disclosed to us last month, and also clearly has had discussions in relation to matters concerning our client, at least inferentially, from the documentation, and that has still not been disclosed to us. In fact, even the very existence of that documentation and the correspondence only came to our attention within the last seven to nine days.

And in my respectful submission, having regard to the decision of the Supreme Court in O'Callaghan v. Mahon, that is a clear breach of fair procedures.

Therefore, it's against that background, sir, again, I very much regret to say that the confidence of my client in the entire process has not been enhanced either by this delay or by this failure to have timely disclosure, and therefore, for that reason, we must, a) reserve our position until we see the documents, and b) request that the documents be produced regardless of any confidentiality agreement between Mr. Andersen and the Tribunal.

But more fundamentally than all of that, I return to this point, which has been so tellingly made by my colleagues, and whose elegance I cannot possibly hope to emulate, but

it is nonetheless this simple fact, that after 130 days, there simply is no evidence of impropriety on behalf of on the part of Mr. Lowry. And that is a fundamental, telling, critical fact which surely, in my respectful submission, even at this late stage, must induce the Tribunal, irrespective of Mr. Andersen, irrespective of anything else, now to discontinue its investigations and discontinue this particular module and to arrive at a conclusion that the process was not compromised by Mr. Lowry in any way, and that the Tribunal should proceed to make a positive finding which will lift the cloud which is hanging over my client, and indeed other witnesses, even though of course the Tribunal goes to some lengths to assure us that there are no allegations against my client. Well, it is true that there are no allegations against my client and no allegations have been made, even at this stage. But nonetheless, the reputation of my client, and perhaps more fundamentally other persons represented by other colleagues in this hall against whom no specific allegations have been made, all of that requires that they be positively vindicated, that their good names be vindicated as quickly as possible.

And that means, sir, even at this late stage, this Tribunal should, without further ado, without further waste of public resources, come to a speedy and immediate end with such a finding.

Those are my respectful submissions.

CHAIRMAN: Thank you, Mr. Hogan.

Mr. Coughlan, I had indicated that of course it would be inappropriate that Tribunal counsel make a submission, for obvious reasons. But is there anything you wish to state in relation to any matter that may have arisen?

MR. COUGHLAN: No, sir.

CHAIRMAN: Well, I am obliged to the persons who have attended for their submissions, which I will consider very seriously and proceed to issue a ruling, as I have indicated, before the end of next week.

It may be, Mr. Hogan, on the ancillary matter that you have raised, I may wish to explore matters of privilege, and it may be that I will defer that for some period. But I'll deal with the substantive matters and rule accordingly before the end of next week.

Thank you.

THE TRIBUNAL ADJOURNED UNTIL FURTHER NOTICE.