



Chestvale Properties Limited

Hoddle Investments Limited

Houses of the Oireachtas

DAIL ÉIREANN
- 7 OCT 1992
ON ORDER PAPER

INTERIM REPORT



Chestvale Properties Limited

Hoddle Investments Limited

INTERIM REPORT

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Christvale Properties Limited

Hodder Investments Limited

Houses of the Oireachtas
INTERIM REPORT

THE HOUSES OF THE OIREACHTAS
COMMISSIONERS OF THE GENERAL LAND REVENUE
INTERIM REPORT
1997-1998

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PRINCIPAL NAMES AND DEFINITIONS

<u>Name</u>	<u>Description</u>
AIIM	AIIM Nominees Limited, a shareholder in UPH, as nominee for a registered property unit trust called The Allied Irish Property Fund.
Amarac	Amarac Limited, Amarc Holdings Establishment, an entity or nominee, associated in some way with Freezone and being the reference of an account in Bank Scandinave en Suisse, Geneva, in the name of M. Andre de Pfyffer Etude
Ansbacher	Ansbacher Bankers Limited, lenders to Chestvale, Delion, Freezone, Dagord and Mr. Desmond.
Ansley Trust	A Channel Islands trust, being the owner of Ansbacher and having among it's trustees, Mr. Moloney, M. Andre de Pfyffer and Mr. Lipper.
Aylesbury	Aylesbury Securities plc, a UK property company.
Messrs. Aylmer & White	James Aylmer and Ronan White senior executives of Woodchester Investment Bank (formerly called Trinity Bank)
Bacchantes	Bacchantes Limited, owner of shares in UPH in trust for Dr. Smurfit.
Mr. Barry	Kevin Barry, senior executive of NCB Group and director of UPH.
Mr. Bruncker	Eric Bruncker, partner in Conveyancing Department of A & L Goodbody, acted for UPH.

<u>Name</u>	<u>Description</u>
Mr. Buckley	Michael Buckley, former senior executive and subsequently managing director of NCB Group.
Mr. Bourke	John Bourke, accountant, employee of John Magnier/Coolmore Stud.
Cablelink	Cablelink Limited, majority control of which was acquired by Telecom in June 1990 and the freehold of whose premises adjoining the JMOB site was acquired by Telecom in July 1990.
Mr. Cavanagh	Tom Cavanagh, apparent beneficiary of Company Holdings Limited and Convoy Trust a registered owner of shares in UPH.
Chestvale	Chestvale Properties Limited
Clayform	Clayform Properties (Wales) Ltd, a Welsh property holding company.
The Companies	Chestvale and Hoddle
Mr. Conan	Roger Conan, secretary of Dedeir and personal assistant of Mr. Desmond.
Mr. Cooney	Terry Cooney, a former partner in Bastow Charleton, Chartered Accountants and tax adviser to Chestvale, Hoddle and Delion.
Crampton Site	Re site on Shelbourne Road, Ballsbridge, Dublin 4, owned by G. & C. Crampton Limited.
Dagord	Dagord Limited, subsidiary of Dedeir.

<u>Name</u>	<u>Description</u>
Dedeir	Investment holding company of Mr. Desmond.
Delion	Delion Investment Dealings Limited, a company registered in Cyprus.
Mr. Desmond	Dermot Desmond, former executive chairman of NCB Group.
Dermot Desmond loan	Loan from Ansbacher to Dermot Desmond of £500,000.
DIBOR	Dublin Inter Bank Offered Rate (of interest).
DM	Deutschmark
Mr. Doherty	Patrick Doherty, a London property developer
Mr. Economides	Principal of Totalserve Management Limited, secretarial company in Cyprus.
Emmets	R. & J. Emmets plc
Mr. Finnegan	John Finnegan, principal of Finnegan Menton Estate Agents who acted for UPH in relation to the JMOB site.
Mr. Fitzgerald	Liam Fitzgerald, Managing Director of Financial Coursewear Limited, a subsidiary of Dedeir.
Ivor Fitzpatrick & Co.	Solicitors to Dermot Desmond; involved in obtaining UPH as a shelf company from a company formation agency but not engaged as solicitors to the company.
Fitzwilliam	Fitzwilliam Trust Company, a company owned by Noel Smyth personally.

<u>Name</u>	<u>Description</u>
Freezone	Freezone Investments Limited, registered in the Isle of Man, registered owner of shares in Emmets and recipient of some of the proceeds of the sale of the JMOB site to Telecom.
Mr. Gilmartin	Michael Gilmartin, Senior Executive of Irish Intercontinental Bank.
A & L Goodbody	Solicitors to UPH, JMOB and Mr. Grace.
Mr. Goodman	Laurence J. Goodman
Mr. Grace	Tom Grace, partner in Craig Gardner Chartered Accountants and liquidator of JMOB.
Hamilton Osborne King	Estate Agents, acted for JMOB.
Mr. Hall	Eamonn Hall, a solicitor in Telecom.
Mr. Hannigan	Ronan Hannigan, a solicitor in Noel Smyth & Partners and former director of the Companies.
Mr. Hassett	Padraic Hassett, principal of Hassett & Associates and shareholder in UPH.
Hill Samuel London	Hill Samuel & Co. Limited, lenders to Freezone.
Hill Samuel Ireland	Hill Samuel Bank (Ireland) Limited, sub-participants in loan to Freezone.
Hoddle	Hoddle Investments Limited.
ICC	Industrial Credit Corporation plc.

<u>Name</u>	<u>Description</u>
Mr. Johnson	Michael Johnson, Director of Telecom elected by Telecom employees.
JMOB	Johnston Mooney & O'Brien Limited, former owner of the JMOB site.
The JMOB Site	
"The Site"	Site comprising 5.5 acres (approximately) at Ballsbridge, Dublin 4, formerly owned by JMOB and ultimately sold to Telecom.
Ms. Kenny	Assumpta Kenny, solicitor in Noel Smyth & Partners.
Mr. Kenny	Kevin Kenny, partner in Ernst & Young, Chartered Accountants in Cork and tax advisers to UPH and to Mr. Cavanagh.
Lennon Heather & Co.	Solicitors for Probets and Freezone.
Mr. Lewis	Joseph Lewis, resident of Lyford Cay, Bahamas and apparent beneficial owner of shares in UPH.
Mr. Lipper	Jerome Lipper, an American lawyer and at one time, a trustee of Ansley Trust and chairman of Ansbacher.
Lipper Consortium	A consortium of investors who invested in property in London, which included Mr. Smyth, and for whom Mr. Smyth acted as solicitor.
Mr. Magnier	John Magnier, bloodstock owner and trustee of John Magnier Family Trusts for which Sulzano acted as nominee shareholder in UPH.
Mr. Matthews	Robert Matthews, associate director of Ansbacher.

<u>Name</u>	<u>Description</u>
Ms. Meehan	Ita Meehan, director of Telecom and Chairman of the Telecom Superannuation Fund Trustees.
Mezzanine Finance	Amounts of £1,000,000 and US\$1.5 million transferred to Ansbacher on 10th August 1989 and 7th December 1989 respectively.
the Minister	the Minister for Industry and Commerce.
Mr. Moloney	Gabriel J. Moloney, managing director of Ansbacher.
Messrs Moriarty & McIntyre	Michael Moriarty and Harry McIntyre senior executives of Bank of Ireland.
Mr. McDonagh	Bernard McDonagh, Secretary, Department of Communications, Chairman of Telecom Inquiry.
Mr. McGovern	Fergus McGovern, chief executive of Telecom Eireann.
Mr. McManus	J.P. McManus a bookmaker and bloodstock owner.
NCB, NCB Group	NCB Group Limited, a group of companies in the stockbroking, moneybroking and financial services areas in Ireland.
Ms. O'Connor	Maire O'Connor, senior executive in NCB Corporate Finance Limited, part of NCB Group.
Mr. O'Connor	Tom O'Connor, partner in the Conveyancing Department of A & L Goodbody, acted for JMOB and Mr. Grace as liquidator of JMOB.

<u>Name</u>	<u>Description</u>
Mr. O'Neill	Dan O'Neill, Head of Telecom Property and Service Quality Department.
Mr. O'Halloran	Brian O'Halloran, partner in Brian O'Halloran & Partners, architects to Telecom in relation to the JMOB site.
Mr. O'Nuallain	Rory O'Nuallain, senior executive of ICC.
Ms. O'Toole	Pauline O'Toole, senior lending manager of Ansbacher.
Office Site	Part of the JMOB site comprising approximately 3.5 acres on which Telecom proposed to build offices.
Mr. Osborne	James Osborne, Partner in Commercial Department of A & L Goodbody, acted for UPH.
Mr. Pairceir	Seamus Pairceir, former chairman of UPH who resigned at a board meeting on 1991.
Pegasus	Pegasus Nominees Limited, a nominee company owned by Ansbacher.
Pepper Canister Nominees	Pepper Canister Nominees Limited, a nominee company owned by Ivor Fitzpatrick & Company and registered owner of shares in UPH.
Mr. Probeta	Colin Probeta, resident of Guernsey, apparent lender of funds to Chestvale and apparent owner of Freezone.
Messrs Quinn and Naughton	Lochlann Quinn and Martin Naughton, beneficial owners of shares in UPH and lenders to Dermot Desmond.

<u>Name</u>	<u>Description</u>
Mr. Rothwell	Eamonn Rothwell, former senior executive of NCB Group.
Residential Site	Part of JMOB site comprising approximately 2 acres, sold to Telecom but subject to option to Hoddle to buy back and intended for use for residential development.
Sisk/Burton	Proposed joint venture between John Sisk & Son Limited and Burton Property Trust submitted a tender to Finnegan Menton to acquire JMOB site.
Dr. Smurfit	Dr. Michael Smurfit, former Chairman of Telecom and beneficial owner of shares in UPH through Bacchantes.
Smurfit Paribas	Smurfit Paribas Investment Management Limited, registered owner of shares in UPH in trust for Jefferson Smurfit Group Pension Fund.
Messrs. Robinson & Smith	Richard Robinson, chief executive and Fergus Smith, senior executive of Lombard & Ulster Bank Limited
Mr. Smyth	Noel Smyth, principal in Noel Smyth & Partners, former shareholder in Delion and director of Chestvale, Hoddle and Delion.
Noel Smyth & Partners	Solicitors for Chestvale, Hoddle and Delion.
Sportsfield	Sportsfield Equipment plc, a company registered in Ireland and quoted on the Smaller Companies Market of the Stock Exchange.

<u>Name</u>	<u>Description</u>
Mr. Strudwick	Roy Strudwick, principal of Ryde Developments plc, a property developer and owner of Sweepstake site at Ballsbridge.
Sulzano	A limited liability company, acted as nominee shareholder in UPH for John Magnier family trusts.
Telecom	Bord Telecom, State telecommunications company and purchaser of JMOB site.
Telecom Inquiry and and Telecom Report	The inquiry conducted by Mr. McDonagh in September 1989 at the request of the Minister for Tourism, Transport and Communications into all aspects of the acquisition by Telecom of the JMOB site, and the report arising from that inquiry.
TSB	Trustee Savings Bank Dublin having a branch and it's head office at 114 Grafton Street, Dublin 2.
UBS	Union Bank of Switzerland.
UPH	United Property Holdings Limited.
Mr. Walsh	Gerard Walsh, Chartered Surveyor, former managing director of Aylesbury and former acting managing director of UPH.
Mr. Waters	Tony Waters, managing director of NCB Property, part of the NCB Group.
Mr. Watson	Gary Watson, senior executive of Hill Samuel Bank London.

Chestvale Properties Limited
Hoddle Investments Limited ("the Companies")

1.0 Introduction

1.1 Terms of Appointment as Inspector

I was appointed Inspector of the Companies by the Minister for Industry and Commerce on the 9th October 1991 in the following terms:

"The Minister for Industry and Commerce, Mr. Desmond J. O'Malley, TD, in exercise of the powers conferred on him by section 14 of the Companies Act, 1990, being of the opinion that there are circumstances suggesting that it is necessary in the public interest, hereby appoints Mr. John A. Glackin as Inspector under the said section to investigate and report on the membership of Chestvale Properties Ltd and Hoddle Investments Ltd and otherwise with respect to these companies for the purposes of determining the true persons who are or have been financially interested in the success or failure (real or apparent) of these companies or able to control or materially to influence the policy of these companies. Without prejudice to the generality of the foregoing, the investigation shall extend to the investigation of any circumstances suggesting the existence of an arrangement or understanding which, though not legally binding, is or was observed or likely to be observed in practice and which is relevant to the purposes of the investigation."

As is apparent from the terms of the Warrant, the duties imposed are much wider than simply ascertaining who were the members of the Companies. The Warrant follows the wording of Section 14, Sub-Sections (1) and (4) of the Companies Act, 1990 which recognises that corporate entities can be structured in such a way, that the parties having actual control or influence or who have a financial interest in the

success or failure of a company, need not appear on any share register, Companies Registration Office records or even on any other record or document, but may rely, to protect their real interest, on understandings or arrangements with nominees or trustees and through a series of other companies or trusts either domestic or offshore and often in "tax havens", where the perceived protection of secrecy is part of the attraction. The breadth of the terms of the Warrant, as interpreted by me, has given rise to a number of court proceedings, pursuant to which the High Court and the Supreme Court considered inter alia the parameters of the Warrant and consequently of the relevant provisions of Section 14 of the Companies Act, 1990 and determined that such parameters were not being breached by the conduct of the investigation to date. A copy of the Warrant of Appointment is attached as Appendix 1.

1.2 Background

The Inquiry arises out of the acquisition in June 1990 by Telecom Eireann ("Telecom") of a site at Ballsbridge, Dublin 4 for a corporate headquarters ("the JMOB site"). Telecom paid £9,400,000 for the site. The liquidator of JMOB, the then owner of the site, was paid £4,000,000 for the same site on 11th August 1989 by Chestvale, pursuant to a contract, entered into on the 24th November 1988, between JMOB and UPH for the sale to UPH of the same site for £4,400,000. The site was the subject of a series of transactions between UPH, Chestvale, Hoddle and Delion between June 1989 and May 1990 before being sold to Telecom.

1.3 Brief Chronology

12th August 1988: UPH incorporated as Dance Investments Limited.

26th August 1988: Finnegan Menton offer (in trust) £4,000,000 by

- way of indicative tender for the JMOB site.
- 24th November 1988: New tender by Finnegan Menton of £4,400,700 for JMOB site, accepted by JMOB.
- 5th January 1989: Scheduled closing date for purchase of JMOB. Not complied with.
- 6th February, 1989: Meeting of Mr. Finnegan and Mr. Walsh and discussion re plans for JMOB site.
- 14th - 21st February 1989: Split in UPH between NCB and Aylesbury
- 28th February 1989: Liquidator appointed to JMOB.
- 14th April 1989: Agreement reached between Mr. Desmond on behalf of UPH and liquidator of JMOB to vary existing agreement.
- 28th April 1989: Finnegan Menton sent out brochures seeking offers to acquire UPH contract for JMOB site, with UPH to retain "participation".
- 5th May 1989: Dr. Smurfit wrote to Mr. Finnegan and Mr. Hassett jointly and to Mr. Strudwick of Ryde International stating that Telecom required a site for a new corporate HQ and seeking their assistance.
- 17th May 1989: Mr. Smyth submitted a proposal to Mr. Desmond outlining the type of development that he thought could be carried out on the JMOB site.
- 9th June 1989: Dr. Smurfit proposed to Telecom board that a site be sought for a corporate HQ and a sub-committee was formed of Dr. Smurfit and Mr. Johnson.
- 19th June 1989: Mr. Smyth made an offer of £6.3 million for JMOB site, £4 million cash on 31/7/89 and loan note of £2.3 million payable in 1993.

- 3rd July 1989: A & L Goodbody solicitors for UPH notified that agreement reached with Mr. Smyth.
- 31st July 1989: Time made of essence of agreement between liquidator of JMOB and UPH with closing date refixed for 11th August 1989.
- 10th August 1989: £1 million received in account of Noel Smyth & Partners at Ansbacher from UBS in Geneva.
- 11th August 1989: Chestvale paid £4 million to liquidator of JMOB who executed a deed of conveyance of the JMOB site in favour of Chestvale. Chestvale borrowed £3 million from Ansbacher and used £1 million in Noel Smyth & Partners account. Escrow agreed until 1st September 1989.
- 15th August 1989: Mr. Finnegan showed JMOB site to Dr. Smurfit.
- 18th August 1989: Dr. Smurfit sent another joint memorandum to Mr. Finnegan and Mr. Hassett stating that he required information before the end of the year.
- 1st September 1989: Escrow period expired and deed of conveyance delivered to Mr. Bruncker solicitor for UPH. Difficulties with tax structure of the transaction noted.
- 6th September 1989: Telecom Board Meeting. Before or after meeting Mr. Johnson asked to look at the Crampton site. Dr. Smurfit became Chairman of Superannuation Committee of Telecom Board.
- 16th October 1989: Mr. Finnegan sent a fee note to UPH for sale of site.
- 17th October 1989: Mr. Finnegan showed JMOB site again to Dr. Smurfit.
- 24th October 1989: Dr. Smurfit wrote to Telecom Pension Fund Trustees re sale of Gaiety Centre and purchase

- of site for Telecom corporate HQ.
- 27th October 1989: Loan arranged by Messrs Quinn and Naughton for Mr. Desmond.
- 29th November 1989: Ansbacher issued revised loan offer to Chestvale of £4.5 million.
- Mr. Desmond visited Dr. Smurfit in Blackrock Clinic and discussed JMOB site.
- Mr. Johnson visited Dr. Smurfit in Blackrock Clinic and visited JMOB site, Crampton site and Sweepstake site.
- 30th November 1989: Dr. Smurfit wrote to Mr. Desmond offering £7.5 million for 4.5 acres of JMOB site.
- Dr. Smurfit wrote to Fergus McGovern enclosing copy of his letter of even date to Mr. Desmond.
- 5th December 1989: Dr. Smurfit wrote to Mr. McGovern requesting him to visit the site with Mr. Desmond.
- Pension Fund trustees replied to Dr. Smurfit rejecting his suggestions but proposing an alternative.
- 7th December 1989: \$1.5 million received in Ansbacher from AIB (CI) Limited, Jersey and credited to Delion on 22nd December 1989.
- 15th December 1989: Telecom board meeting authorised management to enter into negotiations for purchase of JMOB site.
- 21st December 1989: Mr. Desmond wrote to Mr. McGovern setting out purchase options.
- 2nd January 1990: Executive committee meeting of Telecom notified of proposed purchase of JMOB site for a corporate HQ.
- 9th January 1990: Mr. Desmond wrote to Mr. McGovern stating that the best price he could obtain was £9.4

million for the entire site with a buy back option to the vendors of part of a residential development.

10th January 1990: Telecom board meeting authorised management to enter into negotiations to acquire the JMOB site "on best terms".

11th January 1990: Mr. McGovern notified Mr. Desmond that he accepted the terms in the letter of 9th January 1990.

17th January 1990: Ansbacher agreed to advance loan of £500,000 to Mr. Desmond secured by an undertaking from Mr. Smyth to discharge the loan out of the proceeds of sale of the JMOB site to Telecom.

16th February 1990: Article published in Irish Independent suggesting the involvement of Mr. Desmond and Dr. Smurfit in consortium negotiating sale of JMOB site to Telecom.

17th and 23rd

February 1990: Denials and apologies published in Irish Independent.

20th February 1990: Mr. Desmond wrote to Mr. McGovern suggesting "shelter options" in case of failure to obtain planning permission.

12th March 1990: Dr. Smurfit, Mr. McGovern and Mr. O'Neill of Telecom Property Department met and decided to proceed without any protection in event of failure to obtain planning permission.

12th April 1990: Delion and UPH signed agreement for Delion to acquire Chestvale shares from UPH.

18th April 1990: Chestvale agreed to sell JMOB site to Delion in consideration of Delion taking over Chestvale liabilities of c.£5 million.

- Delion agreed to sell to Hoddle, it's contractual interest in the JMOB site in consideration of Hoddle taking over Delion liabilities to Ansbacher and paying £300,000 costs incurred by Delion. Effect of two contracts and subsequent borrowing by Delion was to increase base price for tax purposes to £9,300,000.
- 19th April 1990: Sale by UPH to Delion of Chestvale shares completed and debenture (loan note) of Delion to UPH for £2,750,000 payable on 11th August 1994 "guaranteed" by Ansbacher, handed over to UPH.
- 3rd May 1990: Ansbacher lent DM24,000,000 to Delion and Chestvale loan from Ansbacher is paid off by Delion.
- 7th May 1990: Hoddle executed two contracts with Telecom for sale of JMOB site for aggregate price of £9.4 million.
- 29th June 1990: Sale to Telecom completed as Telecom paid balance purchase money and took a conveyance of the Office Site. Telecom did not take a conveyance of the Residential Site but granted an option back to Hoddle in respect of that part of the JMOB site; the legal estate in it, remaining in Chestvale.
- 26th July 1990: Ansbacher made a number of substantial payments out of Delion account to accounts at TSB, Dublin and Bankers Trust, New York.
- 30th July 1990: Loan arranged by Messrs Quinn and Naughton repaid.
- 9th October 1991: My appointment as Inspector.

- 11th October 1991: Balance of proceeds of sale of JMOB site to Telecom paid out of the jurisdiction.
- 16th October 1991: Dermot Desmond loan repaid.
- 29th April 1992: UPH loan note discounted and cash paid.

1.4 The Telecom Inquiry

My appointment as Inspector was subsequent to "a Formal Inquiry Into The Acquisition Of A Site for Telecom Headquarters at Ballsbridge, Dublin", the "Telecom Inquiry", which resulted in a report to the Minister for Tourism, Transport and Communication. The Telecom Inquiry concluded on 1st October 1991, that certain developments, as outlined in it's report, represented a serious setback to it and that it should, therefore, request the immediate appointment of an Inspector under the Companies Act, 1990. The said report was published by the Minister for Tourism, Transport and Communications on the 1st October 1991.

The terms of reference of the Telecom Inquiry were to institute a formal inquiry, on behalf of the Minister for Tourism, Transport and Communications, into all matters connected with the purchase by Telecom of a site for its proposed new Headquarters. The Telecom Inquiry decided to concentrate its initial efforts on establishing the facts regarding the transactions relating to the Ballsbridge site, but was thwarted in its efforts, as the following information which was requested by it, was not provided by the date that it submitted its report to the said Minister:

- " (a) **Mr. N. Smyth's knowledge, records and correspondence re: all issues relating to the Ballsbridge Site, Chestvale, Delion and Hoddle.**
- (b) **Details of Mr. Doherty's financing of the purchase of Chestvale and Chestvale's purchase of the Ballsbridge Site and his correspondence with Mr. Desmond regarding Mr. Desmond's assistance in securing finance for Delion.**

- (c) Ansbacher's knowledge, correspondence, documents, minutes etc. in relation to the Ballsbridge Site, UPH, Chestvale, Delion and Hoddle, and details, with supporting documentation, of all payments made by Chestvale, Delion and Hoddle until September 30th, 1991; and
- (d) Confirmation by third parties, including Mr. Doherty's bankers and legal advisers in London, that Mr. Doherty owned and owns 100% of the beneficial interest in Delion and Hoddle. "

1.5 Telecom Inquiry Report and Files

I was furnished by the Secretary of the Department of Communications with all of the Department's files relating to the Telecom Inquiry, as it affected the Ballsbridge site. The Telecom Inquiry under the Chairmanship of Mr. McDonagh performed a remarkable job in obtaining evidence and producing their report in a very short period and I found their report to be most helpful in commencing my investigation. Having commenced to examine these files and the report of the Telecom Inquiry, I determined that the most expedient way of pursuing my investigation was initially to seek possession of the books and documents relating to Chestvale and Hoddle, which were in the possession of Mr. Smyth of Noel Smyth and Partners, the solicitors who appeared to have acted for the Companies at all relevant times.

1.6 Witnesses

I have examined under oath on the dates specified, those persons listed in Appendix 2 and the transcripts of verbal evidence adduced exceed 2,700 pages. In addition I have requested and received a very considerable volume of documentation and files from those persons and from others.

The task of adducing evidence from certain witnesses, was made considerably more difficult by their stated lack of recollection of a number of important and relevant issues. In particular, this comment applies to Mr. Desmond, Mr. Barry, Mr. Moloney and Mr. Matthews and to a lesser extent to Dr. Smurfit and Mr. Finnegan. However the other witnesses were, in general, very clear in their recollections. These comments are not intended to refer to the veracity of any evidence, but rather to the difficulty in establishing the true situation.

1.7 Interim Report

There are a number of additional persons, whom I wish to interview and others to reinterview and there are additional documents which I would prefer to examine, if that is possible, before making determinations, additional to those contained in this report. This report is therefore based on evidence, both oral and documentary, adduced to me to date. It is an Interim Report and may require revision in the light of any further evidence that may be adduced to me. Consequently any person reading this report should refrain from coming to their own conclusions on issues which remain open and in respect of which, I have not made a determination.

1.8 The issues to be determined by me are as follows:

- (i) the true persons, who are, or have been financially interested in the success or failure, (real or apparent), of Chestvale and Hoddle. Although this has a potentially very wide meaning, it seems to me that in this case, the determination required is of the persons who actually benefitted financially, whether directly or indirectly, from the sale of the JMOB site to Telecom, and that it does not extend to those who benefitted financially, merely through the provision of professional services, for which they charged a fee which was not related to the success or failure of the Companies;

- (ii) the true persons who were able to control or materially to influence the policy of Chestvale and Hoddle, in the purchase and sale by each of Chestvale and Hoddle, of the JMOB site and this may include professional advisers, where the advice given is seen to have a material influence on the policy of the companies.
- 1.9 I describe in Sections 3 - 10, the pursuit of the investigation, but before doing so, set out in Section 2, a brief description of some of the companies involved in the series of transactions leading to the sale to Telecom. In Section 11, I report on the membership of the Companies within the meaning of Section 31, Companies Act, 1963 and in Section 12, I explain briefly what remains to be done and make a recommendation to the Minister for Industry and Commerce to exercise his powers under Section 16, Companies Act, 1990.
- 1.10 Section 3 explains the various court proceedings to date involving the investigation and Sections 4 and 5 explain the history of the transactions up to the end of August 1989. The history since August 1989 and some of the gaps before the end of August 1989, are dealt with in the subsequent sections entitled the Attempts to Raise Finance in relation to the JMOB site; the Tax Schemes; the Money Trail; Freezone; and the Involvement of Telecom.
- 1.11 An investigation of the nature being conducted by me cannot proceed without the assistance of others. I would like to thank my partners and colleagues in Gerrard Scallan & O'Brien for their patience, assistance and support. In particular, Claire Callanan who, in addition to assisting me in the investigation, acted as my solicitor in the many court proceedings that have arisen; Joanne Hyde, B.C.L. and my secretary Margaret Dillon deserve special mention; as do John Cooke, S.C., Peter Shanley, S.C., Paul Sreenan, S.C. and Fidelma Macken, B.L. who represented me at the various proceedings in court.

- 2.0 Some Companies involved with the JMOB site
- 2.1 Chestvale
- 2.1.1 Chestvale was incorporated in Ireland, under the Companies Acts 1963 to 1986, on 16th April 1989, as a shelf-company by a company formation agency. The initial directors, Sean Kavanagh and Marc O'Connor, resigned on 1st May 1989 and Mr. Hannigan and Pauline Hewitt, two employees of Noel Smyth & Partners, were appointed directors of the company and Mr. Hannigan was appointed company secretary.
- 2.1.2 On 1st August 1989, Mr. Smyth was appointed as an additional director of the company.
- 2.1.3 Pauline Hewitt resigned as a director of the company with effect from 26th March 1990. It would appear that on the 27th March 1990, Mr. Economides, Androulla Economides and Elena Pirilli all of Limassol, Cyprus were appointed directors of the company and Messrs Smyth and Hannigan resigned as directors, and that that remains the position. The Share Register and Minute Book of this company were removed from Ireland in or about 27th March 1990 and appear now to be in Cyprus, contrary to Section 116(6) and 146(1) Companies Act 1963.
- 2.1.4 The subscriber shares were transferred on 1st May 1989 to Mr. Hannigan and Pauline Hewitt respectively and they transferred their respective share, with effect from 19th April 1990, to Delion, pursuant to a share purchase agreement dated 12th April 1990 between UPH and Delion, which I understand is now the registered owner of one of the issued shares, the second issued share being in the name of Mr. Economides in trust for Delion. I have not, however, seen the share register nor any declaration of trust. The beneficial ownership of Chestvale up to 19th April 1990 is not straightforward, but since 19th April 1990, the beneficial

owners of Chestvale are the beneficial owners of its holding company, Delion.

2.1.5 By resolution of the 27th March 1990, Chestvale changed its Articles of Association. The effect of this change was to assist the company in moving its tax residence from Ireland to Cyprus, by providing that the company could not be managed and controlled in Ireland and that all meetings of the company were to be held in Cyprus. A consequence of this would be, that if Chestvale realised a capital gain, such capital gain would be taxed in Cyprus under the Double Tax Treaty between Ireland and Cyprus. However Chestvale does not appear to have realised a capital gain and it seems unlikely that, even though the scheme for reduction of any tax liabilities evolved over a number of months, it was not clear to its directors and shareholders at the date of the change of the Articles of Association, that it would not make such a gain. Accordingly, the change of residence may have been a form of double protection, in case the Revenue Commissioners in Ireland tried to "look through" the series of transactions which ensued and which were at that stage planned, and to argue that any capital gain arising was in reality that of Chestvale.

2.1.6 Chestvale does not appear to have carried out any business prior to its being named in a deed of conveyance from JMOB and Mr. Grace, the liquidator of JMOB (in Liquidation), which deed was executed by those parties on 11th August 1989, but which is dated 5th January 1990. Chestvale was proposed as the purchaser by Mr. Smyth, but whether it acted as nominee for his clients or for UPH, is as will appear later, one of the issues to be determined by me.

2.1.7 On 18th April 1990, Chestvale contracted to sell the property, acquired by it from JMOB, to Delion and on 29th June 1990, it joined in a conveyance of its interest in the Office Site to Telecom. It is possible

that it may have since joined in a conveyance of the Residential Site to Telecom, but it had not done so when I inspected the title in October 1991.

2.1.8 Between 11th August 1989 and 4th May 1990, Chestvale had two bank accounts, the first of which was closed on 22nd December 1989, when it's debit balance was transferred to the second account opened on 20th December 1989. The first account represented a loan of £3,000,000 from Ansbacher, used to pay the JMOB Liquidator on 11th August 1989, and the second represented a loan of £4,500,000 from Ansbacher, most of which was used to pay off the first loan and various disbursements incurred by Noel Smyth on behalf of the company and the balance of £1,000,000 was advanced to Delion. On 4th May 1990, the entire debit balance of £5,009,938.67 on the second account, was discharged by a transfer from a new Delion account also at Ansbacher. These transactions are analysed further in sections 7 and 8.

2.2 Hoddle

- 2.2.1 Hoddle was incorporated in Ireland, under the Companies Acts 1963 to 1982, on the 24th August 1983, as a shelf company by Noel Smyth and Partners.
- 2.2.2 The initial directors and shareholders were Yvonne O'Connor and Cathal O'Sullivan, employees of Noel Smyth and Partners. On 1st September 1989, Cathal O'Sullivan resigned as a director and Jackie Berns was appointed a director in his stead. On 1st January 1990, Yvonne O'Sullivan resigned as a director of the company and Catherine Daniel was appointed in her stead. The shares held by Cathal O'Sullivan and Yvonne O'Sullivan (nee O'Connor) were then transferred by each of them to Jackie Berns and Catherine Daniel respectively. Jackie Berns and Catherine Daniel were employees of Noel Smyth and Partners.
- 2.2.3 In the course of giving evidence before me on the 16th October 1991, Messrs. Smyth and Hannigan stated that, for the purposes of signing audited accounts for submission to the Revenue Commissioners, they had had themselves appointed as directors of Hoddle for one day only (the accounts were signed on 26th February 1991). They added that no returns were made to the Companies Registration Office in respect of such appointment. They further stated that they were coopted, solely for the purpose of signing the accounts and the auditor was informed of the change of directors for that purpose and instructed to take same into account when preparing the audited accounts.
- 2.2.4 However, by letter to me of the 26th November 1991, Mr. Smyth indicated that his earlier evidence was not correct and stated that, having investigated the matter further, both he and Mr. Hannigan were appointed directors of the company on 21st December 1990 and that the reason for this, was that Jackie Berns who was a director, was leaving

the firm to take up alternative employment and she was resigning as a director. With his letter to me of 26th November 1991, Mr. Smyth enclosed minutes of a meeting of the directors of the company of the 21st December 1990, which stated that Catherine Daniel resigned as a director on the same day. Among papers submitted to me by Mr. Smyth on 15th October 1991, were undated resignations of Jackie Berns and Catherine Daniel and dated and executed blank share transfer forms in respect of the one share held by each of them. The date of the said blank share transfers was 30.9.91.

2.2.5 In the said letter of the 26th November 1991, Mr. Smyth indicated that both he and Mr. Hannigan were named as directors of the company until 29th September 1991, when they resigned, but his letter did not indicate whether they coopted any directors prior to their resignation.

2.2.6 Mr. Doherty in an affidavit filed by him in the High Court Judicial Review proceedings, Chestvale and Hoddle -v- Glackin 1992 ILRM 221, has sworn that the share held by Catherine Daniel was transferred to him on 30th September 1991 and the share held by Jackie Berns was transferred to his wife, Doreen Doherty. Mr. Doherty in the same affidavit swore that **"at two meetings held at the end of September 1991 (one at Heathrow Airport in London and one in Dublin at Mr. Smyth's house) I met with the aforesaid Messrs Hannigan and Smyth and as a result of which meetings my wife Doreen Doherty and myself were appointed directors of the second named applicant and the said Messrs Hannigan and Smyth resigned as directors"**

2.2.7 It would appear that Hoddle did not commence any trading until 18th April 1990, when it entered into a contract with Delion, for the purchase from Delion of the interest which Delion had agreed to acquire from Chestvale, by a contract, also dated 18th April 1990.

- 2.2.8 On 7th May 1990, Hoddle entered into two contracts for the sale of the JMOB site in two parts to Telecom for an aggregate consideration of £9,400,000, the two parts being described as the Office Site and the Residential Site. On 29th June 1990, it executed a conveyance of the Office Site to Telecom, but was not asked to execute a conveyance of the Residential Site. In fact, on the same date, it entered into an option agreement with Telecom, entitling it to call on Telecom to sell back the Residential Site to it for £3,506,000 (the same price as it had contracted to sell to Telecom for), such option to be exercised within 30 days of Telecom receiving planning permission for a residential development on the Residential Site. As planning permission has not yet been obtained, the option has not been exercisable.
- 2.2.9 Although Hoddle entered into the conveyancing transactions and in the deed of conveyance to Telecom, acknowledged receipt of the entire purchase money, it did not have a bank account and the purchase money of £9,400,000 was not paid to it. This is analysed further in the section entitled The Tax Schemes and The Money Trail.
- 2.2.10 The beneficial ownership of Hoddle since the 21st December 1989 appears to have been the same as the beneficial ownership of Delion. Up to 21st December 1989, it was a shelf company owned by Noel Smyth & Partners, but on that date it was proposed by Mr. Smyth that it act as a nominee for Delion to overcome Exchange Control difficulties. It didn't in the end have to perform that role, but rather the role outlined in Paragraphs 2.2.7 and 2.2.8 above.

2.3 UPH

- 2.3.1 UPH was incorporated in Ireland, under the Companies Acts 1963 to 1986, on 12th August 1988 under the name Dance Investments Limited, as a shelf company by a company formation agency. It's name was changed to it's current name on 28th of October 1988. The initial shareholders and directors were Marc O'Connor and Sean Kavanagh. On 25th November 1988, Messrs. O'Connor and Kavanagh transferred their shares to Naomi Mahon and Susan Lawless respectively, each of whom were employees of Ivor Fitzpatrick & Co., Solicitors. On the same date, they resigned as directors and Naomi Mahon and Susan Lawless were coopted as directors. On 26th November 1988, Naomi Mahon transferred her share to NCB Group Limited and on the same date Susan Lawless transferred the share in her name to Mr. Barry.
- 2.3.2 The transfer forms from each of Marc O'Connor and Sean Kavanagh are stamped by the Stamps Branch Capital Taxes, Revenue Commissioners on 4th November 1988.
- 2.3.3 The share transfer forms from each of Naomi Mahon and Susan Lawless were stamped by the Revenue Commissioners on 28th August 1989. There is an endorsement on each of the transfers by Naomi Mahon and Susan Lawless and signed by John King, a partner in Ivor Fitzpatrick & Co. Solicitors, to the effect that the transfers do not represent a transfer on sale, but a transfer from one nominee to another nominee of the same beneficial owner, where the first nominee has at all times held the property on behalf of that beneficial owner. Although I have not seen any declarations of trust by the nominees, it appears from other documentary evidence that one share was being held in trust for NCB Group or NCB Nominees and the other was initially, and until mid February 1989, being held in trust for Aylesbury or Aylesbury Securities Nominees Limited.

- 2.3.4 According to the Companies Registration Office records, Miss Mahon and Miss Lawless resigned as directors on 26th November 1988 and Mr. Pairceir, Mr. Barry and Joseph Kerrigan were coopted as directors. However the Company's own files show that, on or about 1st November 1988, the directors were to include, in addition to the three referred to above, Mr. Walsh, a chartered surveyor from Cork and Anthony Pearson an English accountant, who were to be the representatives of Aylesbury on the UPH board and who did actually attend some subsequent board meetings. Drafts of a prospectus prepared at that time and another in January 1989, represented that Messrs. Walsh and Pearson were directors of UPH and in fact, Mr. Walsh acted as de facto managing director of the company from shortly after its formation until mid February 1989. Mr. Pairceir was chosen as an independent chairman and Messrs. Barry and Kerrigan were nominees of NCB.
- 2.3.5 UPH was the corporate vehicle used by NCB, to participate in acquiring a portfolio of commercial and retail properties in Ireland for subsequent unitisation. NCB research had indicated that in 1988, commercial property was under valued and that there was potential for substantial growth in the market. They also anticipated the emergence of a market for property units in Ireland and hoped to seek a listing for unitised property units on the Stock Exchange in due course.
- 2.3.6 UPH was to be promoted jointly by NCB Nominees and Aylesbury Nominees, Aylesbury Nominees being a company related to Aylesbury and NCB Nominees being part of the NCB group.
- 2.3.7 The concept of UPH seems to have changed considerably during its first six months of existence. The target size of the fund increased from £30,000,000 to £50,000,000. Initially, the promoters were to provide £3,000,000 of equity on a 50:50 basis and to then raise a syndicated loan of IR£27,000,000 and the entire funding package was to be in place by

the end of October 1988. Aylesbury were to act as consultants to the board of UPH under a proposed management agreement and in addition were to arrange presentations to institutions, with a view to raising funds.

2.3.8 NCB Nominees were to be entitled to place 50% of the equity of the company either to its own private clients or to NCB itself. Aylesbury Nominees were equally entitled to place the remaining 50% of the equity allocated to them, as they wished. The board of UPH was to consist of five non-executive directors, two from each of the promoting bodies and an independent non-executive chairman.

2.3.9 The financing of UPH subsequently changed and the intention then was to raise share capital of £5,000,000, of which £1,000,000 would be by way of ordinary shares and £4,000,000 by way of convertible redeemable preference shares. The target value of the portfolio was to be then increased to £50,000,000, to be funded on a maximum debt; equity ratio of 9:1.

2.3.10 A placing document in respect of the issue by UPH of shares was prepared and this went through a number of drafts between October 1988 and April 1989. In addition, a draft management agreement between Aylesbury and UPH and a draft shareholders agreement between NCB and Aylesbury were prepared and each of these went through a series of drafts before reaching final form at the end of January 1989.

2.3.11 Details of the registered shareholders, the apparent beneficial owners, the date of subscription and the shares held at the 30th June 1990 are set out in Appendix 3 attached hereto.

I have written to each of the apparent beneficial owners with a series of questions, including whether they were acting as agent or nominee for a third party. I am satisfied from the replies and from other evidence,

that all of those listed as "apparent", are the actual beneficial owners, save for Mr. Lewis. I am not yet satisfied that Mr. Lewis is the beneficial owner of shares in UPH and have further investigations to make in this regard. Mr. Lewis is resident in the Bahamas and has not, to date, cooperated to my satisfaction with the investigation.

2.3.12 Each of NCB and Aylesbury had the right to allocate shares as between ordinary and preference shares, as they so wished. Certain of the ultimate shareholders in UPH were introduced by Aylesbury, but most were introduced by NCB. There does not appear to be any direct correlation between subscription for ordinary shares and for preference shares but all shareholders other than Mr. Hassett, NCB, Pepper Canister Nominees and Dr. Smurfit were allotted both ordinary shares and at least one class of preference shares. The only shareholder in UPH who was allotted preference shares but no ordinary shares was Smurfit Paribas Investment Management Limited.

2.3.13 On the 14th February 1989 Mr. Walsh resigned as Managing Director of Aylesbury and the relationship between Aylesbury and NCB appears to have changed radically immediately thereafter. Neither the shareholders agreement nor the management agreement, which had been executed by Aylesbury and which were awaiting execution by NCB, were executed by it and although there were certain discussions between the remaining directors of Aylesbury with Mr. Desmond, these seem to have been peripheral to the business of UPH.

2.3.14 However Mr. Walsh has made a claim to Mr. Desmond that he was promised by Mr. Desmond 10% of the ordinary shares of UPH on a "carried" or fee basis, as compensation for work which he did on behalf of the company, in relation to various properties that were either bought or examined by UPH. The clear recollection of Mr. Walsh is that the promise was made verbally, outside the Westbury Hotel, on or about

11th November 1988 and he understood that Mr. Desmond who would be getting shares in UPH, would be holding the 10% of ordinary shares in trust for him. Mr. Walsh has stated that he had earlier discussed the issue with Mr. Desmond and the promise of 10% was the outcome of those discussions. He stated to me that he did not want taxable income, but that he wanted something that would give him a longer term investment. Mr. Walsh also stated in evidence that his 10% was to be part of a "carried interest" for NCB and Mr. Hassett of 50% of the ordinary shares in UPH.

2.3.15 Mr. Desmond stated in evidence that there could have been discussions between himself and Mr. Walsh at the time relating to a performance related basis of reward. He added however, that from the time of the break-up between NCB and Aylesbury until September 1991, Mr. Walsh had not looked for shares nor made any claim for shares. There is an apparent conflict of evidence as to the validity of Mr. Walsh's claim. I do not have sufficient evidence as yet to make a determination on the validity of Mr. Walsh's claim, which, if valid, could mean that he, with the other shareholders of UPH, was financially interested in the success or failure of Chestvale.

2.3.16 The "partnership" between NCB and Aylesbury dissolved in mid February 1989. NCB became aware of information in relation to Mr. Walsh which greatly disturbed them, to the extent that they felt they could no longer deal with him, or with the company, Aylesbury. As a result, the agreements, which had been prepared between NCB and Aylesbury, relating to UPH, were not signed; Messrs Pearson and Walsh, the nominees of Aylesbury on the UPH Board resigned; and from then on, UPH was managed by NCB personnel. Mr. Walsh in his evidence stated however that Mr. Desmond went out of his way to preserve a good relationship between himself and Mr. Walsh and added:

"in fairness, I suppose, (he) helped me and worked with me,

sought my advice;".

Mr. Walsh also said in evidence, that his relationship continued with Mr. Desmond for nearly two years after his split with UPH and that he talked with him on a very regular basis during this period.

2.3.17 One particular requirement of NCB in establishing and bringing investors into UPH, which I find very unusual, was their apparent insistence that no shareholder should know who the other shareholders were. They appear to have simply told the shareholders that the others were either institutions or high net worth individuals. It seems that some UPH shareholders were not concerned about this, but others were.

2.3.18 The investment strategy of UPH was to invest in first class income yielding properties, both commercial and retail, but with an anticipated bias of 60:40 in favour of commercial property. The first property to be acquired by UPH was Findlater House at 23/32 Upper O'Connell Street, Dublin 1 which had a rent roll at the time of IR£437,175, of which IR£333,000 was payable by Telecom . This was purchased for £3,570,000 and bank finance of £3,870,000 was obtained by UPH for it.

2.3.19 The role of UPH, in the transactions involving the JMOB site, is described in the remainder of this report, but the net effect of it's involvement was that on 29th April 1992, it received a gross profit before expenses and tax of IR£2,175,585.76, when a loan note (or debenture), issued to it on 19th April 1990 for £2,750,000 and payable on 11th August 1994, was redeemed. The loan note had been issued by Delion, as consideration for the purchase by it of the shares of Chestvale from UPH.

2.4 Delion

- 2.4.1 On 21st July 1989, a formal application was made in Cyprus for registration of Delion. The application "passed through the Cyprus Courts" on the same day and was received and accepted by the Registrar of Companies in Cyprus on the 22nd July 1989. It seems however, that earlier steps had been taken to form a company in June 1989 under the name "Dilion" and Mr. Smyth has confirmed to me that this "Dilion" is the same company as "Delion". Mr. Smyth has stated in evidence that he bespoke this company from Cyprus for Mr. Desmond.
- 2.4.2 The company was incorporated on the 3rd August 1989 and has its registered office at 227 Makarios III Avenue, Doma Building, 5th Floor, Limassol, Cyprus. It has a share capital of C£1,000 divided into 1,000 shares of C£1 each. The shareholders, according to the Registrar of Companies in Cyprus, until 7th November 1991, were Mr. Smyth of 22 Fitzwilliam Square, Dublin 2 holding 999 shares and Totalserve Management Limited, a Cyprus company holding 1 share. The original directors were Elena Pirilli, Androulla Economides and Mr. Smyth. Mr. Smyth resigned as a director on 20th March 1990 and the relevant form was filed with the Registrar of Companies in Cyprus on the 26th June 1991. For Cypriot company law and tax purposes, the company was deemed to have off-shore status and unless specific approval was obtained from the Central Bank in Cyprus, all its activities had to be outside Cyprus.
- 2.4.3 According to an Affidavit of Mr. Doherty, filed in the Chestvale and Hoddle -v- Glackin, Judicial Review proceedings described in Paragraphs 3.3.1 to 3.3.5, Mr. Doherty is the owner of 999 of the issued shares in Delion and he referred to a certified copy of the company's register as evidence that the shares were transferred to him on the 10th day of October 1991. According to the Companies Registry in Cyprus, the

shares were transferred to Mr. Doherty from the previous shareholder, Mr. Smyth, on 7th November 1991.

2.4.4 The first transaction proposed for Delion was a borrowing from Ansbacher, to acquire the shares of Freezone and pay off Freezones' existing bank borrowings. A draft letter of offer was prepared in June 1989 and another similar one in August 1989, but these transactions do not appear to have proceeded.

2.4.5 Delion was introduced into the series of transactions involving the JMOB site in or about November 1989. The tax plan for Chestvale required a Cypriot company (as is described later) and Delion which had been established at the request of Mr. Smyth, but not used earlier, was proposed.

2.4.6 The proposal was that Delion would acquire the shares in Chestvale from UPH in consideration for the issue of a loan note for £2.75m payable in 1994. This acquisition ultimately happened on 19th April 1990.

2.4.7 A bank account was opened in Ansbacher on the 22nd December 1989 in the name of Delion, into which was transferred £1,000,000 from Chestvale (converted into US dollars) and US\$1,500,000 apparently from AIB (CI) Limited, Jersey. These funds appear to be, what are called later in this report and in the Telecom Inquiry Report, the "mezzanine finance".

A number of bank accounts were opened by Delion in Ansbacher over the next six months and on 3rd May 1990, the balance due by Chestvale to Ansbacher was discharged by debiting a Delion account.

2.4.8 Delion on the 18th April 1990, contracted to acquire the JMOB site from Chestvale for a consideration comprising its taking over all liabilities of Chestvale to Ansbacher.

2.4.9 On 3rd May 1990, Delion contracted to sell its interest in the JMOB site to Hoddle for a consideration of £9,300,000 and when the subsequent sale by Hoddle to Telecom was closed, the entire proceeds of sale to Telecom were credited to a Delion account.

2.4.10 Various payments out of these accounts occurred between the end of June 1990 and 11th October 1991, when the credit balance was transferred to an account in the name of "P.J. Doherty" at AIB (CI) Limited, Jersey. These payments are analysed further in the sections entitled "the Money Trail" and "Freezone".

2.5 NCB Group

- 2.5.1 NCB Group comprises a group of companies involved in various financial services, including stockbroking and corporate finance. Mr. Desmond was, until recently, the Executive Chairman of NCB.
- 2.5.2 In mid 1988, it commenced discussion with Aylesbury with a view to forming a joint venture company, which ultimately resulted in UPH.
- 2.5.3 NCB sought investors for share capital in UPH and itself became an investor in the company on 6th March 1990, when it subscribed £450,000 for ordinary shares of 10p each in the company, of which 254,070 were allotted to Pepper Canister Nominees as nominee of Mr. Desmond and 195,930 to NCB, in trust for executives of NCB.
- 2.5.4 NCB appears to have provided administrative services to UPH at least since mid February 1989 and UPH has at all times operated from the offices of NCB. The directors of UPH included Mr. Barry and Joseph Kerrigan, Mr. Barry being a senior executive of NCB and Joseph Kerrigan being a nominee of NCB. When Mr. Kerrigan resigned as a director in 1990, Chris McHugh another senior executive of NCB was appointed a director of UPH.
- 2.5.5 On 9th/10th August 1989, a sum of £1,000,000 was transferred from an account at UBS, Geneva Branch through the account of NCB at Bank of Ireland, to an account at Ansbacher in the name of "**Noel Smyth & Partners Ref. NCB**". This was then used as a part payment by Chestvale to the liquidator of JMOB. Padraic O'Connor, the present Managing Director of NCB Group has informed me that NCB Group had no beneficial interest in this payment, have no records of it save its movement through their bank account and that the transaction appears to have been dealt with by Mr. Desmond. Further details of this

transaction are described in Paragraphs 8.3.2 to 8.3.6.

2.5.6 Between March 1990 and July 1990, NCB Corporate Finance was involved in advising the board of UPH in relation to a proposed acquisition of UPH by Freezone in consideration of the issue of loan notes by Freezone convertible into shares of Emmets.

2.5.7 On 25th day of October 1990, NCB Group transferred its shareholding in UPH to Pegasus.

2.6 Aylesbury

- 2.6.1 Aylesbury was registered as a limited liability company in the U.K. in November 1987. Its directors included Anthony Pearson an accountant and Mr. Walsh, each of whom had considerable experience in the property business in London.
- 2.6.2 In or about June 1988, Aylesbury commenced discussions with NCB, which discussion ultimately led to the formation of UPH as a company to be promoted jointly by NCB and Aylesbury.
- 2.6.3 Mr. Walsh acted as de facto managing director of UPH until mid February 1989.
- 2.6.4 Aylesbury was to enter into a management agreement with UPH, pursuant to which it would earn fees for managing the UPH portfolio of properties. In addition, it was to be a shareholder of UPH or had the right to nominate shareholders for 50% of the equity of UPH, the remaining 50% to be nominated by NCB and a shareholders agreement was to be entered into between NCB and Aylesbury.
- 2.6.5 Neither the shareholders agreement nor management agreement were signed and although there were certain discussions between the remaining directors of Aylesbury and Mr. Desmond after 14th February 1989, they seem to be peripheral to the business of UPH.

3.0. Court Litigation involved in the Investigation

3.1. Correspondence with Mr. Smyth

3.1.1 I wrote to Mr. Smyth on 10th October 1991, seeking possession of the books and documents relating to the Companies, that were in his possession. Mr. Smyth replied by letter of October 11th, confirming that his firm acted as solicitors to the Companies up to the 29th September 1991, when his retainer was terminated. He stated that prior to determination of his retainer, his firm requested instructions from his client as to whether he could disclose communications passing between the firm and his client and his instructions were not to disclose any information, other than that already disclosed to the Telecom Inquiry. Mr. Smyth stated that he was anxious to assist my investigation in every way possible and that he would give me all assistance in connection with the investigation, which he may reasonably be able to give, subject to his duty to his client, which duty of confidentiality he felt had to be respected in full. He added that a solicitor could not be compelled to disclose communications passing between himself and his client and that the privilege extended to all oral or documentary communications passing between a client and his solicitor. He promised that he would gather what books and documents of the Companies, he was permitted to give me and he would endeavour to let me have those, by close of business on Monday the 14th October.

3.1.2 I replied by two letters of the 12th October. In the first, I disputed his interpretation of the extent of solicitors professional privilege and sought from him all books and documents, which did not fall within the category of communications, to which privilege was granted. I further asked for a list of all documents, in respect of which his client was claiming privilege and I requested that he state the exact grounds on which privilege was sought. In my second letter to Mr. Smyth I stated to him

that from the records available to me already, that it appeared that in relation to the Companies, Mr. Smyth had been a director of Chestvale and that he had held himself out as "controller" of Chestvale, Hoddle and of Delion and I added that I believed that Delion was a company which had been financially interested in the success or failure of Hoddle. I sought from Mr. Smyth in his capacity as director and "controller", all books and documents of those companies.

3.1.3 I added in a further letter of the 15th October, that it had come to my notice, that Mr. Smyth had also held himself out as a director of Hoddle. I stated in my said further letter of the 15th October, that I noted that Mr. Smyth had not complied with my request, by close of business on Monday 14th October and I extended the time, within which he should comply, to 12.30 p.m. on the 15th October.

3.1.4 I indicated that, in the event of my not receiving the books and documents requested, it was my intention to treat such failure as a refusal and to certify such refusal to the High Court, pursuant to section 10(5) of the Companies Act, 1990. I subsequently had a telephone conversation with Mr. Smyth, when he indicated that he was trying to get his clients to cooperate in allowing him to release files and information to me and added that if they would not do that, then he would revert to me quickly, requesting that I take the matter into court. Mr. Smyth reiterated the views expressed in the said telephone conversation, in a letter of the 15th October, received by me shortly afterwards.

3.1.5 Mr. Smyth subsequently sent me copies of certain books and records of the Companies and indicated that he was gathering together conveyancing documentation executed by the Companies, which he hoped to let me have later in the afternoon. I immediately replied, stating that I did not consider this sufficient compliance with my request for production of books and documents and that unless compliance was

made as requested by me, by 5.30 p.m. that afternoon, that I would consider his failure to comply as a refusal.

3.1.6 Mr. Smyth immediately replied by fax, received by me at 5.31 p.m. on 15th October, to the effect that his request to his clients for permission to hand over the documentation, had resulted in a reply from Merriman White, a firm of solicitors in London, who informed him that they had been instructed to act for Chestvale, Delion and Hoddle, and which letter contained a specific instruction on behalf of those companies, not to make disclosure of any company files or papers. The reply added that it was the intention of the writer to apply to a court in Dublin, through Irish solicitors, for an order setting aside the requirement to make disclosures. Mr. Smyth, in his letter of the 15th October, confirmed that he would immediately comply in handing over documents, as and when the court so ordered.

3.1.7 On the 16th October 1991 at 9.50 a.m., I attended at Mr. Smyth's office when Mr. Smyth, Mr. Hannigan and Catherine Daniel, a secretary in his office attended before me for examination in relation to certain formalities, in their capacity as directors of Chestvale and Hoddle and I received cooperation from them in relation to the questions which I put to them.

3.1.8 However, I determined that notwithstanding the said cooperation, that as Mr. Smyth personally, and his firm, had failed to produce all the books and documents which I requested, that I should certify them as having refused, for the purpose of section 10(5) of the Companies Act, 1990 and I immediately, on the 16th October 1991, issued proceedings in the High Court, pursuant to the said certificates.

3.2. Communications with Ansbacher

3.2.1 I was satisfied from my review of the files which were in my possession, that it was necessary to inspect books and records relating to the Companies and to Delion, which should have been in the possession of Ansbacher and on 14th October 1991, I wrote to Mr. Moloney as Managing Director and Chief Executive of Ansbacher, requesting production of the relevant books and documents before 5.00 p.m. on Tuesday, 15th October 1991.

3.2.2 On 15th October 1991, I had a telephone call from Gerard H. Walsh of McKeever & Son solicitors on behalf of Ansbacher, who confirmed to me that the bank would allow me to inspect the documents and papers they had relating to Chestvale, at 5.00 p.m. on that date, in accordance with my request, but that, if I wanted copies of the documents, it would take until 12.00 noon on the following day before I could have them. I agreed to attend at 5.00 p.m. that day to carry out the inspection.

3.2.3 The solicitor for the bank informed me that the bank had a reservation as to my authority to inspect books and records relating to Delion and indicated that in relation to Hoddle, they did not have any account for that company. I had a further telephone call on the afternoon of the 15th October from the said solicitor, requesting an adjournment of my attendance at the bank, on the grounds that they had received a telephone call from London solicitors who informed them that a legal application was to be made on the following day and specifically instructing the bank not to reveal any information. I informed the bank's solicitors that if the bank acted on that instruction, that I would have to consider their failure to give me access to the books and records, as a refusal within the meaning of section 10(5) of the Companies Act, 1990 and it would be necessary to certify such refusal to the High Court.

3.2.4 I subsequently, on the 16th October 1991, issued a certificate to Ansbacher certifying their refusal to produce to me books or documents in their possession relating to Chestvale and Hoddle. As I had become aware that an English firm of solicitors were purporting to act for Chestvale and Hoddle and as Mr. Smyth informed me that he was not aware of any previous involvement by them, I was concerned that the documents might be removed from the jurisdiction. I then issued proceedings in the High Court against Ansbacher, Noel Smyth and Noel Smyth & Partners, in which I sought various reliefs including an interim injunction restraining each of Mr. Smyth, his firm and Ansbacher from parting with any documents which were in their possession, which interim reliefs were granted by Miss Justice Carroll in the High Court at 2.30 p.m. on the 16th October 1991 (See Glackin -v- Ansbacher and Smyth (High Court 1991 No. 13947P)).

3.2.5 I immediately notified Mr. Smyth and the solicitor for Ansbacher and Mr. Mullen, an executive of Ansbacher, of the making of the order by the court.

3.3. Commencement of Judicial Review Proceedings in the High Court

- 3.3.1 On the same afternoon of 16th October 1991, I also notified Mr. Brian Wallace of Hanby Wallace Solicitors, who had earlier indicated to me that he represented Mr. Doherty, Chestvale and Hoddle of the making of the said orders against Ansbacher, Noel Smyth and Noel Smyth and Partners. I later became aware that an application would be made to the High Court later on that day, the 16th October, seeking a Judicial Review of my appointment as Inspector on various grounds.
- 3.3.2 I arranged for a partner in my firm to attend the said court, where the application was to be made, for the purpose of reporting to me on the nature of the application. Claire Callanan, solicitor, attended the High Court at 5.00 p.m. on the 16th October when an application for leave to issue proceedings for Judicial Review was granted by Mr. Justice Blayney (See Chestvale and Hoddle -v- Glackin, 1992 I.L.R.M 221).
- 3.3.3 Mr. Justice Blayney had not been informed in the course of the application made before him by counsel, that another High Court judge had made orders in related proceedings earlier that day, despite the fact that I had specifically notified the solicitor of that fact. Ms. Callanan felt it incumbent on herself to intervene with the court and to notify Mr. Justice Blayney of the making of those orders, as it appeared to her that the failure by the applicant's legal advisers to disclose that to Mr. Justice Blayney, was inappropriate. Senior Counsel on behalf of the applicants told the court that he had not been made aware of the making of the earlier orders by the High Court. An application to the court for an injunction restraining the continuation of the investigation was refused.
- 3.3.4 The relief sought by the two companies fell into two general categories: firstly, that inquiries authorised by Section 14 of the Companies Act, 1990 could not apply to events and circumstances that occurred prior to the

coming into force of the relevant sections of that Act, and that in the event of the Act so applying, that such retrospectivity was repugnant to the provisions of the Constitution of Ireland; and secondly, that an Inspector who sought documents pursuant to Section 10 of the Companies Act, 1990 was obliged to specify the exact nature of the documents and their relevance to the object of the inspection, and that an Inspector appointed pursuant to Section 14 was only entitled to seek documents relating to, or concerned with, the membership of the company or companies under investigation. Pursuant to an application, made at the commencement of the hearing of the judicial review proceedings, the grounds were extended to seek an order quashing the Warrant and prohibiting my continuing to act as Inspector, on the grounds that Gerrard, Scallan & O'Brien Solicitors, the firm in which I am a partner, had previously acted for a company, the beneficial ownership of which was claimed by Mr. Doherty. A further ground was that any books or documents relating to Delion (not being a company named in the warrant), could not be sought by me.

3.3.5 From an early stage in the proceedings by me against Ansbacher, Mr. Smyth and Noel Smyth & Partners, each of these parties had indicated that they would abide by whatever order was made by the High Court. This would be dependant on the outcome of the judicial review proceedings brought by Chestvale and Hoddle. The proceedings were accordingly listed together and came on for hearing on the 29th November and 3rd and 4th December 1991. The judgment was reserved and was then delivered on the 7th February 1992, when all of the grounds upon which the companies relied were rejected. I was granted an order for my legal costs to be paid by the two applicant companies, as were Ansbacher, Noel Smyth & Partners and the Attorney General (all of whom had been made notice parties to those proceedings). No appeal was lodged by the companies against the order of the High Court.

3.3.6 Consequent upon that decision of the High Court, as Ansbacher and Mr. Smyth indicated that they would comply with my requests, no further order was made against either of them in the separate proceedings issued against them pursuant to Section 10(5), Companies Act, 1990 and referred to in Paragraph 3.2.4.

3.4 Further Court Hearings Re: Smyth and Ansbacher

- 3.4.1 Notwithstanding the position that had been adopted by both Ansbacher and Noel Smyth & Partners and the failure of the action brought by Chestvale and Hoddle, difficulties continued in relation to the production of documents. These difficulties centred around two disputes over the interpretation of Section 10 of the Companies Act, 1990, in relation to the extent to which an Inspector was entitled to seek documents and information. Firstly, the Companies, through their solicitor, sought to exercise control over the documents that were to be produced to me. This was a point of fundamental importance not only to this inquiry but to any inquiry under Part II, Companies Act, 1990. If the company or companies, whose membership or affairs is being investigated, can exercise control over what documentation and information is given to an Inspector, then the scope of an inquiry would be severely restricted.
- 3.4.2 This particular issue first came before the High Court on an application by Noel Smyth & Partners to hand over all the documents in their possession to the Companies, so that the Companies could select the documents to be produced. This application was dismissed by Mr. Justice Murphy, who stated that the obligation to select the documents was firmly placed upon the person upon whom a demand had been made and that such obligation could not be passed on to any other party. Mr. Justice Murphy refused an application by Noel Smyth & Partners for the costs of that motion.
- 3.4.3 Secondly and closely following that application, a further application was made by Ansbacher seeking the direction of the High Court as to what documents should be handed over. Noel Smyth & Partners also brought an application in similar terms. These applications arose out of difficulties expressed by the two parties, due to the conflicting views between myself, the Companies and the two parties as to what

documents should be produced. Ansbacher and Noel Smyth & Partners were concerned, that if they handed over documents which they were not obliged to hand over, they could be held liable in an action for damages by the Companies. I understand that this possibility had been made clear to them by the solicitors acting on behalf of the Companies.

3.4.4 These two applications to the court centred primarily on the existence of "Delion documentation" and the issue as to whether or not documents which referred to Delion, or documents which in whole or in part related to Delion's affairs, could be produced. Here again, the point at issue was of fundamental importance to the scope of any inquiry. If, in investigating complex commercial transactions, an Inspector was precluded from obtaining documents, or information, which in any way touched upon another party, not being a named company in the inquiry, the inquiry would be rendered almost entirely nugatory.

3.4.5 The Companies were parties to these applications, which were again heard before Mr. Justice Murphy, who delivered judgment on the 10th March 1992. Mr. Justice Murphy held in favour of the wider interpretations contended for by counsel on my behalf. He found, in particular, that it was not necessary to extend the scope of an investigation to all companies that an Inspector might come across in the course of an inquiry. In the course of his judgment Judge Murphy stated "there are therefore two classes of obligation imposed upon agents or officers or former agents or former officers of a company whose affairs or membership is under investigation, first of all an obligation to produce books and documents and secondly an obligation to attend and give viva voce evidence and in connection with the latter the range and nature of the obligation of the former or present officers or agents is amply defined, it is to give first of all all assistance. It is expressed in the most

comprehensive terms possible in its amplitude and in its purpose

"all assistance" and "in relation to the investigation".

He stated that the obligation was one that was imposed upon the person upon whom a demand for information has been made by an Inspector and that a person must produce books and records which "in their honest opinion may be of assistance to the Inspector". In his judgment, Judge Murphy also recognised the difficulty that can arise due to the fact that a person, upon whom a demand has been made, would not necessarily be aware of all of the information that an Inspector was aware of and accordingly might not be aware of the importance of documents or information in his or her possession. This matter was expanded upon by Judge Murphy in a later decision outlined below. However, in his judgment of the 10th March he stated:

"It seems to me that the Bank and the Solicitor must produce all books and records in their possession which may be of assistance to the Inspector in connection with this investigation into the membership of the Companies. Clearly neither the bank nor the solicitor can make a final determination as to what books or records may be of assistance to the inspector if only for the reason that information that might objectively seem valuable or indeed crucial might be of little value simply for the reason that the Inspector already has access to it. All the persons to whom the demand is addressed can do is to produce books and records which in their honest opinion may be of assistance to the Inspector and that is in my view the obligation which is cast upon them".

These applications were adjourned to enable the Bank and Noel Smyth & Partners to review their position and consequently I was furnished with a considerable amount of additional information which was of assistance to me.

3.5. Communications with Mr. Desmond

3.5.1 On the 16th October 1991, after I had initiated the proceedings against Ansbacher, Mr. Smyth and Noel Smyth and Partners, I considered it appropriate to request Mr. Desmond to attend before me for examination.

3.5.2 I telephoned Mr. Desmond at 4.45 p.m. on the 16th October and requested him to attend. I engaged in a long conversation with him, which was followed by further telephone conversations and correspondence over the next few days, resulting in my writing to him on the 21st October 1991 requesting that he produce to me certain books and records, by 12.00 noon on Wednesday 23rd October, in accordance with my earlier discussions with him.

3.5.3 This was followed by a further telephone conversation with Mr. Desmond on 21st October, when he persuaded me to extend the deadline until 12.00 noon on Thursday the 24th inst. and he assured me that I would then get all the required books and records. I reluctantly agreed to extend the deadline and specifically stated to Mr. Desmond that I was anxious that he would not telephone me shortly before the revised deadline to try to extend it further. He assured me that that would not happen. However at 11.40 a.m. on Thursday the 24th October 1991, I received a telephone call from a solicitor acting for Mr. Desmond, stating that Mr. Desmond would not be able to produce the documentation to me as promised by 12.00 noon and seeking an extension.

3.5.4 At the request of Mr. Desmond's solicitor, I extended the deadline until 2.30 p.m. that day under certain conditions. I was not satisfied that the conditions were complied with by 2.30 p.m. and further discussions and correspondence ensued with Mr. Desmond's solicitors, resulting in my serving a formal request on Mr. Desmond to attend before me for

examination at 2.30 p.m. on Friday 25th October 1991. Mr. Desmond failed to attend and I felt it necessary to issue a certificate in respect of such failure and to institute High Court proceedings pursuant to such certificate (see Glackin -v- Desmond (High Court 1991 14167P)). In those proceedings, a motion was issued for hearing on 4th November 1991. At the hearing before Mr. Justice Lardner, counsel for Mr. Desmond undertook that Mr. Desmond would attend before me on 11th November and the court proceedings were adjourned.

3.5.5 Mr. Desmond then attended before me for interview on the 11th and 12th November 1991. This interview was then adjourned to enable Mr. Desmond to produce further information to me. The interview with Mr. Desmond had not then concluded.

3.5.6 The court proceedings had been adjourned until the 18th November 1991, on which date it was possible for me to apply to the court to have the motion struck out with no order, save for liberty to re-enter the motion. No further information was produced by Mr. Desmond (save one document referred to by him in the earlier interview) and accordingly I requested Mr. Desmond's attendance on the 5th and 6th December 1991, with which request he complied. The interview on the 6th December was adjourned by me to enable Mr. Desmond to take further legal advice, and to fulfil various business commitments which he informed me required his attention.

3.5.7 It was during the course of his attendance on the 6th December 1991 that an issue arose, which ultimately led to the second set of proceedings involving Mr. Desmond, referred to below. I had, at an early stage in the inquiry, sought information through the Minister for Industry and Commerce, in relation to exchange control permission for the disposal by UPH of its shares in Chestvale to Delion. I had received information through the Minister, from which it appeared that the

information given to the Central Bank, and upon which it had premised its consent, was incorrect. On being informed by Mr. Desmond on 11th November 1991 that monies used for the purchase of the JMOB site had come from outside the jurisdiction i.e. from Freezone and Mr. Proberts, I had similarly sought information via the Minister for Industry and Commerce, in relation to compliance with exchange control requirements. I was then furnished with information in relation to transactions by Freezone involving exchange control. I had also, at that stage, ascertained other information relating to Mr. Desmond's role in the transactions and in relation to Freezone. I sought to question Mr. Desmond but he objected to answering questions about Freezone and as stated in Paragraph 3.5.6 above, I adjourned the interview to allow him to take advice from counsel.

3.6 Desmond and Dedeir - Judicial Review

3.6.1 On 16th December 1991, almost immediately after the hearing of the judicial review proceedings by Chestvale and Hoddle that I have described above,(but before judgment was given), an application was made ex parte to the High Court by Dermot Desmond and Dedeir (See Desmond and Dedeir -v- Glackin, the Minister for Industry and Commerce, Ireland and the Attorney General (High Court 1991 No. 288)) for relief to apply for judicial review. Further, an injunction was sought and obtained in terms that prevented the continuation of the Inquiry and further questioning of Mr. Desmond. Because this application was made ex parte, as is normal, I was not represented in court.

3.6.2 The proceedings brought by him, and on behalf of Dedeir, alleged that the information furnished by the Central Bank was illegally obtained by me and by the Minister. The issues raised in those judicial review proceedings were:-

- (i) That the Warrant of appointment was invalid by reason of the failure to show the nature of the public interest upon which the Minister for Industry and Commerce relied in making the appointment;
- (ii) That the inquiry was not entitled to seek information from Desmond and Dedeir concerning (a) their personal business affairs (b) the business affairs of Freezone and/or Probets and (c) the business transactions between Dedeir and Freezone and/or Mr. Probets.
- (iii) That the information emanating from the Central Bank was produced illegally and could not be used in the course of the inquiry; and
- (iv) that Section 10(5) of the Companies Act, 1990 was invalid having regard to the provisions of the Constitution and in particular Articles 38 and 40 thereof.

3.6.3 On learning of the terms of the injunction which prevented the continuation of the inquiry, I immediately applied to have that injunction set aside. On the same day that my counsel applied to the High Court, Mr. Desmond commenced further proceedings against the Minister for Industry and Commerce and me for contempt of court, arising out of the publication of certain comments, following the granting of the injunction. Numerous and lengthy affidavits were filed in the course of both of these applications which were at hearing before the High Court for four days (during which the court sat specially during the Christmas and New Year vacation). At the outset of the application for attachment for contempt against me, it was decided by Mr. Desmond that I had no case to answer and accordingly he did not pursue that motion. Accordingly, I obtained an order from the High Court against Mr. Desmond for my legal costs.

3.6.4 In a lengthy judgment by Mr. Justice O'Hanlon delivered on the 9th January 1992, he also refused an application for attachment for contempt against the Minister. The application to set aside the injunction was granted and the only restriction imposed at that time by the High Court, restrained, until the full hearing of that action, the furnishing of a report by me to the Minister pursuant to the provisions of Section 11 of the Companies Act, 1990, without the consent of the court.

3.6.5 Shortly after the hearing of these two applications in the proceedings brought by Mr. Desmond and Dedeir, similar proceedings seeking judicial review were commenced on the 16th January 1992 by Mr. Probets and Freezone (see Probets and Freezone -v- Glackin, The Minister for Industry and Commerce, Ireland and the Attorney General (the High Court No. 16JR)). The grounds, upon which judicial review was sought, were essentially identical to those in the proceedings brought by Mr. Desmond and Dedeir, save the absence of the ground in relation to the constitutionality of Section 10 of the Companies Act.

These proceedings were then heard immediately following the hearing of the Desmond and Dedeir judicial review proceedings, which commenced five days later on Tuesday the 21st January and the two sets of proceedings together involved seven days of argument before the High Court.

3.6.6. Judgment was reserved and in the Desmond and Dedeir action was delivered by Mr. Justice O'Hanlon on the 25th February 1992 and in the Probets and Freezone action was delivered by him on the 26th February 1992. The judge found in my favour and in favour of the Minister on all grounds, save with one exception in relation to the constitutionality of Section 10(5) of the Companies Act, in respect of which there was a finding that some only of its provisions were contrary to the Constitution but that Sub-Section 5 could otherwise remain intact. The judge found that the information obtained by the Minister from the Central Bank was not obtained illegally, and that the

"the Inspector was fully justified in addressing the most searching inquiries to Mr. Desmond as to his personal involvement with all the parties (including Irish companies and off-shore companies) who participated in the various transactions whereby the property in question first became vested in UPH and then by devious routes involving at different times, the intervention of Chestvale, Hoddle, Delion, Mr. Doherty, Mr. Probets and Freezone, ultimately became vested in Telecom Eireann in the year 1990".

In the Probets and Freezone proceedings Mr. Justice O'Hanlon in his judgement stated:

"When an investigation is directed to take place under the provisions of Part II of the Companies Act, 1990, or under the similar provisions found in the United Kingdom legislation on companies, it has been justly said in one of the decided cases regarding the scope of the Inspector's powers that he must commence his investigation in many cases with nothing before

him but a blank sheet of paper.

The Applications appear to take the view that the Inspector should accept at face value, and without further investigation, matters which have been deposed to by statutory declaration, or at least that there is some onus on him to show a prima facie case for disbelieving the averments made before continuing to seek further evidence to confirm or disprove the accuracy of what he has been told.

In my opinion, this is not a correct interpretation of the Inspector's functions when conducting an investigation. In relation to the present case, the judgment already delivered in the proceedings brought at the suit of Dermot Desmond and Dedeir contains a lengthy recital of the information which the Inspector claimed to have obtained in relation to the part played by the Applicants in that case, and also the Applicants in the present case in the transactions concerning the Ballsbridge property from the time it was purchased by United Property Holdings until it became vested in Telecom Eireann in the year 1990.

This involved the Inspector in the examination of a very complicated network of property dealings in which Mr. Desmond appeared to emerge as the principal protagonist at all stages of the process, and the present Applicants were brought into the picture by Mr. Desmond for the purpose of providing some £2m. to help finance the acquisition of the property by Mr. Doherty for a brief interlude while the title was passing from United Property Holdings to Telecom Eireann.

The Inspector considered that some important questions still remained unanswered and it was while he was pursuing his inquiries about those matters that he encountered most resistance from the persons named as Applicants in three sets of proceedings which have been brought against him. While the Inspector's brief speaks of an investigation for the purpose of

determining the true persons who are or have been financially interested in the success or failure (real or apparent) of Chestvale Properties Ltd and Hoddle Investments Ltd, it is quite apparent from the events leading up to his appointment that the real purpose of his work is to endeavour to throw light on the persons who have benefitted by the series of transactions whereby the ownership of the Ballsbridge property passed to Telecom Eireann."

3.6.7 The court directed that two thirds of the legal costs incurred by me and incurred by the Minister should be paid by Mr. Desmond and Dedeir. The reduction from an award of full costs arose out of the partial finding in favour of the applicants on the constitutional interpretation of Section 10(5). My legal costs for the application to set aside the initial injunction were granted in full. In the Probets and Freezone application, all of my legal costs and those of the Minister were awarded against Mr. Probets and Freezone.

3.6.8 Appeals were lodged by Mr. Desmond and Dedeir, and by Mr. Probets and Freezone and these were heard by the Supreme Court commencing on the 13th July 1992 and ending on the 16th July 1992. Judgment was reserved by the Supreme Court and on the 30th July 1992, the appeals were dismissed.

3.6.9 An order for security for costs (to include all High Court and Supreme Court costs) in the Probets and Freezone proceedings was made by the Supreme Court on the 26th June 1992 and on 10th July 1992, the order was complied with. This means that in the event of the Supreme Court upholding the order of the High Court, granting me an order for my legal fees, there will be monies available in this jurisdiction to satisfy such an order, without recourse to further proceedings abroad.

3.7 TSB

- 3.7.1 The next step in my inquiries, which led to the next court proceedings, arose from the documents and evidence eventually given by Ansbacher and Mr. Smyth consequent upon the orders made by Mr. Justice Murphy and referred to in Paragraphs 3.4.2 and 3.4.5. I ascertained, in particular, that on the instructions of Mr. Desmond, two payments out of the proceeds of sale of the site to Telecom in the amounts of £1,300,000 and £1,131,170, were transferred to the TSB, for the credit of a particular numbered but otherwise unidentified account. I accordingly sought information from the TSB on the 20th March 1992. The TSB however felt constrained, because it believed that it still had a duty of confidentiality to its customer, and had been requested by the customer not to furnish any information on the account without their authority, which was not forthcoming. It further transpired that the TSB had been written to, as early as November 1991, by solicitors on behalf of the customer, instructing the TSB not to furnish documents to the Inspector, unless expressly authorised by the customer or ordered by the High Court.
- 3.7.2 Arising out of the refusal by the TSB to furnish information, I issued proceedings with a view to seeking an order from the High Court directing the TSB to comply with my request (See Glackin -v- TSB and McInerney (the High Court 1992 No. 2265P)). At the outset of these proceedings, an application was made by Freezone, who it transpired were the holders of the account, to be joined in the proceedings. As with the two companies, Chestvale and Hoddle, Freezone sought to argue that they were entitled to exercise control over what information and documentation was furnished by the TSB.
- 3.7.3 The matter came on for hearing on the 10th April 1992, when it was agreed between all of the parties, that the application would be treated as an inquiry under Section 10(6) of the Companies Act 1990. Mr.

Justice Costello gave judgment on the same afternoon and found in favour of the arguments that were presented on my behalf. In considering the duty of a party upon whom a demand for information has been made, and in considering the position of some third party such as Freezone, Judge Costello stated the following:-

"The Oireachtas has made it perfectly clear to my mind, what people, statutory organisations such as the Trustee Savings Bank are required to do. They are required to assist the Inspector, who has been appointed by the Minister. They are not entitled to obstruct him and they must observe his requests. They have a statutory obligation to do so. They are not entitled to ask their customer whether or not the customer objects. Whatever contractual arrangement there has been between the Bank and the customer has been clearly over-ridden by the provisions put into this section by the Oireachtas and the manner in which it should comply with the request has been made clear by Mr. Justice Murphy. They are to give assistance to the Inspector when requested to do so. The Inspector is, by the nature of things, enquiring into a situation in which it is very possible that efforts have been made to conceal the true position which is believed to exist. In carrying out an inquiry as required by the Minister pursuant to the provisions enacted by the Oireachtas, it may well be that the Inspector may obtain information from the documents which are completely irrelevant to what he is inquiring into. He does not know until he has seen the documents, and documents which may appear to be irrelevant may subsequently, as a result of subsequent investigations in other areas, may prove to be relevant and this is the scheme which the Oireachtas has directed to be carried out, and I do not think that the analogy between parties in

discovery is a particularly close one. What the Bank has to do, and other persons who are subject to a request by an Inspector under the Section, is to comply with the request and to assist the Inspector in the work which he has to perform and which is clearly set out in the Section".

- 3.7.4 The TSB were directed to pay my legal costs. Freezone has lodged an appeal to the Supreme Court against Mr. Justice Costello's order but no date has been fixed for this appeal.

3.8 Mr. Fitzgerald

- 3.8.1 On obtaining details of Freezone's account in the TSB, I set about making further inquiries about the various transactions in the account, with a view to tracing the profits received out of the sale to Telecom. I discovered, inter alia, that payments were made from the account of Freezone at the TSB, to another account in a different branch of the TSB, in the name of a Liam Fitzgerald. I wrote to the TSB and obtained information from them in relation to this account, including the address of the account-holder.
- 3.8.2 Having obtained Mr. Fitzgerald's address from the TSB, I wrote to him requesting his attendance before me for the purpose of assisting me in my inquiry. On the same day, the 16th April 1992, an ex parte application was made on behalf of Mr. Fitzgerald to the High Court, for an injunction restraining the TSB from furnishing any information or documentation to me and for an order directing me to return all copies of Mr. Fitzgerald's current account statements and deposit account pass books which had been furnished to me. (See Fitzgerald -v- Glackin and the TSB (High Court 1992 No. 2812F)).
- 3.8.3 In his grounding Affidavit, Mr. Fitzgerald confirmed that he was the Managing Director of Financial Courseware Limited, a subsidiary of Dedeir. On foot of his application, an order was made by the High Court restraining the TSB from handing over any further documentation. No order was granted against me.
- 3.8.4 The application for an interlocutory injunction came on for hearing before Judge Costello on the 4th May 1992, when Judge Costello refused the application, on the grounds that Mr. Fitzgerald had failed to satisfy him that there was a fair issue to be tried at the full hearing of the trial of the action. Judge Costello did not accept the contentions made on behalf

of Mr. Fitzgerald, firstly that an Inspector was not entitled to seek information in the manner I did, from a bank under Section 10(2) of the Act, and secondly that an Inspector was under an obligation to direct inquiries first to the holder or to the owner of the account. As is the normal practice, the costs of the interlocutory application were adjourned to be disposed of at the hearing of the trial of the action. Mr. Fitzgerald has lodged an appeal to the Supreme Court against the refusal by Mr. Costello to grant him an injunction but no date has been fixed for this appeal.

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3.9 Freezone re Ansbacher; and Probets re ICC

3.9.1 In pursuing my inquiries into the relationship between Mr. Desmond, Dedeir, Freezone and Mr. Probets, I had, by this stage of the inquiry, ascertained that Ansbacher were in possession of considerable information in relation to Freezone. In particular, they had confirmed to me that they held an account in the name of Freezone. Freezone had also appeared on a number of documents that had been produced by Ansbacher over the previous few weeks pursuant to the various judgments. I had also ascertained that the ICC had been paid a sum of money from the Freezone account in the TSB and that they were also in possession of, what I believed to be, relevant information. Ansbacher had refused to furnish information and to answer any questions in relation to Freezone as it did not believe that the information that it had in its possession was relevant to the inquiry. On being furnished with a copy of Mr. Justice Costello's judgment in the case of Glackin -v- TSB and McInerney, Ansbacher reconsidered their position and agreed that they would furnish documents and information. However, by that stage, both Ansbacher and the ICC had been advised by Lennon Heather & Co., solicitors acting on behalf of Freezone and Mr. Probets that they would be sued for damages in the event of their handing over further information.

3.9.2 As each of Ansbacher and ICC informed Lennon Heather that they would hand over to me the required documentation unless they were restrained by court order, two further sets of proceedings were initiated. The first of these entitled Freezone Investments Limited -v- John A. Glackin, Gabriel Moloney and Ansbacher Bankers Limited (High Court 1992 NO. 3269) was instituted on the 12th May 1992, when an ex parte application was made to Mr. Justice Murphy in the High Court, seeking an injunction restraining me from seeking documents from Ansbacher and an injunction restraining Ansbacher from handing documents over or giving

information, save such documents as they might in their honest opinion feel were relevant to the investigation. An injunction was granted restraining Ansbacher from handing over the documents sought by me.

- 3.9.3 Prior to the hearing of the interlocutory application in that case, a further injunction was sought and obtained by Colin Probets against the ICC (see Colin Probets -v- John A. Glackin, Michael Quinn, Industrial Credit Corporation plc (the High Court 1992 No. 3502)) on the 20th May 1992. As the two actions were closely associated, both were listed to be heard together before Mr. Justice Murphy on the 25th May 1992. On that occasion, counsel on behalf of Ansbacher confirmed that Ansbacher would not hand over documents, other than those they were obliged to do. Mr. Justice Murphy accordingly refused the application for a continuation of the injunction, which was discharged.
- 3.9.4 In the course of his judgment, Mr. Justice Murphy gave a further clarification of the obligations imposed upon a person upon whom a demand has been made. This arose out of a query raised by counsel on behalf of Ansbacher, as to whether in forming an honest opinion as to what documentation would be of relevance, they were obliged to consider evidence from other sources, (such as from an Inspector) which would show a relevance, not otherwise apparent to the bank. Judge Murphy stated that the obligation was not to ensure that the documentation would be of assistance, but to form an honest opinion that it may be of assistance. The judge again repeated that the obligation imposed upon a person was very wide and that it was a duty imposed upon them alone and could not be interfered with by any other party. Mr. Justice Murphy confirmed that a person upon whom a demand had been made, in forming their honest opinion as to what documentation may be of assistance, could not ignore information from other sources, including that furnished by an Inspector, which would affect the forming of that honest opinion as to whether or not the

documentation or information might be of assistance.

3.9.5 On the refusal of the application for a continuing injunction, counsel on behalf of Mr. Probets (who was also representing Freezone) declined to proceed with their application for a continuing injunction against ICC, which accordingly was discharged. As is the normal procedure, the legal costs of the parties were adjourned to be determined at the hearing of the trial of the action.

3.9.6 On the same occasion, an application for security for costs was made to the court on my behalf against Freezone. It was conceded that security should be given and an order was made to this effect.

3.10 Comment:-

While it is apparent that the above litigation resulted in considerable delays being incurred during the course of this inquiry, there had hitherto been no legal precedents directly on the topic within this jurisdiction and in fact only a small body of case law of assistance from similar United Kingdom investigations under their equivalent legislation. The High Court here has, however, now consistently shown that they support a broad interpretation of the statutory powers given to an Inspector, to enable him to comply with the terms of his warrant in accordance with the scheme envisaged by the Oireachtas. A similar approach was subsequently adopted by the High Court in the only other Irish case relating to Part 2, Companies Act, 1990 which arose out of the "Greencore" inquiry in proceedings entitled Lyons, Keleghan and Murphy -v- Curran (High Court 1991 No. 294JR) where Judge Blayney held that investigating the membership of a company under Section 14 of the Companies Act was

"not simply for the purpose of ascertaining who are the members. It is for the purpose of determining who are the true persons financially interested in the success or failure of the company. That would clearly cover ascertaining the identity of the beneficiary, where shares are held by a person or persons as trustees or by a corporate trustee, but in my opinion it also covers ascertaining the identity of the person entitled to the shares of a corporate member. Otherwise it will be necessary to conclude that where an inspector had ascertained that some or all of the shares in the company he was investigating belonged to another company, he had finished his investigation; he had determined the true persons financially interested in the success or failure of the company. In my opinion that could not be so. I am satisfied that the phrase "the true persons" means the real individuals who are financially interested, and cannot refer to a company. So, where

an Inspector finds a company as shareholder in the company he is investigating, he must go further and seek to determine the persons who are the beneficial owners of that company."

The Supreme Court in their judgment on 30th July 1992 approved the adoption of that approach.

4.0 Purchase of JMOB Site from UPH and other related matters between August 1988 and April 1989

4.1 JMOB decision to move from Ballsbridge

4.1.1 At some time in the mid 1980's, JMOB sought advice from their property advisers, Hamilton Osborne King on the disposal of their land and bakery premises at Ballsbridge. Nothing transpired at that time, but in or about July 1988, the Sweepstakes site at Ballsbridge was sold by auction and subsequent to that, two underbidders for that site approached JMOB, enquiring as to whether they could purchase their land. Hamilton Osborne King advised JMOB about the possibility of a sale and subsequently sought tenders from a limited number of parties, whom they considered as potential purchasers. This was not a public tender, as JMOB were concerned that if their employees knew of a proposal to sell the JMOB site, it might result in industrial relations difficulties.

4.1.2 JMOB had considered moving to a "green field" site on the outskirts of Dublin, where they would build a new bakery. JMOB had a certain threshold value below which they wouldn't sell as it would not justify the cost of relocation. Accordingly, they requested Hamilton Osborne King to seek tenders in excess of £4,000,000 for the JMOB site and also requested that any tender should provide for JMOB to remain in possession of the premises for a period of time, during which they would arrange a smooth transfer to their new premises. The figure of £4,000,000 reflected their advisors assessment of the value, but also their estimated cost of relocation.

4.1.3 Evidence has been adduced to me that on 25th August 1988, Mr. Finnegan brought to the attention of Mr. Desmond, the fact that the JMOB site was for sale and that Hamilton Osborne King, Estate Agents, on behalf of JMOB were seeking tenders in excess of £4,000,000. It is not clear how much work was done before the 26th August 1988, by or on behalf of Mr. Desmond, in relation to an assessment of the site, but

on the 26th August 1988, being the deadline for the receipt of the indicative tenders by Hamilton Osborne King, Mr. Finnegan submitted a proposal to purchase the site in the sum of £4,000,000 stating that he was instructed by "National City Brokers" as trustees. On request from Hamilton Osborne King, and on information furnished by Mr. Desmond, he indicated that the tender was made on behalf of "Expert Financial Systems Group Pension Portfolio". There had been a specific provision in the letter from Hamilton Osborne King, when seeking tenders, that the vendors would not consider any proposal that was conditional on planning permission. This reflected their doubts on the availability of planning permission for commercial development of the site.

4.2 UPH Activities at this Time

- 4.2.1 At or about this time, NCB and Aylesbury, the proposed partners or joint promoters of UPH, were in the process of drafting a placing memorandum for submission to potential equity investors and lending institutions. The investment strategy of UPH was outlined in the draft memorandum, as being the purchase of first class commercial and retail properties, with the intention that the income from the properties would pay for the funding costs of loans required to finance the purchases.
- 4.2.2 Mr. Walsh, who acted as chief executive of UPH until mid February 1989, has stated in evidence that he looked at a number of potential investments for UPH in the latter part of 1988 and early 1989 and that many of these had Telecom as a tenant. In addition to Findlater House in O'Connell Street, which was being considered by Mr. Desmond before Mr. Walsh became involved, Mr. Walsh has stated that he considered on behalf of UPH, the purchase of Merrion House, the Ardilaun Centre in St. Stephen's Green, the Gaiety Centre in South King Street and Cumberland House in Fenian Street, all in Dublin. He also stated that he considered the purchase of the Setanta Centre on Nassau Street, St. Stephen's Green House on Earlsfort Terrace and the former Irish Cement Limited offices at Lower Pembroke Street.
- 4.2.3 One of the properties which Mr. Walsh had examined and reported on for UPH was Nassau House, Setanta Centre in Dublin. Mr. Desmond gave evidence that he discussed this property with John Finnegan and that Mr. Finnegan would have had an indication of what UPH were prepared to offer for the property. Mr. Finnegan had sent details of the property to Mr. Desmond by letter of 4th October 1988. According to the evidence of Mr. Desmond, discussions ensued between Mr. Finnegan and Mr. Walsh on behalf of UPH, but Mr. Finnegan in his evidence has stated that he did not have any discussions with Mr. Desmond in relation

to any other property in which he was interested, other than the JMOB site. The Setanta Centre was bought, subsequent to a private tender, by Dr. Smurfit and Mr. Goodman jointly. I understand that each of Dr. Smurfit and Mr. Goodman were clients of Mr. Desmond in NCB at the relevant time, which was in December 1988. Mr. Walsh has stated that he instructed Mr. Finnegan to submit a tender on behalf of UPH and that the amount of the tender was equivalent to that submitted by Dr. Smurfit, but Mr. Finnegan has denied this. According to the evidence of Mr. Walsh, he was very annoyed at the time about this, as he felt that UPH had been incorrectly treated.

4.2.4 UPH submitted a tender through Mr. Finnegan for the purchase of St. Stephen's Green House at Earlsfort Terrace and submitted a different tender through Mr. Hassett. They also made an offer for the former Irish Cement Limited premises on Lower Pembroke Street.

4.2.5 In January 1989, Aylesbury and NCB with others, were seriously considering a takeover bid for Green Property plc but this did not proceed, as it would appear that a merchant bank involved became unhappy with one of the proposed partners. It is not clear whether this was to be part of UPH or merely parallel to it.

4.2.6 The tender for the JMOB site does not appear to have fitted into the stated investment strategy of UPH, even though it was intended that JMOB would rent the property back for a short period of time, so that at least for that short period, UPH would have the rental income and during which period UPH could apply for planning permission for the site.

4.3 After the "Indicative" Tenders

- 4.3.1 There appears to have been very little activity between August 26th 1988 and the middle of October 1988, by or on behalf of UPH, in relation to the JMOB site, save that they may have done some more research into the planning situation with Dublin Corporation. Mr. Desmond stated in his evidence that he did not seek to ascertain from Hamilton Osborne King or from JMOB what the position was in relation to the tenders, even though the purchase of the property would have required a very substantial commitment from UPH in terms of its financial resources.
- 4.3.2 In or about 27th October 1988, Hamilton Osborne King, on behalf of JMOB, submitted tender forms to five parties who at the earlier stage had indicated that they would be prepared to make a tender in excess of £4,000,000. The tender was to provide for an early closing of the sale and a lease back to JMOB of the property for a period of up to 24 months.
- 4.3.3 The evidence adduced shows that Mr. Walsh and Mr. Finnegan had a number of discussions from mid October 1988 in relation to the proposed purchase of the JMOB site. Mr. Finnegan asked at least one architect to advise him on what type of development might be achievable on the site. Mr. Walsh stated in evidence that he was unhappy with the proposal that UPH try to acquire the JMOB site, as it was not an "investment property", but that the decision to proceed was made by Mr. Desmond.

4.4 Tenders for JMOB Site

4.4.1 On 22nd November 1988, Mr. Desmond having consulted with Mr. Finnegan and Mr. Walsh, instructed Mr. Finnegan to tender the sum of £4,400,700 for the property and this tender was submitted. On 24th November 1988, the tenders submitted to Hamilton Osborne King were opened and of those tenders submitted in accordance with the stated procedures set out by Hamilton Osborne King, the tender of UPH was the highest and Mr. Finnegan was notified of that. The solicitors for JMOB were A & L Goodbody and Mr. O'Connor of that firm dealt with the matter on its behalf. The solicitors for UPH were also A & L Goodbody and Mr. Bruncker of that firm dealt with the matter on its behalf. At the time the tenders were opened and before a decision was finally made, Mr. Bruncker had been asked by Mr. O'Connor, who UPH were and was informed that they were associated with NCB and were financially sound. Mr. O'Hogan of Hamilton Osborne King who was with Mr. O'Connor and others at a lunch after the tender by UPH was accepted, stated in evidence that he was under the impression then that UPH was backed by Mr. Desmond and Dr. Smurfit and some other people whose names he did not know.

4.4.2 A deposit of £660,000 was paid on behalf of UPH by NCB. Shortly afterwards, requisitions on title were raised by Mr. Bruncker and submitted to Mr. O'Connor and counsel's opinion on title was obtained by Mr. Bruncker. Replies to the requisitions were made and Mr. Bruncker was satisfied with the title. A draft deed was prepared showing Rockmar Developments Limited ("Rockmar") as the proposed purchaser. Rockmar was a shelf company owned by NCB.

4.4.3 The closing date stated in the tender document, and accepted by UPH on 24th November 1988, was the 5th January 1989, but the sale did not close on that date and it would appear that UPH did not have the

financial resources at that date to complete the purchase. It had not raised any share capital, save for the sum of £833,000 subscribed by one shareholder and it had not arranged any bank finance. The deposit of 15%, which had been paid as to 5% with the tender and 10% shortly thereafter, had been advanced by NCB. An application for funding the purchase of the JMOB site was made to AIB in December 1988 or January 1989 by Mr. Walsh on behalf of UPH, but this application does not appear to have been pursued.

- 4.4.4 A further application was made to Trinity Bank in late February 1989 but this application was not proceeded with either.

4.5 UPH Raising Equity Funds

4.5.1 Mr. Desmond, on behalf of NCB and Mr. Walsh, on behalf of Aylesbury, approached a number of potential investors, in the latter part of 1988 and early 1989, with a view to their subscribing for share capital in UPH and resulting from that, share capital of £2,033,000 was subscribed.

4.5.2 On the 23rd December 1988, Mr. Desmond wrote to Dr. Smurfit seeking investment by him in UPH. Dr. Smurfit has given evidence that Mr. Desmond had earlier approached him and asked him to invest. He added that he did not really want to, as it was not his style to invest small sums of capital, but as Mr. Desmond was somebody to whom he was attracted, he decided to make the investment in the company. At that time, a placing document had been prepared for submission to the proposed investors. Dr. Smurfit has given evidence that he did not ask for a copy and that he did not see one, but agreed that some of his advisers may have seen one then or at a later stage. However his evidence is that he was not aware then that UPH had an interest in the JMOB site.

4.5.3 By letter of the 16th January 1989, Una Duffy of Jefferson Smurfit plc, wrote to Mr. Desmond stating that Dr. Smurfit would take up 100,000 ordinary shares of £1 each in the company, which were to be registered in the name of Bacchantes Limited and that payment in respect of the shares would be made by direct transfer on 17th January 1989 to an NCB bank account. The letter from Una Duffy added that:

"I understand that the Pension Fund is taking up the £400,000 convertible and no doubt Kevin Goss will be in touch with you in this regard"

The sum of £100,000 was then subscribed as promised.

4.5.4 On 20th January 1989, Smurfit Paribas Investment Management Limited

signed a subscription agreement which had earlier been submitted to them by NCB subscribing for 400,000 cumulative redeemable convertible preference shares of £1 each. This investment appears to have been for the account of "BHPT1" and correspondence in relation to it took place with Kevin Goss of McDonagh Boland Beech Hill Pension Trustees Limited, part of the Smurfit Group. On 20th January 1989, the sum of £400,000 was paid by Smurfit Paribas Investment Management Limited to NCB for the account of UPH. This money appears to have been lodged to an account in the name of AS Nominees Limited (a subsidiary of Aylesbury Securities Limited) at Allied Irish Banks Limited, South Mall, Cork where the £100,000 subscribed by Bacchantes Limited had also been lodged. I have been informed that this investment of £400,000 was made on behalf of the Jefferson Smurfit Group Pension Fund.

- 4.5.5 Between 13th December and 23rd December 1988, £833,000 was subscribed by Company Holdings Limited, a company associated with Tom Cavanagh. This was also lodged to the account of AS Nominees Limited but was refunded on the 24th February 1989. Company Holdings Limited then subscribed again through Convoy Trust on the basis of a second amended placing document on 15th May 1989.
- 4.5.6 On 16th January 1989, AIIM subscribed £700,000, which was also lodged to the AS Nominees account and like the Company Holdings Limited funds was returned to them on 24th February 1989. Consequently, the only shareholders funds remaining in UPH between 24th February 1989 and 15th May 1989, was the £500,000 subscribed by Bacchantes Limited and Smurfit Paribas Investment Management Limited, this sum having been transferred on 24th February 1989 from the account of AS Nominees Limited to an account of NCB for UPH.
- 4.5.7 I understand from evidence adduced to me, that in February 1989, after the split with Aylesbury, NCB seriously considered not proceeding with

UPH. It was for this reason that the monies subscribed by Company Holdings Limited and AIIM were refunded to them on 24th February 1989. Dr. Smurfit in his evidence stated that he was not aware of those considerations by NCB, nor was he aware that other shareholders had their subscriptions returned to them.

- 4.5.8 Subsequently in May and June 1989, a further £2,900,000 was raised by UPH, which included a partial resubscription by AIIM and Company Holdings Limited and subscription by a number of new shareholders. At that time, £500,000 had been subscribed for ordinary shares (which included the £100,000 subscribed by Bacchantes Limited) and the remainder for one or other of three different classes of preference shares, although the Articles of Association of UPH did not provide for any preference shares. In March 1990, a further £450,000, in aggregate, was subscribed for ordinary shares by NCB (in trust for its' executives and Pepper Canister Nominees as nominee of Mr. Desmond) and £50,000 was subscribed by Mr. Hassett. It is not clear why some shareholders subscribed for ordinary shares only and others for ordinary and preference shares. Even though NCB, Pepper Canister Nominees and Mr. Hassett did not subscribe for shares until March 1990, the share register of UPH indicates that they were allotted fully paid up shares on 31st May 1989.

4.6 Initial Plans of UPH for JMOB Site

- 4.6.1 According to the evidence of Mr. Walsh, who was then effectively the chief executive of UPH, he perceived that the JMOB site purchase did not conform to UPH investment strategy, but he felt that it could fit into the investment strategy, if a tenant could be identified to take all the proposed office area, so that UPH, with a good covenant in place, could arrange for development of the site. It would then move from being merely a development site to being an investment site. According to Mr. Walsh, Telecom were, at the end of 1988 and early part of 1989, perceived by him as a suitable party with whom to do this kind of deal.
- 4.6.2 Mr. Walsh in evidence, stated that the value of £4,400,700 offered for the JMOB site could be underpinned by a straight forward residential development of 150 units which would comply with the Dublin Draft Development Plan. However, to achieve a profit for UPH, planning permission for some form of office development would be necessary. Mr. Walsh stated that he recognised the difficulty in getting such planning permission, but felt having received legal advice, that there was a better chance of getting permission for a corporate HQ type of building rather than an office park type of development. It was in the context of this and being aware that Telecom was one of the major office users in the city, that he thought of Telecom as a potential occupier for the office content of the JMOB site and said that this idea really developed in his mind during January 1989.
- 4.6.3 Mr. Walsh also stated in his evidence that he discussed the Telecom suggestion with Mr. Finnegan and told Mr. Barry of UPH of his thoughts. He also stated that he understood that Mr. Finnegan had mentioned the matter to some people in Telecom, but could not be sure if he heard the names of such people from Mr. Finnegan. Mr. Barry has stated in evidence that he did not recollect being so informed.

4.6.4 Mr. Walsh in his evidence on this aspect referred in particular to a lunch time meeting which he had with Mr. Finnegan on 6th February 1989. He produced to me an agenda for that meeting prepared by Mr. Finnegan which refers, not only to the JMOB site, but also to other investment proposals. He stated that this meeting was the culmination of a series of earlier discussions on that issue. The agenda referred under the heading "JMOB" to Planning, Drawings, Stamp Duty and Consultants. Mr. Walsh stated that most of the discussion at lunch related to that aspect of the agenda, with very little discussion on the other investment proposals. He said that there was discussion relating to Telecom usage, the space that might be required by them, the outline terms of a lease and the appointment suggested by Mr. Finnegan of Mr. O'Halloran as Consultant Architect. Mr. Walsh added that drawings or sketches were produced by Mr. Finnegan to him which drawings were produced by Mr. Walsh to me. Mr. Finnegan in his evidence to me on the 12th June 1992 initially said that he did not remember the discussion nor the meeting, but subsequently admitted that he did remember the meeting but could not remember what was discussed at it. He added that he did not remember any discussions about Telecom in relation to the JMOB site, at or about that time. He said that he certainly did not give drawings to Mr. Walsh. In fact, I have ascertained that the drawings that were given to me by Mr. Walsh, were prepared by Scott Tallon Walker Architects at the request of Mr. Finnegan and Mr. Walsh has indicated that he had no direct contact with Scott Tallon Walker. The matters outlined in Paragraphs 4.6.3 and in this Paragraph constitute a clear conflict of evidence which I have not yet resolved to my satisfaction.

4.7 Appointment of Liquidator to JMOB

- 4.7.1 During January and February 1989, some correspondence ensued between Mr. O'Connor as solicitor for JMOB and Mr. Bruncker as solicitor for UPH in an endeavour to have the sale completed, but the sale was not completed then and on the 28th February 1989, a resolution was passed at an extraordinary general meeting of JMOB, that the company should be wound up as a members voluntary winding up and that Mr. Grace, F.C.A., a partner in Craig Gardner & Co., Chartered Accountants be appointed as liquidator.
- 4.7.2 At the end of February 1989, an application was made to Trinity Bank on behalf of UPH for funding the acquisition of the JMOB site and this was approved, but on terms which could not be complied with by UPH, because of the appointment of a liquidator to JMOB.
- 4.7.3 Mr. Grace, on his appointment as liquidator, continued the business of the company, to give him time to assess whether it could be sold as a going concern. He was contacted shortly after his appointment by Mr. Desmond, who informed him of the existence of the contract for the sale of the property and Mr. Grace indicated to Mr. Desmond that he would consider the effect of that. The fact that there was a contract for the sale of the property complicated any attempt to sell the business as a going concern, but as it transpired, there was no third party interest in acquiring it and on the 24th March 1989, production ceased at the premises and all the employees were made redundant.
- 4.7.4 This had an effect on the contract between JMOB and UPH, insofar as UPH were to receive an income from JMOB under the proposed lease back, which was to last for a minimum of eighteen months from the date of closing the sale and during which period, UPH intended to seek planning permission for development of the JMOB site.

4.7.5 In the interim, Mr. Grace had engaged in negotiations with Mr. Desmond to complete the sale of the property. To comply with the terms of the existing contract, Mr. Grace as liquidator would have had to pay rent and all the other outgoings for the property for a period of eighteen months. He calculated that the holding cost could be somewhere between £1,000,000 and £1,500,000. After a number of discussions, Mr. Grace and Mr. Desmond agreed to adjust the contract, so that the obligation of JMOB to lease back the property would be waived; the closing date would be extended to 15th July 1989 with an option to the liquidator to extend that to 31st July 1989; no interest would be charged on the outstanding purchase price until the closing date and the purchase price would be reduced to £4,000,000. Final agreement was reached with Mr. Desmond, who was negotiating on behalf of UPH, on the 14th April 1989.

4.7.6 The revised agreement did not get reduced into writing until June 1989 according to Mr. Bruncker the solicitor for UPH. It was not actually signed until 31st July 1989 by which time, it had changed again, as the purchaser could not close the sale on that date and the document between JMOB (in liquidation), the liquidator Mr. Grace and UPH provided for a new closing date of 11th August 1989 and time was made of the essence of the agreement. The process by which this agreement was entered into by UPH was unusual. It appears to have been agreed between Mr. Grace and Mr. Desmond without consulting their respective solicitors and Mr. Barry of UPH agreed to it without consulting his solicitor. The agreement by Messrs. Desmond and Barry seems to have weakened their negotiating position with the liquidator and may have caused some of the pressure which arose over the subsequent few weeks.

5.0 Sale on by UPH - April 1989 to August 1989

5.1 Third Party Enquiries re: JMOB Site

5.1.1 Mr. Barry and Mr. Desmond have stated in evidence that one of the options available to them at all times after they contracted to purchase the JMOB site in November 1988 was to sell it on, on the basis that there was a rising market. Mr. Finnegan had advised them from an early stage, that that was a fall-back position for them. Mr. Finnegan has stated that although there were no formal approaches to him, he knew that there were likely to be a number of interested parties and he was confident that the site could be sold on. Mr. Walsh estimated that the site had a base value of c.£4,000,000, if the entire site was used for residential development only, but any increase on that value would only arise, if planning permission for offices on part of the site could be obtained.

5.1.2 Mr. Waters of NCB Property wrote in a memorandum to Mr. Desmond of the 21st March 1989 stating that an approach had been made in March by Mr. Neill of Town and Country Investments plc and advised Mr. Desmond that there were various advantages in pursuing discussions with Mr. Neill. He added that as there was a danger that the property market might begin to slip again, UPH should seriously consider taking a profit at that stage by selling on the property. However it does not appear that any serious discussions were pursued with Mr. Neill.

5.2 UPH - Invitations to Tender

- 5.2.1 The evidence of Mr. Waters concurred with advice from Mr. Finnegan to Mr. Barry of UPH, contained in a letter of the 12th April 1989. This letter from Mr. Finnegan was followed up by telephone conversations with Mr. Barry and possibly with Mr. Desmond and it was agreed that tender forms should be prepared and a list drawn up of potential purchasers. Mr. Finnegan, in his letter of the 12th April 1989 to Mr. Barry, suggested that the closing date of the proposed sale should dovetail with the revised closing date, agreed with the liquidator, of the 15th July 1989.
- 5.2.2. Mr. Finnegan has stated in evidence, that he initially had a discussion with Mr. Desmond and followed that with a discussion with Mr. Barry and then wrote the letter of 12th April 1989 referred to above, at the request of Mr. Barry.
- 5.2.3 Although he had left Aylesbury and UPH at the time, Mr. Walsh remained interested in the site. He stated in his evidence that he personally doubted the genuineness of the intention to sell on at that time and says that it did not make commercial sense to sell, without first having applied for and received some planning permission to enhance the value of the site. Some of the evidence adduced to date shows that Mr. Barry of UPH did want to sell on the site but that Mr. Desmond did not want to do so, as he saw further potential in the site.
- 5.2.4 On 20th April 1989, Mr. Finnegan wrote to Mr. Barry and stated that he had a list of names prepared and that he would like to compare it with Mr. Barry's list. In the first list, the names included "**Dr. Michael Smurfit**" and "**Mr. L. Goodman**", but these names have a handwritten line through them and they do not appear on subsequent lists. Neither Mr. Barry nor Mr. Finnegan was able to explain why these names were on the list and why they were removed. However, Mr. Finnegan subsequently said that

it may have been because they had bought the Setanta Centre jointly, when he acted for Dr. Smurfit and that they probably would not be interested in further purchases, until that was completed and a rent review in place. This, however, does not conform with other evidence that Dr. Smurfit was looking at further property investments a few months later with Mr. Finnegan. Dr. Smurfit stated in evidence that he did not instruct Mr. Finnegan that he was not interested in purchasing more property, but he added that he was not aware that his name was on the list. Mr. Goodman also confirmed that he did not know his name was on the list and hence could not explain why it was subsequently removed.

5.2.5 Mr. Finnegan in his letter of 12th April had indicated that there should be a public tender process, but what transpired in the end was a limited tender, with a letter being submitted to certain identified individuals, rather than being advertised publicly, or even through the usual city estate agents. The only estate agents to whom tenders were sent, were Pat McCormack of Palmer McCormack and Paul Newman of Douglas Newman Good although Ian French of Hamilton Osborne King appears to have received a copy, through a client of his.

5.2.6 The instructions to Mr. Finnegan were that the disposal was to be by means of an opportunity for the vendor, UPH, to participate and that it was not to be seen as an outright sale. Mr. Finnegan drafted a letter, which was an invitation for people to participate in the tender and he submitted this to Mr. Brunner, solicitor for UPH, for approval on the 27th April 1989. The draft letter was engrossed without amendment by Mr. Brunner and was circulated to the parties on the list on 28th April 1989 with a brochure. Mr. Finnegan, who was an external property adviser to UPH, has stated in evidence that he did not consider a tender inviting ongoing participation with the vendor to be the best way of selling the property and could not remember a previous occasion when this was done (i.e. without the extent of the required participation being specified).

5.2.7 The circular letter specifically stated that Finnegan Menton were instructed to issue the invitation to tender for participation in the site and invited each tenderer to offer a proposal to the vendor whereby the vendor may be involved in participation by way of profit sharing, to such extent as may be deemed reasonable to the tenderer and indicated that such offer would be taken into consideration by the vendor, in conjunction with the purchase price offered. It added that tender documents would be available on application and that the latest date for receipt of tenders would be 12.00 noon on the 21st May 1989.

5.2.8 There were six parties who sought actual tender documents and of this six, four actually made offers either through Mr. Finnegan or through A & L Goodbody Solicitors. Mr. Barry, a director of UPH indicated in the course of his evidence on 23rd October 1991, that he did not recollect any specific instructions to Mr. Finnegan to try to achieve a joint venture or some form of participation for UPH in the development and said that he would be very surprised if there were instructions of that nature. He added that it surprised him that Mr. Finnegan in his tender form requested proposals for participation. I have seen the memorandum of at least one meeting dealing with this matter, apparently attended by Mr. Barry, which implies that this particular matter was discussed with him. Mr. Barry subsequently added that it did not surprise him in another sense and that it was quite possible that UPH would be happy to have a situation where a third party "paid Tom Grace the £4,000,000" and UPH would take a proportion of the "upside". He added that that is certainly the kind of thing a stockbroker would think about. As pointed out above, Mr. Finnegan stated that the idea of continuing participation for UPH was not his and that he advised against it. He added that it was either Mr. Barry or Mr. Desmond who gave those instructions to him. Mr. Barry in his evidence stated that it was not he who gave such instructions.

5.2.9 A proposal was submitted by Mr. Smyth solicitor, whose name was on

the circulation list to whom the letter and a brochure was sent by Finnegan Menton, dated 17th May 1989 and a copy of this is attached as Appendix 4. Mr. Smyth has given evidence that when he first looked at the JMOB site in May 1989 and when he drafted the proposal of 17th May 1989, he did not have a specific client. He, however, had the intention of trying to interest some existing clients in forming a consortium with, perhaps, UPH and had in mind, Mr. Lipper, an American lawyer with whom Mr. Smyth had participated in other property transactions. Mr. Lipper on a number of occasions had led a group of investors in, what was known as, the "Lipper Consortium".

5.2.10 Discussions ensued between Mr. Desmond and Mr. Smyth in relation to this proposal and on the 19th June 1989, Mr. Smyth, at the request and on the instructions of Mr. Desmond, made a formal offer to Mr. Barry of UPH in the sum of £6,300,000; £4,000,000 to be paid at closing and the sum of £2,300,000 to be paid by way of a loan note in four years time, with interest accruing on the loan note at a commercial rate. When requested, Mr. Smyth confirmed that the loan note would be guaranteed by a bank. Mr. Smyth has given evidence that on 19th June 1989 and thereafter, he considered that his client was Mr. Desmond. The "Lipper Consortium" did not participate further as far as Mr. Smyth knew, although as indicated below, he later tried to involve them further.

5.2.11 The offer from Mr. Smyth referred to discussions he had had with Mr. Desmond. The offer was recommended by Mr. Desmond and approved by Mr. Barry on the grounds that it met the closing date requirement of the liquidator and was tax efficient. However according to the evidence of Mr. Pairceir, the offers were not considered by the board of UPH.

5.2.12 Three of the four parties who made offers have either given evidence before me or produced documentation to me. The fourth party did not reply to my correspondence and as it is outside the jurisdiction, I did not

consider it necessary to pursue it further. None of the said three parties appeared entirely satisfied with the procedures for assessing offers, particularly in the circumstances of the nature of the tenders required and at least two of them felt that it would have been more satisfactory, if direct discussions had taken place between them and the principal, who they perceived as Mr. Desmond. Each of the four parties, who made an offer, were substantial property companies with well established track records in property development. Various reasons have been given by Mr. Barry, as to why UPH were unhappy with the offers, one being that the closing date proposed by one purchaser was in September (when the then due date for closing with the liquidator was at the end of July), another being that the proposals were not tax efficient. However, neither of these points were made to the particular offerors to give them an opportunity to vary or improve their offers. Each of these parties appear to have gone to considerable efforts in preparing a tender and engaged the services of valuers, architects, engineers, quantity surveyors and planning consultants or some combination of these professionals.

5.2.13 What appears strange in my opinion is that, according to the evidence of Mr. Barry, no comparative analysis was made of the different offers and their different elements, and no advice was sought from Mr. Finnegan. In fact, the evidence of Mr. Finnegan himself is that he was effectively cut out of the process at that stage and he wasn't involved in negotiations, nor in assessing offers.

5.2.14 It may be that Mr. Desmond intended to acquire the JMOB site either alone or with other investors and that the tender mechanism was used to try to establish a value to be placed on the property, rather than a genuine attempt to dispose of it at arms length, as no serious efforts seem to have been made to negotiate with those third party offerors. Any contacts, on behalf of UPH with those offerors, were made by Mr.

Desmond. Alternatively, it may be that it was only when he saw these other offers, that Mr. Desmond decided to acquire the site himself or with others. No reference was made by Mr. Desmond to his instructing Mr. Smyth at any time during the first four days of his giving evidence to me.

5.2.15 Having subsequently interviewed Mr. Smyth on 20th and 21st February 1992, I put it to Mr. Desmond on 5th April 1992 that the successful offer to UPH by Mr. Smyth was submitted on Mr. Desmond's instructions. Mr. Desmond stated initially that he told Mr. Smyth that the price would have to be in excess of the best bid and that the highest bidder was going to win it. When pressed by me, he stated that he could have told Mr. Smyth that he would have to be in excess of £6,250,000 to win it. However Mr. Desmond did then confirm that Mr. Smyth put in his offer of £6,300,000 at Mr. Desmond's request.

5.2.16 On receipt of the letter of offer from Mr. Smyth dated 19th June 1989 and which was open for acceptance up to and including 30th June 1989, Mr. Barry contacted Mr. Kenny for tax advice. Mr. Kenny advised that from the point of view of UPH, the proposed deal would be good, but that the loan note needed to be bank guaranteed and the guarantee should not be secured on the site, as this would contravene Section 60, Companies Act, 1963. He added that the loan stock should carry a commercial rate of interest or else it would be less bankable, because of a difference from loan stock in general. He added, however, that from the purchasers point of view, the proposal would create a tax problem further down the road, as capital gains tax would be calculated on a base of £4,000,000 as opposed to £6,300,000. Mr. Barry reverted to Mr. Smyth and on the 3rd July 1989, Mr. Smyth wrote a further letter confirming that his offer was to be treated as amended, to include a bank guaranteed loan note. In fact, as appears in Paragraph 7.2.19 et seq., the difficulty for the purchaser that Mr. Kenny on behalf of UPH identified at that time, was used by the purchaser some months later, to seek a reduction in the

price payable to UPH and it was ultimately agreed that UPH would receive effectively, £500,000 less (on a gross basis) than originally offered. One effect of this was to reduce the price payable to UPH well below other offers made by third parties.

5.2.17 On 30th June 1989, Mr. Barry telephoned Mr. Brunker and informed him that agreement had been reached on the sale on of the UPH contractual interest in the JMOB site for cash of £4,000,000 and loan stock of £2,300,000. He indicated that the purchaser was Mr. Smyth and that the property should be put into the name of a shelf company.

5.2.18 Having heard from Mr. Barry on 3rd July 1989 in relation to the sale on to Mr. Smyth, Mr. Brunker wrote to Mr. Smyth by letter of the 6th July 1989 referring to Mr. Smyth's letters to Mr. Barry of 19th June and 3rd July and the telephone conversation between Mr. Smyth and Mr. Brunker. Mr. Brunker stated in the letter, that he appreciated that Mr. Smyth wanted to talk to Mr. Grace, the liquidator, to establish precisely the proposed structure of the transaction, as Mr. Smyth in his letter of offer sought cooperation from UPH in mounting a stamp duty savings scheme. It was acknowledged that Mr. Grace would not be bound by that but Mr. Smyth hoped to persuade him to participate.

5.2.19 Mr. Brunker stated further in the letter, that on the basis that the property "should be put into a wholly owned subsidiary of UPH in the first instance", he had drawn up a purchase deed in favour of a shelf company, which "can be readily made a wholly owned subsidiary of UPH". Mr. Brunker then forwarded to Mr. Smyth the original contract for the purchase of the property by UPH, various documents on title, requisitions on title with replies and a copy of counsel's opinion on title. On the basis that Mr. Smyth's client would be acquiring the shareholding of the shelf company, he asked for a copy of the proposed share purchase agreement, together with a copy of the proposed format of the

loan note in respect of the deferred payment of £2,300,000, for his approval. As indicated above, Mr. Finnegan appears to have been ignored at this stage and was trying to ascertain what the up to date position was. There is evidence of his trying to contact Mr. Brunker or Mr. Brunker's assistant to ascertain what the position was in relation to the progress of the deal with Mr. Smyth.

- 5.2.20 Mr. Smyth did not reply to the letter of the 6th July 1989 from Mr. Brunker and a reminder was sent by Mr. Brunker on the 19th July 1989.
- 5.2.21 By two letters of the 26th July 1989 from Mr. O'Connor, solicitor for the liquidator, Mr. Brunker was informed that the liquidator was most anxious to have the sale completed on the 31st July 1989. He was asked if there was any reason why Mr. Brunker's clients would not be able to complete on that date and requested that they please notify Mr. O'Connor immediately. On the same day, Mr. Brunker rang Mr. Barry of UPH to notify him of the lack of response from Mr. Smyth. Mr. Barry rang back to say that he had spoken to Mr. Smyth and that Mr. Smyth had assured him that everything was in order.
- 5.2.22 By letter of the 28th July 1989, Mr. Brunker sent to Mr. Barry a form of endorsement containing the alterations to the contract, whereby the purchase price was reduced to £4,000,000 and the closing date extended to the 31st July as referred to earlier and he asked that this document be executed on behalf of UPH and returned to Mr. Brunker as early as possible.
- 5.2.23 The sale did not close on the 31st July and on the 2nd August, Mr. Brunker spoke to Mr. Barry who confirmed that the endorsement to the contract had been signed. This however was a different endorsement than that which was sent by Mr. Brunker to Mr. Barry on the 28th July. Mr. Brunker informed Mr. Barry that the endorsement that he had signed

meant that the deposit paid by UPH was at risk if the sale was not closed on the 11th August 1989, because he had allowed time be made of the essence of the contract. Mr. Barry does not appear to have realised that and said that he would tell Mr. Desmond.

5.2.24 It would appear that no written agreement was signed by Mr. Smyth or his clients with UPH at least until April 1990 even though one of the apparently most important reasons for acceptance of Mr. Smyth's offer, was his perceived ability to meet the closing deadline with the liquidator of JMOB.

5.2.25 Even in the latter part of July, when the UPH solicitor was expressing concern at Mr. Smyth's delay, Mr. Barry does not seem to have sought information as to the financial capacity of Mr. Smyth's client to comply with their part of the agreement, save that he seems to have relied on assurances by Mr. Desmond that Mr. Smyth would perform. This is particularly surprising as the reason given for rejecting another offer, was doubts as to the offeror's financial capability. Indeed, when UPH were contracting with JMOB in November 1988, NCB had to give some comfort to the vendors agents as to the financial capacity of UPH.

5.2.26 Mr. Barry stated in evidence to me that he relied on Mr. Desmond's recommendation of Mr. Smyth's offer and his assurance that it would be complied with and felt that if there was a problem with it, it was up to Mr. Desmond to sort out, even though he accepts that he, Mr. Barry, was the director of UPH and not Mr. Desmond.

5.2.27 Mr. Barry has stated in evidence that he was not aware that Mr. Desmond had any involvement in Mr. Smyth's consortium, but later said that he did understand that Mr. Desmond was assisting Mr. Smyth in putting together the finance to complete the purchase, and that this in itself did not concern him.

5.3 Noel Smyth Consortium

- 5.3.1 As indicated above, according to the evidence of Mr. Smyth at the time that he prepared his proposal in May 1989, he did not have any particular client in mind. However, he did have in mind the possibility of putting together a consortium of investors and he prepared the proposal of 17th May with that in mind.
- 5.3.2 He commenced discussions with Mr. Desmond in relation to his proposal and Mr. Desmond indicated that he would have clients who would be interested in joining a consortium. Mr. Smyth stated in his evidence, that at the 19th June 1989, when he made the offer to UPH on the instructions of Mr. Desmond, he was not aware of there being any consortium as such and assumed that Mr. Desmond had decided then to proceed to purchase the property himself.
- 5.3.3 Mr. Desmond gave evidence that Mr. Smyth and his consortium, including Mr. Desmond's clients would be acquiring the JMOB site and transferring it to Sportsfield with a list of other properties owned by various parties (including Mr. Doherty) that were being put together by Mr. Smyth for the purpose of a reverse takeover of Sportsfield. Mr. Smyth has indicated, that while that was something that was considered, it was not to happen for a considerable length of time after August 1989. Mr. Desmond stated that he had informed the executives of NCB, who were dealing with the reverse takeover of Sportsfield, of this proposal and that Mr. Barry of UPH was also aware of it.
- 5.3.4 According to Mr. Desmond, he understood that Mr. Smyth would be able to produce investors as would he and that he was confident that the purchase could be completed. Mr. Desmond stated that Mr. Smyth at that time was not acting for Mr. Doherty, but was acting for a consortium that had been put together and which was being assisted by Mr.

Desmond. He added:

"there were no members classified, there was a number of people, Noel Smyth had a client list and he would have no problem in getting a number of people to participate, and I was the same way. The concept was that people that would put money in from my side would be people that would be able to take a site or buy a house site and I would have taken a house site myself, then they would put up the money, and the money would be taken out through the conveyancing of a house site and shares in Sportsfield and they would get part of the development profits, but they would have basic value plus they would get a house site at the right price or base price, plus they would get an uplift in the value through having Sportsfield shares".

5.3.5 I asked Mr. Desmond if the remainder of the site, after the houses were built, was going to be put into Sportsfield and he replied,

"yes, simply yes, that would be correct; Sportsfield then would have development profits".

I then asked Mr. Desmond if that concept had been discussed with any particular investors and he replied in the negative. I asked him if he just reckoned that he could put that together and he replied in the affirmative. Mr. Desmond added that he had not spoken to any of his clients about it, but thought that Mr. Smyth had spoken to a number of his own clients who would have put a high value on it and that included in those was Mr. Doherty. In fact, each of Mr. Magnier and Mr. McManus, who are two of Mr. Desmond's clients, have stated in evidence that Mr. Desmond did discuss with them the purchase of a house site but confirmed that there was no discussion about Sportsfield and that nothing further was discussed nor did they pursue the matter further.

5.3.6 Each of Ms. O'Connor who was the executive in NCB dealing with the proposed Sportsfield reverse takeover, Mr. Rothwell who was the senior

person in NCB dealing with it and Mr. Buckley, who was at that time in charge of the corporate finance department in NCB, have each stated that they were not aware of the proposal to include the JMOB site among the properties to be transferred into Sportsfield. Mr. Barry has stated in evidence on 1st July 1992 that he was not aware of the proposal and that he thought, that the first he ever heard of the suggestion, was when I put the question to him.

5.3.7 According to the evidence of Ms. O'Connor, a formal proposal was put to the Sportsfield board on the evening of the 27th July 1989 by Mr. Smyth and having been accepted, was signed by both parties. The shares of Sportsfield were then suspended by the Stock Exchange at 9.30 a.m. on the 28th July 1989. The formal proposal listed a number of properties which were to be transferred into Sportsfield and the proposed valuation of those properties. It did not mention the JMOB site. It was a provision of the proposal that an independent valuation of the properties be made and if the value found by the independent valuation was less than 75% of the value suggested by Mr. Smyth, then Mr. Smyth had the right to withdraw that property from the proposal. On 8th August 1989, Mr. Smyth wrote indicating that he was withdrawing one of the properties, being Galway Shopping Centre owned by Feresant Limited, (the shareholders of which included Mr. Smyth himself, Mr. Doherty and Ansley Holdings), on the grounds that the independent valuation was only 75% of the proposed valuation.

5.3.8 Mr. Desmond's evidence was that he was aware towards the end of July, that a dispute between Smyth, Doherty and Ansbacher would mean that the reverse takeover of Sportsfield could not proceed. This does not comply with the evidence of Ms. O'Connor nor with documentary evidence produced by her. In addition, Mr. Rothwell does not accept this. He says that the proposal fell away at an early stage, but added that it did not fall away because of one particular factor - "it could have

been because of a combination of things".

5.3.9 Mr. Desmond stated in evidence that towards the end of July, a dispute arose between Mr. Smyth and Mr. Doherty and that because of that, Mr. Smyth was not going to be able to proceed with the acquisition of the JMOB site. He added that Mr. Doherty then approached him and told him that the Sportsfield concept was not going to be able to "get off the ground" as it needed an experienced developer behind it. Mr. Desmond also explained that he was concerned about the closing of the sale with Mr. Grace, the JMOB liquidator, and that Mr. Grace was indicating to him that "time was of the essence" and that it had to be closed by 11th August 1989. However it would appear that the agreement, that time be made of the essence of the contract, was only finalised on the 31st July 1989 and as indicated earlier, the agreement making time of the essence appears to have been made voluntarily, at least to the extent that neither Mr. Grace's lawyers, nor UPH lawyers, nor Mr. Smyth were involved in the discussions on it.

5.3.10 Mr. Smyth has stated in evidence that, if Mr. Desmond had not agreed with Mr. Grace that time be made of the essence of the contract, he would have ensured that the sale would not have closed on the 11th August. This was on the basis that Mr. Grace, the liquidator, was not in a position to give vacant possession of the site at the scheduled time, as there remained on the property a considerable amount of machinery and equipment. He said that if the sale had been delayed, as he had envisaged, then it might have been possible, the Sportsfield reverse takeover having already taken place, that the JMOB site be transferred into Sportsfield, but that that would have been a few months after August 1989. He knew that the proposed takeover of Sportsfield would, at best, take some months to finalise.

5.3.11 Mr. Smyth added that he suggested to Mr. Desmond, that Mr. Desmond

ensure that UPH assign their contract with JMOB to the purchaser, so that he, on behalf of the purchaser, could then deal with the liquidator on a totally independent basis and could argue the issue of vacant possession. Mr. Smyth added that he felt, that because the liquidator and UPH employed the same firm of solicitors, the interests of UPH were not being properly considered. However, it would appear also from other evidence that UPH themselves wanted to have the sale closed at the earliest possible opportunity and that they were not unhappy at the agreement to close the sale on 11th August 1989.

5.3.12 Mr. Desmond stated that, with the interests of UPH in mind, he realised that using Mr. Doherty was the only way of being able to complete the purchase with Mr. Grace and as Mr. Smyth would not then be able to close, he arranged that Mr. Doherty effectively took over Mr. Smyth's interest in the contract. He added however, that Mr. Smyth was not aware of who was taking over the interest because of the dispute which had arisen between Mr. Smyth and Mr. Doherty and that he informed Mr. Smyth that he was acting for a number of overseas investors who would be the purchasers. Mr. Desmond stated that he persuaded Mr. Doherty that Mr. Smyth should continue as the solicitor and Mr. Doherty reluctantly agreed to this. He also stated that Mr. Doherty was interested in the property, but that it was the wrong time for him financially and it did not suit his portfolio. Mr. Desmond said that he then thought of getting a mezzanine financier, who would put up some of the money required and that the remainder could be borrowed.

5.3.13 Mr. Desmond indicated in evidence that he then contacted a friend of his, Mr. Probets in Guernsey, who owned Freezone, and that he told Mr. Probets that a good deal could be done and he merely had to put up £2,000,000. He, Mr. Probets, would be guaranteed the return of £3,000,000 in three years time, together with interest at commercial bank rates on the said £2,000,000 and in addition he would get the first

£1,500,000 of profits after costs. Mr. Doherty was to sign a promissory note for £3,000,000 payable in three years time and according to Mr. Desmond, a letter of agreement was signed by Messrs. Probets and Doherty some time between the 4th August and 11th August. Mr. Desmond added that £1,000,000 was transferred immediately to Ansbacher for Mr. Smyth and at the closing of the sale on the 11th August 1989, Mr. Smyth was therefore able to produce a draft from Ansbacher for £4,000,000, of which, according to Mr. Desmond, £1,000,000 came from Mr. Probets and £3,000,000 from Ansbacher. Mr. Desmond described the role of Mr. Probets and Freezone as mezzanine financiers. Mr. Smyth in his evidence stated that despite his role in the transaction he was not aware at any time before the Telecom Inquiry in September 1991 that there was any mezzanine finance involved.

5.3.14 Mr. Desmond stated that he was informed by Mr. Doherty, that Mr. Doherty would be unable to borrow any further money from Ansbacher because he had significant borrowings from them already. Therefore, according to the evidence of Mr. Desmond, he, Mr. Desmond, had to arrange the borrowings from Ansbacher, but could not tell them who the actual borrower was and he has given evidence that Ansbacher lent the £3,000,000 to the borrower on the basis that it was Mr. Desmond's overseas clients, but without knowing anything more about them. In addition, it would appear that Ansbacher lent the money, relying only on an undertaking from Noel Smyth & Partners to hold the title deeds in trust for them. Noel Smyth & Partners, in this regard, acted as solicitor for the borrower and for the bank. According to the bank's internal Credit Application Form, they understood that Mr. Desmond's clients were Mr. Magnier, Mr. McManus and Mr. Desmond himself. However, Mr. Matthews of the bank stated in verbal evidence that he believed that Mr. Smyth was the real purchaser of the JMOB site.

5.3.15 Mr. Moloney, chief executive of Ansbacher has stated that to the extent

that Mr. Doherty believed that he could not borrow further monies from the bank, he was mistaken and no such decision was ever taken by the bank.

5.3.16 The evidence of Mr. Doherty may help to reconcile some of the conflicts of evidence outlined above. However, I have not had an opportunity of interviewing Mr. Doherty as he will not attend before me, without a specific senior counsel being present and it has been difficult to find a time that is convenient to all. I asked Mr. Doherty to send to me all books and records relating to the Companies which might be of assistance to me in the investigation. He sent to me by letter of the 1st May 1992 from his solicitors, a copy of a letter to him from Mr. Proberts dated 9th August 1989, a copy of which is attached as Appendix 5. The said letter of 1st May stated that Mr. Doherty had no other books or records relating to Chestvale or Hoddle, that might be of assistance to the investigation and that he never had. I however pointed out some documents which should be in his possession and production of which I requested and more documents were submitted to me by letter of the 28th July 1992. Arising from those documents I have requested further information and on receipt of that would hope to interview Mr. Doherty.

5.4 Closing Meeting - August 1989

5.4.1 Time having been made of the essence and the closing having been agreed for 11th August 1989, it was essential that Mr. Smyth be ready and have the money and loan note available. As will appear from Section 6, a number of meetings were held with banks between the end of July and 11th August 1989. Further legal work had also to be done by him to ensure his readiness for closing.

5.4.2 By letter of the 8th August 1989, Ms. Kenny of Noel Smyth & Partners wrote to Mr. Bruncker enclosing copies of two letters from Noel Smyth & Partners to Mr. Grace together with a draft power of attorney. Mr. Smyth was trying to persuade Mr. Grace to agree to a stamp duty savings proposal and indicated that in the event of the stamp duty savings scheme being successful, that he would share the saving on a 50:50 basis with Mr. Grace, the effect being to increase the proceeds for the company in liquidation by £120,000. He explained that the stamp duty savings proposal effectively meant that Mr. Smyth would not take a conveyance of the property from Mr. Grace, until some time in the future. However, the £4,000,000 would have been paid to the liquidator immediately and accordingly Mr. Smyth would get a first charge over the property and Mr. Grace would execute the power of attorney in favour of Irish Intercontinental Bank (this was on the assumption that that bank were going to lend the money to Mr. Smyth to pay the £4,000,000 which in fact they did not ultimately do). The power of attorney would have empowered the bank to join in the necessary conveyances to transfer or dispose of the legal interest of JMOB in the property, upon being called upon to do so by Mr. Smyth.

5.4.3 Mr. Grace refused to deal with Mr. Smyth on the terms put to him by Mr. Smyth and insisted that the sale be completed in the ordinary way with UPH or its nominee, by 12.00 noon on Friday the 11th August.

- 5.4.4 By letter of the 9th August 1989 to A & L Goodbody, Noel Smyth & Partners confirmed that their clients now had approval from a bank to guarantee the £2,300,000 loan note and requested from A & L Goodbody, a draft of the loan note required by them. They added that they anticipated that it would take a further few days to get the loan papers in place, and suggested that on closing, Noel Smyth & Partners would give their undertaking to use their best endeavours to have the loan papers put in place as quickly as possible and that meanwhile they would hold the title deeds to the property in trust for A & L Goodbody, subject only to the first charge to be given to a lending institution.
- 5.4.5 A & L Goodbody sent a copy of this letter immediately to Mr. Barry of UPH and pointed out that the suggestion of Mr. Smyth was not satisfactory, given the time that his office had been dealing with the matter. They added however that at that late stage the options available might be limited and asked Mr. Barry to revert to Mr. Brunner with instructions. By further letter of the 10th August, Mr. Brunner wrote to Mr. Barry sending an amended apportionment account which showed a balance due on the 11th August 1989 to the liquidator of £3,526,959.50, after allowance had been made for the deposit already paid, rates and accrued interest.
- 5.4.6 In or about the 6th or 7th August 1989, Mr. Smyth notified Mr. Brunner that the property was to be taken in the name of Chestvale and thus the shelf company earlier suggested by Mr. Brunner was not to be used. This may have some significance in determining the beneficial ownership of Chestvale.
- 5.4.7 On the 8th August 1989, A & L Goodbody appear to have drafted a loan note in the name of Chestvale in favour of UPH and in a letter from Mr. Brunner to Mr. Barry on 9th August, he stated that he was arranging to send a draft to Mr. Barry in the first instance before complying with Mr.

Smyth's request to send it to him.

5.4.8 By letter of the 10th August 1989 from Mr. Brunker to Mr. Barry, when giving details of the final balance due, Mr. Brunker added that:-

"With regard to the sub-sale to Noel Smyth, the deal as I understand it is that while the sub-sale price is £6.3m, £4m would be paid in the first instance and £2.3m to be secured by Loan Notes. It may be that the placing of the loan notes will be deferred in accordance with the copy letter which I received from Noel Smyth and faxed to you yesterday, and if so, please let me have instructions to the effect that I may complete this transaction on production by Noel Smyth of £4m which will, of course, allow me to complete with Tom Grace and to pass over title to the property to Noel Smyth and to rely on his undertaking for production of the loan notes. Perhaps you would let me have your instruction on this just as quickly as possible".

5.4.9 A meeting was held in A & L Goodbody solicitors on the 11th August 1989, for the purpose of completing the sale by JMOB and its liquidator Mr. Grace. The meeting was attended by Mr. Brunker and Mr. Barry representing UPH; Mr. Grace, and Mr. O'Connor representing JMOB and Ms. Kenny of Noel Smyth & Partners representing the purchaser. A representative from Ansbacher joined the meeting at some stage with a draft for £4,000,000, which was handed over to Mr. Grace on the understanding that he would refund, through A & L Goodbody, the excess consideration received over and above the balance on the apportionment account.

5.4.10 At the closing, all title deeds, other than the deed of conveyance to Chestvale and its memorial which had been executed by Mr. Grace, were handed over to Ms. Kenny. It was agreed that the deed of conveyance and memorial were to be held in escrow by Mr. O'Connor, on behalf of

Mr. Grace, at the request of Mr. Smyth so that, as Mr. Bruncker stated in evidence, Mr. Smyth would be allowed to produce a series of purchasers who might in fact take parts of the property by way of sub-division into different companies. A subsequent letter from Ms. Kenny to Mr. Desmond on the 24th August 1989 which stated inter alia,

"I would also appreciate talking to you on the conveyancing end - are we taking specific tax advice on what particular companies are taking what portions...",

seems to corroborate the understanding of Mr. Bruncker, but it would appear that, contrary to what Mr. Bruncker understood, the intention was that the different companies would all be part of the one group, rather than there being sales to independent and unrelated third parties.

5.4.11 The liquidator was paid the £4,000,000, but as there was no guaranteed loan notes available on closing, a letter of undertaking was furnished by Noel Smyth & Partners to A & L Goodbody and a copy of this letter of undertaking is attached as Appendix 6. The letter contained confirmation that Mr. Smyth's clients, Chestvale, had accepted facilities from Trinity Bank to guarantee the loan paper in accordance with the terms previously agreed. It contained two undertakings, the first to hold the documents of title in relation to the JMOB site in trust for UPH, subject to a first charge being placed on the property by the bankers who were to provide facilities to the purchasers, but which charge would not exceed £4,000,000; and the second to use their **"best endeavours"** to procure that Chestvale would put in place on or before the 25th August 1989, the necessary guaranteed loan paper. The letter added that Noel Smyth & Partners had irrevocable instructions from Chestvale to give the necessary undertakings.

5.4.12 Before accepting the letter of undertaking, Mr. Bruncker discussed the position with Mr. Barry and Mr. Barry authorised Mr. Bruncker to accept the undertaking and close the transaction on that basis. An issue arises

as to the understanding of the parties of the effect of the transaction on 11th August 1989 i.e. whether it was intended that UPH were selling their interest in property or in shares. This has significance not only in ascertaining the beneficial ownership of Chestvale but also on the tax consequences of the transaction.

5.4.13 Sometime between 8th August 1989 and 15th August 1989, A & L Goodbody sent to Noel Smyth & Partners a draft of the proposed loan note, as on the 15th August, Ms. Kenny sent it to Mr. Smyth with a letter indicating that she understood that there may be more negotiations in relation to it. On the same date, she sent a copy of the loan note to Mr. Desmond. There was some discussion between Mr. Desmond and Ms. Kenny between 15th August and 22nd August during which Mr. Desmond suggested an amendment to the loan note. The amendment was to delete the words **"together with all outstanding interest which may accrue from time to time"** from the amount being guaranteed and the insertion of the following

"in the event of the disposal of the shares in the company to the extent that the control of the company is altered or in the event that the company disposes of the property which it is acquiring at Ballsbridge (being the old JMB property) then the company shall procure to furnish to the noteholder a bank guarantee in the amount of all outstanding interest which may accrue from time to time".

This amendment which was written onto the draft by Ms. Kenny pursuant to the telephone conversation, had a subsequent significance, as it alerted Mr. Kenny, tax adviser to UPH, that there was a misunderstanding as to the nature of the transaction. This is dealt with later in Paragraph 7.2.11 et seq.

5.4.14 It is necessary to briefly explain the undertaking of Mr. Smyth given at the closing and the statement that guarantee facilities had been granted

by Trinity Bank. This will be analysed in greater detail later, but an application was made to Trinity Bank on the 26th July 1989 by Mr. Desmond on behalf of Fitzwilliam Trust, a company which appears to be owned by Mr. Smyth. Discussions ensued with Trinity Bank and on 4th August 1989, they issued a letter to the directors of Fitzwilliam Trust, stating that they would be prepared to issue a guarantee facility on behalf of Fitzwilliam Trust to a maximum amount of £2,300,000. It would appear that Trinity Bank at that stage had been informed that another bank had granted loan facilities of up to IR£4,000,000, to satisfy the cash requirement for the closing of the sale. The security required by Trinity Bank comprised (i) a deposit of £750,000 to be placed with the bank and hypothecated to it, (ii) the personal guarantee of Mr. Desmond for the full amount of the facility, (iii) a second charge on the site in favour of the bank and (iv) the counter indemnity of Fitzwilliam Trust for the amount of the facility.

5.4.15 Mr. Desmond accepted the offer of facilities from Trinity Bank and forwarded the letter with his acceptance endorsed on it, to Fitzwilliam Trust for acceptance by them. He stated in evidence that he had no further discussions with Trinity Bank after accepting their letter of the 4th August and stated that the situation changed within the following week, referring to the introduction of Mr. Doherty and Mr. Probets. It was on the basis of Mr. Desmond accepting the offer of a loan from Trinity Bank and forwarding the letter of offer with Mr. Desmond's endorsement of acceptance on it to Mr. Smyth at Fitzwilliam Trust, that Mr. Smyth felt comfortable in making the statement and giving the undertaking in the letter of 11th August 1989.

5.4.16 Mr. Desmond in evidence stated that the guarantee was not required on the 11th August at the closing and that when the guarantee was required, he arranged the guarantee in November with Ansbacher when he "**regularised banking facilities**". According to the evidence of Mr. Barry

and Mr. Brunker, the guaranteed loan notes were required and the only reason for their not being produced, was that Mr. Smyth sought a few days to have the guarantee by the bank put in place. Mr. Smyth understood at the time of his giving the undertaking, that there was no difficulty in getting the bank guarantee, as he had seen the offer letter from Trinity Bank accepted by Mr. Desmond.

5.4.17 On 23rd August 1989 Mr. Brunker had a series of telephone conversations. The first was with Mr. Barry of UPH who wanted to know the status of the loan note. Mr. Brunker said that he had not heard from Noel Smyth & Partners and said that he would contact that firm. It would appear that he subsequently spoke to Ms. Kenny who pointed out that according to her instructions, there was to be a guarantee of the principal only and that the interest would not be guaranteed, unless the company and the premises were sold on. Ms. Kenny added that she would send to Mr. Barry a copy of the guarantee as soon as it became available but added that she had sent it to Mr. Desmond in NCB two days earlier, with a suggestion that Mr. Desmond discuss it with Mr. Barry. Mr. Brunker notified Mr. Barry of his conversation with Ms. Kenny.

5.4.18 In the latter part of August 1989, Mr. Brunker contacted Ms. Kenny in relation to the escrow. On the 29th August 1989, she told him that she had no final instructions on the conveyance, but would revert to him before the weekend. On the 31st August 1989, Noel Smyth & Partners sent a fax to Mr. O'Connor, solicitor for the liquidator, confirming that the deed to be delivered was that to Chestvale and further confirming that their client would be responsible for security and insurance on the premises from 12.30 p.m. on the 1st September as originally agreed with the liquidator.

5.4.19 Mr. O'Connor then sent the original conveyance and memorial in favour of Chestvale to Mr. Brunker on behalf of UPH. Mr. Grace and Mr.

O'Connor explained that they did not have privity of contract with Chestvale and therefore felt that the deed should be given to the solicitor for UPH. It would appear that Mr. Brunker held the deed as security for the outstanding loan note due to UPH and that it was not released to Mr. Smyth until the end of December 1989 or the beginning of January 1990, so that Mr. Smyth could have it stamped in the Stamps Office of the Revenue Commissioners and registered in the Registry of Deeds. According to Mr. Smyth, it was then returned to Mr. Brunker as he only had it on temporary loan and the deed was not finally released to Mr. Smyth until late April 1990, when the loan note guaranteed by Ansbacher was handed over to UPH. This is a matter of some significance in considering the beneficial ownership of Chestvale, at least between 11th August 1989 and 21st December 1989, as if Chestvale was a wholly owned subsidiary of UPH during this time, it is arguable that UPH did not require to have security by way of a lien over the deed of conveyance to ensure compliance with its obligations by Chestvale. Alternatively, it may be just another indication of a lack of understanding by the parties involved of what was intended and what was effected.

5.4.20 By letter of the 21st August from Ms. Kenny to Mr. Brunker, she indicated that she would forward an engrossed assignment (presumably of the property contract) to Mr. Brunker within the following 24 hours. In fact, this was forwarded to him on the 5th September 1989. Mr. Brunker sent this to Mr. Barry on the 12th September 1989 for sealing by UPH, but it does not appear to have ever been sealed, as intervening events indicated that a flaw had been detected in the transaction and that the execution of such an assignment would aggravate the difficulties.

6.0 Attempts to Raise Finance in relation to the JMOB site

6.1 General

6.1.1 There is evidence that from the end of July 1989, Mr. Desmond was attempting to raise the finance, necessary to comply with the agreement to take over the benefit of the contract between UPH and the liquidator of JMOB, which involved the payment of £4m to the liquidator and the furnishing of guaranteed loan notes to UPH of £2.3m.

6.1.2 As stated earlier, Mr. Desmond has given evidence that he initially envisaged that the property would be paid for, by it being "reversed" into Sportsfield. The evidence of Mr. Smyth however, was that that was very much an outline idea and was certainly not envisaged to happen as early as July or the beginning of August. In fact, this is at least partially corroborated by the evidence of Ms. O'Connor and Mr. Rothwell of NCB, who were dealing with the proposed reverse takeover of Sportsfield and who have stated in evidence, that even at the time that a conditional agreement was signed by Mr. Smyth with Sportsfield on 28th July 1989 (immediately before dealings in it's shares were, at it's request, suspended by the Stock Exchange), no mention was made to them of a proposed involvement with the JMOB site.

6.1.3 A proposal dated 26th July 1989 was prepared by Noel Smyth & Partners on behalf of Fitzwilliam, which formed the basis for an application for finance for the JMOB site. A copy of this proposal is contained in Appendix 7. There is no reference in this to Sportsfield or to the property being reversed into Sportsfield or any other company. It sets out the finance required, the amount that would be introduced to the new company by the proposed borrowers as equity and an outline of the purchasers proposals in relation to the property, which involved office development, residential development and perhaps a leisure development. It would appear that a number of originals of this document were prepared and each of Mr. Desmond and Mr. Smyth

approached various banks for finance and gave the proposal to the banks as their application to the bank.

6.1.4 The banks were as follows:-

- (i) Trinity Bank
- (ii) Lombard and Ulster Banking Limited ("Lombard and Ulster")
- (iii) Bank of Ireland
- (iv) Irish Intercontinental Bank ("IIB")
- (v) Ansbacher Banking Company Limited (now Ansbacher Bankers Limited) ("Ansbacher")

6.1.5 Meetings were held between executives of each of these banks and either Mr. Desmond or Mr. Smyth and each of the banks processed an application within their lending departments, based on the proposal of the 26th July referred to above and the further information obtained by them in the course of their discussions with either Mr. Desmond or Mr. Smyth. These applications will be referred to collectively as the July/August financing applications. There were a series of applications later in the transactions and they will be analysed later in this section. The evidence from the banks is significant, because it shows the understanding of each bank of the representations made by Mr. Desmond and/or Mr. Smyth in relation to the ownership or proposed ownership of the purchasing company (Chestvale), and also shows the banks' understanding that at least as early as July/August 1989, consideration was given to Telecom becoming an occupier of the JMOB site.

6.1.6 I received a substantial amount of evidence in relation to these applications from the banks, who were however conscious of their duties of confidentiality to their clients and who furnished information

to me, when satisfied of their legal obligation to do so.

6.1.7 Resulting from the July/August financing applications, a number of offers for finance were made, each of which had different conditions attaching to them and as is known now, the one which was actually accepted was the offer by Ansbacher, but this itself required a number of modifications over the ensuing ten months to meet additional finance requirements and to comply with the tax reduction scheme as it evolved. I set out below an analysis of each of July/August financing applications.

6.2 Trinity Bank

6.2.1 I became aware of the Trinity Bank involvement on reading the letter of undertaking furnished by Noel Smyth & Partners to A & L Goodbody on the 11th August 1989, the date on which the liquidator was paid £4m by Chestvale. That letter of undertaking stated that approval had been granted by Trinity Bank for the guaranteeing of the loan notes, payable to UPH as their profit in the transaction. In the course of my examination of Mr. Desmond on the 12th November 1991, the matter of the Trinity Bank guarantee arose and Mr. Desmond agreed that he would check with Trinity Bank in relation to the application and approval of the guarantee of the loan notes and whether they were still available for furnishing to me. I wrote to Mr. Desmond on the 15th November referring to that agreement with him and requesting that he comply with it.

6.2.2 By letter of the 21st November 1991 to me, Ivor Fitzpatrick & Co. solicitors for Mr. Desmond, enclosed a copy letter dated 4th August 1989 from Trinity Bank issued to the directors of Fitzwilliam confirming that on the application of Mr. Desmond, Trinity Bank were prepared to issue a guarantee facility on behalf of Fitzwilliam to a maximum amount of £2.3m, the security for which guarantee was to consist firstly, of a deposit of IR£750,000 to be placed with the bank and to be hypothecated to the bank; secondly, the personal guarantee of Mr. Desmond for the full amount of the facility; thirdly, a second charge on the site to be executed in favour of the bank; and fourthly, the counter indemnity of Fitzwilliam for the amount of the facility. There were a number of other conditions attaching to that and endorsed on the copy letter was an acceptance by Mr. Desmond.

6.2.3 I replied to Ivor Fitzpatrick & Co. by letter of the 25th November, stating that I had sought not only the letter of approval but also any letter of

application to Trinity Bank and requested that that be obtained for me. Ivor Fitzpatrick & Co. replied by letter of the 28th November 1991 stating that "to the best of our client's recollection no letter of application was written to Trinity Bank Limited".

6.2.4 I examined Mr. Desmond again in relation to this matter and in the course of my interview with him on the 5th December 1991, I asked Mr. Desmond if any written application had been made to Trinity Bank to provide the guarantee and he replied in the negative. I then asked him if there were any proposals or figures put to Trinity Bank and he replied:-

"Again I don't know whether I gave them ... whatever information on the site or whatever the case is but I don't think I gave it to them.

It is a long time since I made a written application as far as I know".

I then asked him if they, Trinity Bank, knew then who the owner of the site was going to be and he replied that they knew that he was representing investors, but they did not know who the owner of the site was and he told them that he was.

6.2.5 As the letter from Trinity Bank dated 4th August 1989, which Mr. Fitzpatrick had sent to me was addressed to the Directors of Fitzwilliam, I queried him in relation to that and he indicated that that was Mr. Smyth's company. I asked him why that company would be applying and he said that he did not know the reason. I asked him who would have given that name to Trinity Bank and he replied:-

"I would have asked Noel Smyth what name is the guarantee to be given under, what name is the borrowings guaranteed to be drawn under"

After further examination in relation to this, Mr. Desmond replied that UPH were to transfer the shares in Chestvale to Fitzwilliam (in fact as stated elsewhere in this report, the shares were transferred to Delion).

6.2.6 I then asked Mr. Desmond why Trinity Bank required as part of their security, a personal guarantee of Mr. Desmond if he was merely the "man in the middle". He replied that he was "standing in between the investors" and he did not have any investors in place at that stage and added

"but I was guaranteeing it, putting my neck on the block to Trinity.

I cannot give them names I have not got and I wasn't going to pursue it with anyone unless I knew I had the facility in place".

At a later stage in the same interview, Mr. Desmond explained the way he was raising finance. He stated as follows:-

"The way I approach finance is that what I would have done is that I would have found out how much is required, what bank facilities are approved, then I would go along with five or six different people which would not be hard for me to identify and say this is the proposal, you need to put up £1.5m, borrow £4.8m of which £2.3m is guaranteed or whatever, the company would be taken out by Sportsfield at a later stage, and you for putting up the money would have the option of a site at cost price, plus likely pick up in share value in Sportsfield when planning permission has been received because there will be increased value in the site so reflected in the shares - that is how I would have it in my mind at that stage".

6.2.7 I then asked Mr. Desmond to authorise Trinity Bank to release to me whatever information I required in relation to the application and he replied that he would take advice on the matter. I added that it would help me to understand it and he replied

"maybe I will have a look at the information, I have not looked at it, I have not seen it, but I will fully reflect on your request".

By letter of the 12th December 1991, I received from Ivor Fitzpatrick & Co., further papers in relation to Trinity Bank, which Mr. Desmond in turn had received from Trinity Bank. These included a further copy of the letter of the 4th August 1990 and the proposal of July 26th 1989 on

which certain handwritten notes were endorsed. This letter from Mr. Fitzpatrick of the 12th December 1991 was pursuant to my reminder to him on the 9th December, to the effect that I had asked Mr. Desmond to authorise Trinity Bank to release to me whatever information I required; a letter from Mr. Fitzpatrick of the 11th December in reply saying that he understood that his client had made an application to Trinity Bank to obtain the information and my letter of the 12th December in response, pointing out that what I had asked Mr. Desmond to do, was to authorise Trinity Bank to release to me whatever information I required and pointing out that I had asked for this on two occasions already. Later on the 12th December, having received the letter from Mr. Fitzpatrick enclosing copy papers relating to Trinity Bank, I replied that that did not comply with my request and again pointing out that I had asked Mr. Desmond to authorise Trinity Bank to release to me the information required. No response was received and I sent another reminder to Mr. Fitzpatrick on the 7th January 1992.

6.2.8 As I perceived that I was not receiving cooperation from Mr. Desmond in relation to this issue, I wrote to Mr. Smyth by letter of the 7th January 1992 requesting him, as the apparent owner and director of Fitzwilliam, to write to Trinity Bank, authorising them to disclose to me their file on the proposal made by Fitzwilliam. Mr. Smyth complied with that request by letter of the 14th January 1992, which I then passed on with a covering letter to Woodchester Investment Bank (Trinity Bank having changed its name to Woodchester Investment Bank since August 1989) and on 16th January 1992, I attended at Woodchester Investment Bank where the file was produced to me. The Trinity Bank file contained the following:-

- (i) Two different copies of the proposal of July 26th prepared by Noel Smyth & Partners. There was a bound copy and a photocopy, the latter of which contained two or three letters from Dillon and Associates, Estate Agents on behalf of Sisks/Burton property Trust

but which did not contain the report from Mitchell O'Muire Smith Architects which was in the bound copy.

- (ii) Memorandum by Jim Aylmer dated 15th August 1989 in relation to an attendance on Dermot Desmond.
- (iii) The Credit Committee minutes of 1st August 1989 and 3rd August 1989.
- (iv) The submission to the Credit Committee of 1st August 1989 made by Ronan White of the bank.

6.2.9 The bank subsequently produced to me a copy of their file in the matter and on 4th February 1992 I examined Mr. Aylmer and Mr. White. During the course of the interview, a satisfactory explanation was given to me for the existence of two different proposals on the file. It was adduced in evidence to me that the application through Trinity Bank was not merely for the guarantee facility, but was initially for a guarantee and a loan.

6.2.10 In the course of the interview, Mr. Aylmer indicated to me that the application probably came on the 1st August 1989 and was followed by a meeting on the 1st August between Messrs Aylmer and White on behalf of Trinity with Mr. Desmond. Mr. White informed me that no particular significance was attributed by them to the company Fitzwilliam, as they were informed that Fitzwilliam, or another company then unnamed, was going to be made up of a number of high net worth individuals, whose names could not be disclosed, but that the bank would have no problem in recognising them and recognising them as being persons of substantial means. Mr. White said that he and Mr. Aylmer wanted the names of the persons at that stage, but that it was quite obvious to them that they were not going to be given the names. Mr. White added that the said individuals would collectively put up £1m by way of equity in its broadest sense, rather than the £1.2m referred to in the proposal, so that the bank were being asked for an overall

financing requirement of £5.3m.

6.2.11 In the course of the meeting with Mr. Desmond, the possibility of the bank merely providing the guarantee facility was raised and that appeared to be of interest to Mr. Desmond. Messrs White and Aylmer felt that that was the only part of the financing that they should be involved with and that is the one that they recommended to their Credit Committee. According to Mr. Aylmer, Mr. Desmond wanted an urgent response to the proposal from the bank.

6.2.12 Messrs White and Aylmer discussed with Mr. Desmond the proposals in relation to the property and in particular how he envisaged the development proceeding e.g. whether the proposed residential development would precede the office development or vice versa and whether the intention was to sell on the office part or whether it was to be let. In the context of the office development, there was a handwritten note on the proposal "Telecom Cablelink". I asked the context in which that was raised and Mr. White indicated that they were discussing with Mr. Desmond whether he intended to go with the small "own door" type of development or the large corporate type office accommodation. The indication from Mr. Desmond was that it was the larger corporate market that was their target. He added that the two names, Telecom and Cablelink were noted as coming up in conversation by Mr. Desmond on a "for example type basis", but he added that he did not recollect the exact context in which the names were mentioned. However, as far as he could recall, Telecom were mentioned in the context that they were the type of corporate entity with a lot of property interests around the city and that it would make a lot of sense for them to relocate and to have an identifiable corporate headquarters in one particular location. According to Mr. White, Mr. Desmond added, that at that time in 1989, there were discussions going on as regards Telecom getting involved with Cablelink by acquiring

shares in Cablelink and that Cablelink were next door to the JMOB site in adjoining premises. Mr. White added that the whole thing was very loose and very much on a "for example basis" rather than being definite or specific. No other names of potential purchasers of the property were mentioned.

- 6.2.13 Messrs Aylmer and White told me, that to the best of their recollection, there was no reference to Sportsfield or the property being reversed into any company, as part of a reverse takeover. They are satisfied that it was represented to them that the payback to them for any part of the financing that they might advance, would be through the sale of portion of the asset, or through a rent roll when generated and that is the way they presented the proposal to their credit committee.
- 6.2.14 I enquired in relation to a handwritten note on one of the memoranda where the names of "John Magnier" and "J.P. McManus" appeared. Mr. White explained that his recollection of his noting those specific names was that as the conversation developed in relation to the names of the high net worth individuals referred to earlier, Mr. Desmond mentioned the two particular names as the type of people he either knew or dealt with or had dealt with or could deal with, but Mr. White's recollection was, that it was not specifically represented that these two people were definitely coming in or becoming involved with Fitzwilliam or UPH or any other purchasing company.
- 6.2.15 Messrs Aylmer and White said that because they anticipated that their credit committee would want the names of some individuals when considering the proposal, they pressed Mr. Desmond that they should have something to back up what they were putting on paper to the credit committee, without necessarily having to say that the people mentioned were definitely taking an interest in the particular transaction. Mr. White said that he and Mr. Aylmer understood that he had a number

of interested persons, that they did not know whether those persons had committed and "signed on the dotted line" but they understood that "there was a pool of people there".

6.2.16 I asked Messrs Aylmer and White who it was who suggested that Mr. Desmond would give a personal guarantee and I was informed that this was offered by him. I then asked them if they asked Mr. Desmond, on what basis he was offering his own personal guarantee, when there were going to be other investors involved. I was informed that they did not recollect doing so, but that, as there was a degree of urgency in getting the proposal through, they thought that perhaps the guarantee was offered to add comfort to the facility, with a view to having it approved speedily.

6.2.17 I was also informed that Mr. Desmond indicated to Messrs White and Aylmer that there was a degree of similarity between the shareholders involved in UPH and the proposed shareholders in the new company, but that there would not be a total overlap as some wanted "out" at that stage and some new people would be coming in. I was also informed that Mr. Desmond refused to give details to Messrs White and Aylmer of who the shareholders in UPH were.

6.2.18 One of the other elements of security required by Trinity Bank at that time, was a cash deposit of £1,000,000, to be hypothecated to the bank. This was discussed with Mr. Desmond in the course of a telephone conversation, probably on 3rd August 1989 and there was resistance to that by Mr. Desmond. Messrs White and Aylmer subsequently agreed that a lower level of deposit would be acceptable and on that basis, they suggested the figure of £750,000. According to Mr. Aylmer, it transpired that the requirement for a deposit to be hypothecated in this way was "the killer on the deal by virtue of the fact it wasn't going to be forthcoming, the deal went away and there was a large element of

resistance to give any kind of cash cover".

6.2.19 There were subsequent telephone calls from the bank to Mr. Desmond trying to follow up the proposal, but there does not appear to have been a subsequent meeting. The bank's understanding was that the facility offered was not acceptable to Mr. Desmond. When I pointed out to Messrs White and Aylmer that Mr. Desmond had endorsed his acceptance on the copy letter which had earlier been sent to me by him, they were surprised. They understood that it did not go ahead as the deal was not sufficiently attractive to him. According to them, Mr. Desmond never came back to the bank at any stage to indicate that he was not going to accept the facility, although as stated, there were a number of phone calls from the bank to him to prompt him. These calls continued at least until the 22nd August 1989, eleven days after the JMOB liquidator had been paid £4,000,000 by Chestvale.

6.2.20 It should be noted, that although Mr. Desmond stated in his evidence, that he told Trinity Bank that he was the owner, the evidence of the representatives of the bank who dealt with him is to the contrary. It should be further noted that at that time, according to the evidence furnished, Mr. Desmond was considering Telecom and/or Cablelink (in which Telecom was to subsequently acquire a shareholding), as being possible targets for the property, for the establishment of a corporate headquarters. In fact, in subsequent evidence adduced to me by Mr. Desmond on 5th April 1992, in response to my question as to whether he could explain the reference in July 1989 documents to his involvement with Telecom, he replied:

"The answer simply is that any involvement with Telecom, there wasn't involvement with Telecom as such. It was in relation to Cablelink, that Telecom was purchasing Cablelink and Cablelink had offices in or adjacent to the Johnston Mooney & O'Brien site and it was discussed, or revision or review, that if Telecom were

successful with Cablelink, which I believed that they would be successful, that they would require additional space for the enlarged or enhanced Cablelink operations".

Houses of the Oireachtas

6.3 Lombard and Ulster

6.3.1 Pursuant to the judgment of Mr. Justice Murphy in the judicial review proceedings Chestvale and Hoddle -v- Glackin and others delivered on 7th February 1992, discussions ensued between myself and McKeever & Son, Solicitors for Ansbacher, pursuant to which I was allowed to inspect certain of the documents which Ansbacher had and I did this on the night of 13th February 1992. Subsequently on 17th February 1992, copies of those documents were released to me. On reading those, I noted a passing reference to Lombard and Ulster and gathered, that an application may have been made to Lombard and Ulster for finance at the end of July or early August 1989. Accordingly, by letter of the 18th February 1992, I wrote to the chief executive of Lombard and Ulster in Dublin referring to that and seeking production by him of any books and documents in that bank's possession, relating to that application and which, I anticipated, was made either by Chestvale or Fitzwilliam or Mr. Desmond on behalf of one or other of those companies.

6.3.2 By letter of the 27th February 1992, Mr. Robinson, chief executive of that bank sent to me (a) minutes of the meeting of the "**Dublin Credit Committee**" of the bank which dealt inter alia with an application in relation to the purchase of a 5.5 acre site at Ballsbridge, Dublin 4 and which was dated 14th August 1989 and (b) a copy of an internal "**Loan Application Memorandum**". The letter stated that the loan was not availed of, because the valuation of the property did not meet the requirements of the bank.

6.3.3 On examining the documents produced, I noted that in the second document (being the Loan Application Memorandum ("**the Memorandum**") which is dated 3rd August 1989), it is stated that the name of the borrower was a company, whose name was to be provided and that it would be Fitzwilliam or its wholly owned subsidiary. It is

further stated that the introduction of the application was by Mr. Desmond, that no bank had been appointed and that the solicitors were Noel Smyth & Partners. The facility required was a loan of £4,250,000 of which £3,750,000 would be drawn down and the balance would be in respect of interest roll-up. The purpose of the facility was to purchase a 5.5 acre site at Ballsbridge which was stated to have cost £4m but which was then worth £6.3m.

6.3.4 The Memorandum in describing the "Customer" stated as follows:

"The borrowing company will either be Fitzwilliam or a wholly owned subsidiary thereof. The beneficial shareholders of the borrowing company will be as follows:-

Mr. Dermot Desmond, Mr. L. Goodman, Mr. Michael Smurfit, Mr. J.P. McManus and Mr. Smyth. These are high net worth individuals but this is irrelevant in respect of this application except in relation to what each can contribute. The first three parties named have a high profile and L. Goodman has extensive connections with UIB. Messrs McManus and Smyth are a turf accountant and a solicitor respectively".

6.3.5 Under the section entitled "Purpose", the following is stated:-

"United Property Holdings Limited through a 100% owned subsidiary contracted to purchase the Johnston Mooney & O'Brien site (5.5 acres) in December last for £4,400,000 on a sale and leaseback basis. A deposit of £440,000 was paid but the sale price was subsequently reduced to £4,000,000 following the liquidation of the vendor company and its inability to comply with lease back terms. The beneficial owners of United Property Holdings Limited are D. Desmond, L. Goodman, M. Naughton, Loughlin Quinn, MI Smurfit, T. Cavanagh, J.P. McManus, ? Maguire, Seamus Parker (?). The borrowing company (Fitzwilliam Trust or its wholly owned subsidiary) proposes to take over the contract to purchase for £4m

and additionally it will agree to pay the original purchasing company a further £2.3m in four years time by way of guaranteed paper endorsed by Woodchester Investments Limited. This loan note will be secured by a cash sum of £750,000 plus a Second Charge (ranking after our First Mortgage) and a negative pledge plus a guarantee from one of the shareholders (not named) in Fitzwilliam. The shares of the United Property Holdings Limited subsidiary will pass to Fitzwilliam following the delivery of the loan note for £2.3m".

6.3.6 There then follows a section on "Sources/Method of Repayment" as follows:-

"Bord Telecom is acquiring Cablelink and thus the latter's Head Office at 10 Pembroke Place, Dublin 2. This latter property adjoins the site now being acquired. It is expected that Bord Telecom will apply for planning permission for 100,000 square feet of office to meet its own requirements on an enlarged site incorporating part of the Johnston Mooney & O'Brien lands. There is an established entrance at Pembroke Place and no difficulty is expected with the planners. Bord Telecom will be a potential purchaser for the office portion of the development which the promoters value, with planning, at £8m. The residential portion is valued by them at £4m (subject to planning) and the remaining 1.25 acres has not been valued (see attached application from promoters)."

6.3.7 Attached to the Memorandum were draft terms and conditions of a letter of offer and there was a recommendation that the bank approve the facility requested, on the basis that the promoters expect to make substantial profits by obtaining planning and enhancing its value and the site would then be sold in parcels for offices, housing, hotel etc.

6.3.8 The second document was the minutes of a meeting of the "Dublin

Credit Committee" of the bank where the decision was noted as approval for a loan of £4,250,000 to purchase the 5.5 acre site at Ballsbridge, Dublin 4 on the understanding that an independent valuation would indicate a current market value of not less than £6,300,000 to their security.

- 6.3.9 By letter of the 4th August 1989, Mr. Robinson of Lombard and Ulster wrote to Mr. Desmond confirming that the bank would be prepared to provide the facilities, subject to the terms and conditions referred to earlier and these were attached with the letter to Mr. Desmond. One of these conditions required the production to the bank of letters of indemnity from "sufficient high net worth individuals" to the effect that interest would be serviced if and when the account exceeded £4,250,000, or, commencing at the end of the initial 12 month period, whichever was the sooner. Mr. Desmond endorsed in his own handwriting that the letter would be from himself personally in relation to the interest and would confirm that he held equivalent letters from the other individuals. A further condition of the bank was the payment on acceptance of a commitment fee of £25,000. Mr. Desmond endorsed "no 15k". In reply to the condition that a special fee of £75,000 be paid to the bank within twelve months of the initial advance or on prior redemption of the facility, Mr. Desmond endorsed "no full stop".
- 6.3.10 The final condition was that clarification be received on the exact status of the borrowing company, and, if it was to be a subsidiary of Fitzwilliam, that the bank would probably require a guarantee by Fitzwilliam. The terms of that condition added that the name Fitzwilliam Trust implied the existence of a trust and that the word "Limited" was absent. If it was a trust then the trust deed was to be critically examined by the bank and/or its solicitors before any advance and the bank was to be satisfied with the financial standing of Fitzwilliam Trust before an advance was made. In response Mr. Desmond endorsed

"Noel Smyth to arrange" and added "also what company will it be held in I.O.M. Jersey, Cyprus etc. etc."

6.3.11 It is not clear on what date Mr. Desmond made these endorsements but it is likely to have been between 4th August and 9th August 1989.

Mr. Desmond then communicated with Mr. Smyth, as a result of which Mr. Smyth, on the 9th August 1989, sent a copy of the Certificate of Incorporation and Memorandum and Articles of Association of Chestvale, the proposed borrower, to the bank and added that he would let Mr. Fergus Smith an official of the bank have on the following day the necessary documentation from accountants re: the net worth of Mr. Desmond (which was also required by the bank). On the following day, 10th August 1989, Noel Smyth then had a number of telephone conversations with Mr. Fergus Smith of the bank. Mr. Smyth asked that the bank arrange their own valuation and stated that the cost, which was to be borne by the borrower, should not exceed £2,000. The statement of net worth of Mr. Desmond was to be forwarded later that afternoon but as is noted in a handwritten memo, it does not appear to have been produced.

There is a reference also from the solicitor acting for Lombard and Ulster, that the bank felt that the borrower may have arranged bridging finance, but there is no further comment in relation to that. Discussions ensued in relation to a stamp duty savings scheme and this was referred to in a letter from Noel Smyth & Partners to the bank's solicitors in a letter of the 10th August when the documents of title were being forwarded to them.

6.3.12 On the 11th August, Noel Smyth & Partners sent details of the title on the property to Lisney Estate Agents who had been appointed by the bank to carry out a valuation of the site. This of course was the date on which the closing with the liquidator of JMOB was scheduled to and did take place.

By letter, also of the 11th August 1989, the bank issued a conditional letter of offer to Chestvale for a facility of £4,250,000 (including £500,000 for rolled up interest) and stated that, although they would look at any proposal to reduce the incidence of stamp duty, the bank generally looked unfavourably on similar proposals. The letter included among its provisions that the company should accept the facility within five days and at the same time pay a cheque in respect of the bank's commitment fee of £25,000.

6.3.13 The offer was not accepted within that time period and on 21st August 1989, Lombard and Ulster wrote to Noel Smyth & Partners indicating that the valuation placed on the property by Lisneys was insufficient to satisfy the valuation conditions contained in the letter of offer.

6.3.14 By letter of the 24th August 1989, Mr. Smyth reported to Mr. Desmond and enclosed the letter of the 21st August from Lombard and Ulster. He added that Lombard and Ulster informed him that the valuation which they received was £3,750,000, based on the planning advice which came from Delaney McVeigh & Pike and which was premised on the assumption that planning permission would be granted only for a residential development; although Lisneys themselves thought it was possible that planning permission could be obtained for 60,000 square feet of offices and this would bring the valuation to between £5,400,000 and £5,500,000.

That ended that particular application with Lombard and Ulster, although a further application was made in March 1990, which will be referred to later.

6.3.15 Having perused the enclosures, I requested the attendance before me of Mr. Robinson and Mr. Fergus Smith, a lending executive in the bank, who had dealt with the application and these persons attended before me on the 2nd March 1992.

6.3.16 Messrs Robinson and Smith in the course of their interview with me, informed me that Mr. Desmond when discussing the proposal with them, did not indicate or give any hint to them that the transaction and the people involved were in any way related to a proposed reverse takeover of Sportsfield.

They added that in relation to the reference to Telecom, it was explained to them as a possible "exit" but the bank did not seek to verify it, as their primary focus of attention initially was on the valuation and they added that no other potential purchaser was mentioned.

6.3.17 I referred Messrs Robinson and Smith to the statement made by their solicitor in the course of a telephone conversation on the 10th August 1989, to the effect that the bank felt that Chestvale had arranged bridging and I was informed that that reference may have been to their understanding that Ansbacher would bridge the Lombard and Ulster letter of offer. However, they added that Lombard and Ulster were not going to alter the conditions they had set.

6.3.18 On further questioning of Messrs Smith and Robinson in relation to Mr. Desmond's co-shareholders, I was told that Mr. Desmond was indicating to the bank the sort of people who were associated or were going to be associated with it. They pointed out that the Memorandum stated that the beneficial shareholders of the purchaser company would be Messrs. Desmond, Goodman, Smurfit, McManus and Smyth and I asked how specific that information was in the interview they had with Mr. Desmond. Mr. Smith replied that a lot of questions had to be asked of Mr. Desmond to get that information, and Mr. Robinson added that the bank wanted to know, but that there was a reluctance to give that type of information. He added that if someone were to say, that there were a number of others involved, it would not have surprised him but the names given were typical and as far as Mr. Robinson was concerned, those persons, at the very least, were investing as shareholders.

6.4 Bank of Ireland

6.4.1 In the course of my interviewing Mr. Smyth on the 20th February 1992, I was informed by him that he had made applications for finance to Bank of Ireland and to Irish Intercontinental Bank.

6.4.2 Accordingly on 27th February 1992, I wrote to Bank of Ireland and sought from them relevant documentation and on 5th March and on 9th March I attended at the bank's premises and inspected the relevant documents and received copies thereof. I then interviewed Messrs Moriarty and McIntyre of the Bank of Ireland on the 10th March and subsequently interviewed them again on the 19th March.

6.4.3 It was adduced to me in evidence that Mr. Smyth approached Bank of Ireland on the 26th July 1989, with a proposal in relation to the purchase of the JMOB site. According to Mr. Moriarty who dealt with him, Mr. Smyth considered it as a "personal" venture with three other individuals, Mr. Desmond, Mr. McManus and Mr. Magnier. Mr. Smyth indicated also to Mr. Moriarty that the proposal was also being put to Ansbacher as well.

6.4.4 In the course of his discussion with Mr. Moriarty, Mr. Smyth explained that the proposal was to acquire from UPH, their interest in the contract which they had with the liquidator of JMOB. Mr. Smyth represented to Mr. Moriarty that UPH had among its shareholders Dr. Smurfit and Hugh McLoughlin and added that the company had been established by Mr. Desmond and was involved in Findlater House on O'Connell Street, another property with Telecom and finally the JMOB site. He added that there was a private tender in May/June 1989 and that a joint venture between Sisk and Burton Property Trust had offered approximately £6.3m for the property.

- 6.4.5 Mr Moriarty added that Mr. Smyth had put together a proposal at the request of Mr. Desmond. The understanding of Mr. Smyth, as relayed to Mr. Moriarty, was that Mr. Desmond, Mr. Magnier and Mr. McManus were to put up £400,000 each to form the equity base for the purchase and Mr. Smyth was to get a 10% "carried" interest for putting the package together, including negotiation of the additional bank finance.
- 6.4.6 Mr. Smyth in his evidence of 20th February 1992 has confirmed that evidence, but indicated that he had hoped to bring in another partner, being the "Lipper consortium" so that each of Desmond, Magnier, McManus and the Lipper consortium would invest 25% of the capital and be entitled to 22.5% of the equity and he would be entitled to the remaining 10%. He added that he did not get any of the equity as the matter transpired, because he was not able to put together the financing package required by Mr. Desmond. According to Mr. Moriarty, Mr. Smyth explained to him in July 1989 that he envisaged the front part of the property being developed as offices and referred to Cablelink having a requirement for 100,000 square feet of offices, that approximately 3 1/4 acres at the rear of the site would be used for residential development and would consist of houses costing £250,000 each. Mr. Moriarty noted from Mr. Smyth that there was a need to decide by Wednesday the 2nd August, as there was an urgency in the matter. Mr. Smyth also indicated to Mr. Moriarty that Ansbacher would guarantee £1m, part of the required guarantee facility. Mr. Moriarty was also told that the £1.2m to be introduced by Messrs. Desmond, Magnier and McManus was from external sources.
- 6.4.7 Mr. Smyth applied for a cash facility of IR£2.8m, which added to the equity investment, would complete the IR£4m payment required for the liquidator and also sought a bank guarantee to support the £2.3m deferred payment. Mr. Smyth told Mr. Moriarty that he understood the price offered by Sisk/Burton was £6.3m and that he had to match this

price to get the property. In relation to the £2.8m cash facility, Mr. Smyth was also seeking a roll-up of interest for 18 months and recognised that the security value of the site was insufficient to support the total facilities of £5.1m and asked what additional security would be required to provide the above facilities. Mr. Moriarty calculated that the cost of the rolled-up interest would be £650,000 so that the total exposure, if they were to accept Mr. Smyth's proposal would be £5,750,000.

6.4.8 In respect of the bank guarantee for the deferred payment, only £1.3m was sought from Bank of Ireland and it was explained that the remaining £1m was to be guaranteed by Ansbacher. Mr. Moriarty recommended to the group managing director of the bank that they approve a loan of £3.3m and a bank guarantee of £1.3m for four years, the loan to comprise £2.8m for the initial cash payment and the balance in respect of rolled-up interest for 12 months only and as security, the bank were to have a lien on sufficient cash from the promoters to pay the interest in the second year of circa. £400,000. The conditions included (i) a valuation condition that the property be worth not less than £6m and independent confirmation that it could reasonably be expected that the houses be built and sold at the proposed cost prices and the offices built and let at the proposed cost rates, (ii) that there be a satisfactory independent review of the reasonableness of the promoters draft planning submission, (iii) that undertakings be received from the shareholders to fund the company for interest and guarantee fee payments after year two if the property was not sold and (iv) an injection of £1.2m of share capital or subordinated loans by the promoters together with (v) satisfactory statement of the net worth of Mr. Smyth.

6.4.9 The bank issued a conditional letter of offer on the 31st July 1989 offering a loan of £3,250,000 to include one years roll-up of interest, and

in reply to this, Mr. Smyth indicated that the transaction might then complete on Friday 11th August and that the borrower might draw down the facilities of £2.8m against the security of the site and in doing so, leave open the negotiations vis-a-vis the extra security that would have to be put in place to obtain a guarantee of the loan notes. Because there would not be sufficient time to put the formal security in place, he suggested a solicitors undertaking that the bank would have a good and marketable title and that he would cause to be put in place the necessary legal formalities that the bank would require for their security.

6.4.10 Mr. Moriarty replied to Mr. Smyth by letter of the 4th August 1989, stating that he did not consider it satisfactory to leave the guarantee element unresolved at closing. He thought it unlikely that the vendors (UPH) would close if they did not have bank guarantees for the loan notes. He suggested that the guarantee for the full £2.3m be obtained from Ansbacher, based on a second charge on the site and whatever other collateral they required and added that the bank would accept an undertaking from Noel Smyth & Partners regarding the security, provided it was signed by other partners in the firm. He added that work was necessary on the site valuation and assessment of plans and in relation to the status of the new borrowing company and asked that Mr. Smyth revert to him as soon as possible after his return from a visit to the U.S., so that the proposed timetable could be met.

6.4.11 On 8th August 1989, the bank instructed Palmer McCormack Estate Agents to prepare a report on the site value and development proposals. Their initial reaction was that the site was worth about £5m and that it would be difficult for the promoters to get planning approval for the development as outlined in their submission to the bank, particularly with regard to the 100,000 square feet of offices. The bank met with Mr. Smyth on the evening of the 8th August to discuss the situation and agreed that because of the time pressures and the wide

difference between the two valuations, the bank would not offer the facility requested.

6.4.12 On the 16th August 1989, Mr. Moriarty spoke to Mr. Smyth again who told him that short term bridging had been put in place to enable the deal with the liquidator to close and that he had two weeks to put longer term financing in place. He added that he was pursuing discussions with Lombard and Ulster and added that a valuation of IR£5.5m by Lisney's or Palmer McCormack was supposed to be available. He was offering the bank an opportunity to put in a further proposal based on the revised valuation of £5.5m. The bank considered offering a reduced facility of £3,250,000 by way of 12 month loan to be secured by (i) a first charge on the property, (ii) a bank guarantee from an acceptable bank in respect of the interest of £400,000 that would accrue in the first year and (iii) personal guarantees and indemnities from the four promoters in respect of any interest over and above that covered by the bank guarantee. However, following further internal discussion in the bank, it was decided not to make an offer of the revised facility.

6.4.13 In the course of the interview with Messrs Moriarty and McIntyre, Mr. Moriarty, in explaining the context in which he was shown the offer made by Dillon & Associates, on behalf of Sisk and Burton Property Trust, to UPH, said that he understood that it was being shown to him to seek to support the value placed on the site and to make the transaction seem fully at arms length on the grounds that a new sub-group of the original owners were purchasing and they were proposing to purchase at the same level as outside parties purchased. When queried by me, Mr. Moriarty said that perhaps the reference to "sub-group" was the wrong term and that he intended to refer to some overlap in the shareholding in UPH and the proposed shareholding in the new company. In further clarification, Mr. Moriarty said that he did not envisage having to get security from Mr. Smyth as he always

thought of Mr. Smyth as having a carried interest and that he envisaged that the security by way of guarantees or indemnities, would be provided by Messrs. Desmond, Magnier and McManus. Mr. Moriarty added that he never envisaged Fitzwilliam as the borrower as he understood at all times that the reference to Fitzwilliam in the proposal of 26th July 1989 was not intended as Fitzwilliam being the borrower.

- 6.4.14 In additional evidence on 19th March 1992, Mr. Moriarty confirmed, *inter alia*, that no reference was made to Sportsfield as a vehicle which would acquire the JMOB site.

- 6.5 Irish Intercontinental Bank ("IIB")
- 6.5.1 Mr. Smyth approached Mr. Gilmartin, a lending officer of IIB, on the 26th July 1989, seeking finance for the proposed purchase by himself and some partners, of the JMOB site at Ballsbridge. He informed Mr. Gilmartin that the site was currently owned by UPH, an NCB led vehicle, which had acquired it for approximately £4.5m but that for various reasons, UPH had not yet closed on the transaction and that it had been decided, in view of the buoyant Dublin property market to take a profit on the deal at that stage. Negotiations had been held with several parties and a firm offer had been received from Sisk Properties Limited for the entire site for £6.3m.
- 6.5.2 Mr. Gilmartin was informed by Mr. Smyth that Mr. Desmond then agreed that a vehicle of Mr. Smyth could acquire the property for £6.3m and Mr. Desmond was to be included in the Smyth backers along with **"John Magnier of Coolmore Stud"** and **"J.P. McManus"** who was described as a wealthy horse dealer.
- 6.5.3 Mr. Smyth emphasised to Mr. Gilmartin that at no point were those three names to appear as having any interest in the site and that the entire deal was to be fronted by Mr. Smyth possibly through his family company Fitzwilliam, which was the name of the applicant company on the written proposal of 26th July 1989 referred to earlier, and which was handed to Mr. Gilmartin at that meeting on the 26th July. Mr. Gilmartin noted that Mr. Smyth was to have a 10% interest in the venture with the others sharing the balance equally.
- 6.5.4 Mr. Gilmartin noted that of the consideration of £6.3m, £4.1m was to be payable on closing, the balance to be due four months later and to be bank guaranteed. He also noted that the partners were to invest £1.3m, so that a loan by way of bank finance of £2.8m was required

immediately, together with a bank guarantee for £1.3m. The remainder of the bank guaranteed amount of £1m was to be obtained through the provision of "outside security to Ansbacher Bank". Mr. Smyth also requested a facility for interest roll-up for the first 12 months, following which the partners would fund the interest liability and he anticipated that the interest roll-up would add a further £350,000 to the liability over the 12 month period.

6.5.5 Mr. Gilmartin further noted that the site was zoned to allow for mixed development, but that the plan of the promoters was to apply for approval for 45 exclusive town houses (2,000 square feet each) and an office block of 120,000 square feet. No value had yet been attached to a third portion of the site which could accommodate a hotel or multi story car park. It was anticipated that the office development would require 1 acre, the residential 3.25 acres with a balance of 1.25 acres remaining. Mr. Smyth's plan was to dispose of the residential portion of the site when planning permission was obtained and he anticipated receiving not less than £4m. The sale would in effect clear the indebtedness of the bank and the company would then be in a position to proceed with the office development.

6.5.6 Mr. Gilmartin recommended to his bank's credit committee that the proposal was bankable and that the bank should revert to Mr. Smyth positively, subject to the bank receiving comfort regarding the possible planning on the site. However he did comment that the development was speculative and the amounts involved were large.

A copy of Mr. Gilmartin's internal memo of the 26th July 1989 was produced to me together with a copy extract from the minutes of the credit committee meetings of the bank of 3rd August 1989, 8th August 1989 and 14th August 1989.

6.5.7 The minutes of the meeting of the 3rd August 1989 under the heading

"Newco - Johnston Mooney Site" stated that an outline proposal for the financing of the venture to purchase the site was considered. It noted that the general feeling was negative, on the grounds that the proposal was for speculative and non-earning property, and there was a query as to the experience of the promoter in directly managing such a venture. Concern was also expressed at the high valuation of the site, considering that it was bought recently for £4m from the liquidator of JMOB.

6.5.8 The meeting of 8th August 1989 noted however a decision of approval in principle, subject however to the following conditions (i) the valuation of the property being confirmed independently at £6.3m, (ii) adequate guarantees being provided for the interest charges at the level provided in the credit application, (iii) an increased investment required from the investors so that total bank exposure would be £4m, of which IIB would participate for £2m, and (iv) that IIB be satisfied that any other exposure to Mr. Smyth would stand alone from a risk and servicing point of view. The meeting of the 14th August 1989 noted a rejection of the application.

6.5.9 I interviewed Mr. Gilmartin on the 30th March 1992 in relation to his knowledge of the application and he confirmed that he met Mr. Smyth on the 26th July. I asked him if Mr. Smyth indicated whether he was going to have to put up some of the equity or whether it was all being provided by his three partners and Mr. Gilmartin replied that he took it that Mr. Smyth was to put up some but he was not concerned where the equity came from.

I asked Mr. Gilmartin what the reference was on the Credit Committee minute to the experience of the promoter in directly managing such a venture and he replied that this referred to Mr. Smyth as the bank took it, that this was his proposal. He added that he was informed by Mr. Smyth that the bank were not to meet the other investors, but it was

anticipated that when guarantees were required for the interest cover, that the guarantees would be from all the shareholders.

6.5.10 Mr. Gilmartin added that the involvement of Telecom or indeed Cablelink was not mentioned to him at any time by Mr. Smyth and when he read some time later of the purchase of the JMOB site by Telecom, he was very surprised.

I asked him if Mr. Smyth had indicated to him whether Messrs Desmond, Magnier and McManus were interested in taking houses which were to be built on the site but he said there was no reference to that.

6.5.11 Mr. Gilmartin told me that he was aware that Mr. Desmond had been a shareholder in UPH and that he was continuing his involvement, but that he did not remember Mr. Smyth indicating that Messrs. Magnier and McManus had also been part of UPH. He added that the question of Mr. Desmond being part of the vendor and part of the purchaser arose in discussion with Mr. Smyth and the reply given was that Mr. Desmond wanted to proceed with the site, whereas the others in UPH did not, but to keep the peace, it would be unwise to disclose the fact that Mr. Desmond was on both sides of the transaction.

6.5.12 Mr. Gilmartin added that once the bank decided not to proceed with the proposal on the 14th August 1989, that was the end of the matter and they did not consider any further application in relation to it.

6.6 Ansbacher Finance: July/August 1989

6.6.1 Ansbacher were also approached for finance for this project. It would appear that either Mr. Desmond or Mr. Smyth approached Ansbacher before the 26th July 1989 and that Ansbacher had agreed to provide a guarantee of £1m as part of the guarantee facility of £2.3m. It would also appear that initially they either were not asked for additional finance or indicated that they would not be interested in providing any further banking facilities.

6.6.2 I have interviewed both Mr. Moloney, the chief executive of Ansbacher and Mr. Matthews, an associate director in charge of lending. I have tried to interview Ms. O'Toole who was the manager of the lending department and who was directly involved with the proposal, but Ms. O'Toole was unavailable for interview for medical reasons. Mr. Moloney in his evidence stated that he thought, although he was not certain, that the question of financing the JMOB site purchase was raised by Mr. Desmond at an informal breakfast meeting, before Mr. Smyth became involved in it, but he did not recollect even in general terms what was discussed at that meeting and did not refer to the earlier proposal for £1m financing, until I raised it in my interview with him on the 19th May 1992 (being the second day of his interviews with me). His reply to me when I informed him that other banks had been told on the 26th July that Ansbacher were going to provide £1m of the guarantee is as follows:-

"That does not surprise me there are commercial games going on which are quite obvious that there was a certain amount of kiting of the transaction around the marketplace. I was aware of Trinity Bank and Lombard & Ulster other than that I had not considered the matter. Ansbacher were going to make their own decisions on the basis of the value of the transaction. We had £2m being lodged our concern was purely in relation to the loan risk."

6.6.3 Mr. Matthews could recollect very little in relation to the application and its initiation and said that Ms. O'Toole might remember.

6.6.4 On 1st August 1989, Mr. Smyth wrote to Mr. Moloney referring to previous correspondence and confirming that the earliest date, on which they would now possibly require the facilities would be 11th August. I have been unable to find any of the previous correspondence referred to and anticipate that it might be reference to the Noel Smyth proposal of 26th July (see Appendix 7). Mr. Smyth added that they were still trying to organise the "overall" in relation to the matter, but added that it was possible that they would not have this completed by the 11th August. He added that the Ansbacher takeout would either be from IIB or from Bank of Ireland and enclosed a photocopy letter from Bank of Ireland confirming that they would make £2.8m available which according to Mr. Smyth would more than cover the £2.5m which would be required.

6.6.5 I have not been able to get any explanation for the reference to £2.5m. The £2.8m was the figure that was mentioned to each of the banks and indeed in the Noel Smyth proposal of 26th July. However, I have noted a handwritten memo on a file of Noel Smyth & Partners which seems to be dated 31st July 1989 referring to "£2.5m - B. loan" which I understand from him to be a bridging loan and in addition there is reference to "£1.5m / Dermot" which according to Mr. Smyth meant that Mr. Desmond would be providing this money, i.e. the equity referred to earlier.

6.6.6 On 10th August 1989, Ms. O'Toole wrote to Mr. Smyth requesting his undertaking in relation to Chestvale as well as a copy of the purchase contract and the offer letters from Lombard & Ulster and Trinity banks so that she could have "the documents ready for you by the morning". I have been unable to ascertain the immediate lead up to that letter, but

it would appear that there was at least one telephone conversation between Mr. Smyth and Ms. O'Toole on the 10th August or immediately before that.

6.6.7 Mr. Smyth wrote to Ms. O'Toole by letter of 11th August enclosing the letter from Lombard & Ulster and the letter from Trinity Bank. He added that he presumed that Ansbacher had now received the "**£1m transfer from NCB**". He also enclosed a separate letter of undertaking (see Appendix 8) to hold the title documents and to lodge the net proceeds of the loan facilities, from Lombard & Ulster or such other bank from whom he may obtain facilities, when they come to hand and explained that there was a possibility that they may take facilities from IIB rather than Lombard & Ulster. He explained further that the facility was originally applied for in the name of Fitzwilliam, his company, as nominee, but that they would now be taking the property in the name of Chestvale.

6.6.8 In the separate letter of undertaking, Mr. Smyth confirmed, inter alia, that he was hopeful of closing the sale on that day, the 11th August and that he therefore required bridging facilities of IR£3m. This appears to be the written application on behalf of Chestvale pursuant to which Ansbacher issued a letter of the 11th August 1989, offering loan facilities of £3m on a bridging finance basis for the period up to 11th September 1989. The said letter offering the facility was accepted by Mr. Smyth, who also signed a drawdown form on behalf of Chestvale on the 11th August and he also signed various other forms for the bank including a promissory note, an application form for the opening of an account and a specimen signatory form.

6.6.9 The offer of facilities by Ansbacher to Chestvale is reflected in their internal document Credit Application 908/21 dated 22nd August 1989, which, I have been informed by Mr. Moloney and Mr. Matthews, was

drawn up retrospectively and was indorsed by Mr. Moloney as managing director on 25th August 1989 and by Mr. Lipper, chairman of the bank on 11th October 1989. A copy of this Credit Application form is contained in Appendix 9.

The credit application noted the shareholders of Chestvale as "**Dermot Desmond, John Magnier and J.P. McManus**". It stated that the purpose of the loan was to provide bridging finance to enable the company to complete the purchase of the JMOB site and that repayment of the loan was to be by way of refinancing on the 11th September 1989 from Lombard & Ulster Bank. It added that the bank guarantee of £2.3m would be provided by Trinity Bank.

- 6.6.10 Unlike Lombard & Ulster Bank and Trinity Bank, Ansbacher do not appear to have any record of a proposed transaction with Telecom at this time in August 1989 and each of Mr. Moloney and Mr. Matthews indicated that they were not aware at that time of a proposed sale to Telecom. Neither were they aware, according to their evidence to me, that a possible take out of the loan would be by reversing the site into Sportsfield as part of the proposed reverse takeover of Sportsfield.

6.7 Attempts to Refinance the Ansbacher "short-term" loan

6.7.1 On the 1st September 1989, Ansbacher wrote to Noel Smyth & Partners reminding them that the loan of £3m, which had been drawn down on 11th August, was to be repaid on the 11th September and wondering what progress had been made in arranging that. Noel Smyth & Partners replied noting the position, but in fact the loan was not repaid on the 11th September and further correspondence ensued from Ansbacher seeking information in relation to the borrowers' proposals to repay it.

6.7.2 Mr. Smyth said that he was under pressure, particularly in relation to his undertaking, as he had been informed by that time that Lombard & Ulster Bank were not proceeding, on the grounds that the valuation received by them was inappropriate for the level of financing required by the company. It is likely that by that time, he was also aware that Mr. Desmond had changed his mind, about proceeding with the proposed guarantee facility in favour of UPH from Trinity Bank, either because the conditions imposed by them were unsatisfactory or because by early September, it was realised that the scheme, from the point of view of achieving tax benefits for UPH, was incorrectly structured.

6.7.3 In the course of discussions in relation to the tax structure, Mr. Bourke of Coolmore Stud (owned by John Magnier) was introduced. Mr. Bourke had a meeting with Mr. Smyth and Ms. Kenny on the 4th or 5th September 1989 and sent a fax to Ms. Kenny setting out some notes of what he termed "**the game plan**" and stated that he was contacting "**the owner**" to clear it. A copy of the fax and the attached "**notes**" are included as Appendix 10.

In the course of dealing with the structure, Mr. Bourke noted that the Irish company (presumably Chestvale) would be owned by "**Offshore Limited**" which was to be owned by "L" and added that the Irish company would borrow £3m on a "**back to back arrangement**" between

the bankers of "Offshore Limited" and an Irish bank which would be IIB or Bank of Ireland. The memorandum also referred to another unnamed company to be registered in Cyprus and "owned by a Trust or guarantee company (LIC only)".

6.7.4 Mr. Bourke could not remember who "L" was nor what "LIC only" meant. It is possible that the "L" referred to Mr. Lewis, as in an undated handwritten page on a Noel Smyth & Partners file, there is reference to "Joe Lewis" in a graphic, which would imply that he was in some form of intermediate or nominee position between a Cyprus company and three other unnamed persons. Judging by the position of the page in Mr. Smyth's file, the page appears to have been written in early September 1989 but I am not certain of this. Neither Mr. Smyth nor Mr. Kenny could explain what the reference to "L" or to "LIC" was.

6.7.5 Mr. Smyth stated in evidence that he was informed by Mr. Desmond that Mr. Bourke would also be involved in raising the finance to pay off Ansbacher. On 18th October 1989, Mr. Smyth wrote to Mr. Bourke referring to previous discussions and confirming that he was coming under increasing pressure to repay the bridging loan. He added that he was given to understand by Mr. Desmond that Mr. Bourke was to put in place the necessary refinancing of Ansbacher and added that he himself had taken some steps with Bank of Ireland to make the monies available, presumably as an alternative to Mr. Bourke's plans. Mr. Smyth added that Ansbacher had threatened to call in the loan and pointed out that this could result in an early liquidation of the company, which would have serious consequences for Chestvale and also for UPH and for the profit that they were entitled to under the present deal. Mr. Smyth added that as Mr. Bourke's clients apparently also had an interest in UPH, it was in everyone's interest that the matter be resolved as quickly as possible. Mr. Smyth understood at this time in October that Mr. Bourke's clients were Messrs Magnier and McManus, although

he maintains that he had no direct involvement with them and that as far as he was concerned, his client was Dermot Desmond.

- 6.7.6 By letter of 8th November from Mr. Smyth to Mr. Desmond, Mr. Smyth informed Mr. Desmond of the increasing pressure to which he was being subjected by Ansbacher and requested "immediate instructions" from Mr. Desmond on the repayment and source thereof, of the Ansbacher loan and the position re the £2.3m loan note due to Ansbacher.
- 6.7.7 By letter of the 8th November 1989, Mr. Smyth wrote to Ms. O'Toole of Ansbacher apologising for the delay in reverting to her in relation to the repayment of the loan. He stated that Mr. Bourke, who had taken over responsibility in relation to the refinancing of the package, had been away in the United States for the previous 10 days and Mr. Smyth added that Mr. Bourke had indicated to him prior to his leaving that the finance was in place but that he was anxious to get final agreement from Mr. Cooney who was advising Mr. Smyth on the tax aspects, on how the tax situation could be resolved as between the various parties. Mr. Smyth added that he had endeavoured to contact Mr. Bourke, but that he would not be able to contact him for another few days and that he would then try to get a definite commitment from him as to when the funds would be available to repay the loan.
- 6.7.8 Mr. Bourke has denied that his role was ever to arrange finance for the purchase. He accepts however that Mr. Smyth may have been under the impression, that that was his role, and Mr. Smyth is clear in his recollection that Mr. Desmond indicated to him at the time, that Mr. Bourke was to have a role in arranging finance. Mr. Bourke was adamant and very clear in his evidence to me that his only role was to report to Mr. Desmond on the tax aspects of the transaction involving UPH and stated that his only concern was the protection of the Magnier

family trusts' interest in UPH. This conforms with Mr. Desmond's evidence to me, but Mr. Kenny, who was the tax adviser to UPH and who attended a meeting with a number of parties including Mr. Bourke, was equally adamant that he perceived Mr. Bourke as being on the opposite side to him in trying to resolve difficulties between UPH and Chestvale and that Mr. Bourke represented the interest of Chestvale or it's members. Mr. Kenny's views are corroborated by the evidence of Mr. Smyth. This is an area where I have considerable difficulty in reconciling the conflicting evidence.

6.8 Ansbacher Finance: November 1989

6.8.1 Irrespective of the intended role of Mr. Bourke, I have not seen any evidence that, in fact, finance was arranged by him with one of the banks, but what did transpire very shortly after that and which first appears on a Noel Smyth and Partners memorandum of 10th November 1989, is a reference to the Ansbacher loan being increased to £4.5m. Their security was to be increased to include, not only a charge on the JMOB site, but also a charge on a £2m back to back deposit. The same memorandum also referred to "Clayform" in cryptic terms, Clayform being a large shareholder in Dunloe House Property plc, an Irish company quoted on the Stock Exchange in Dublin. Even though the said memorandum is in Mr. Smyth's own handwriting, he has not been able to explain his handwriting nor does he have a clear recollection of the context of the memorandum. It would appear, however, from a letter which Mr. Smyth wrote to Mr. Desmond on the 10th November, that the memorandum related to a meeting he had with Mr. Desmond that day, as it, inter alia, refers to Ansbacher issuing a new facility of IR£4.5m to Chestvale, but taking a charge on the property for £2.5m only. Although there appears to be a mistake in the letter, it is clear that it is referring to a charge for £1.8m in favour of UPH to be discharged on the 1st March 1990 when it would be replaced by a loan note guaranteed by Ansbacher for £1.8m. In the meantime, the charge in favour of UPH was to rank subordinate to the Ansbacher charge. The letter added that Mr. Desmond was to persuade UPH to accept these revised terms.

6.8.2 The difficulties with Ansbacher in relation to the non repayment of the July/August loan appear to have resolved themselves somewhat, as on 13th November 1989, Ansbacher wrote to Mr. Smyth seeking certain documents "in order that our security be perfected" and what was required was the Certificate of Incorporation, Memorandum and Articles

of Association and a list of directors and shareholders of Chestvale.

6.8.3 It further appears that Mr. Moloney met with Mr. Desmond on the 14th November 1989 and that Mr. Moloney agreed with Mr. Desmond that Chestvale would get a new facility of £4.5m, as Mr. Smyth wrote to Mr. Moloney on the 14th November referring to that meeting and that agreement. He added that he would write separately to Mr. Moloney in relation to the other matters discussed at the meeting. Mr. Moloney cannot recollect any such meeting.

6.8.4 Mr. Smyth subsequently wrote to Mr. Desmond by letter of the 14th November, enclosing a copy of a letter which he proposed sending to Mr. Moloney, in relation to the new facility and the new account to be opened. He added that a new company, Delion, would now be used, that the £1m to become available would be transferred into Delion and that the £1m as introduced by Mr. Desmond in August would be repaid out of the new facility of £4.5m and would then be reintroduced as a deposit of Delion. He added that as Delion was a Cypriot company, the account would be treated as an external account and would not attract any DIRT or other tax. Ansbacher would have a lien on the deposit (which would be the £2m) in addition to a charge on the site. The proposed letter to Mr. Moloney refers to Delion having a deposit of £2m, but does not indicate where the £2m was to come from. Mr. Smyth in the said letter requested Mr. Moloney to furnish the necessary documentation, facility letter and application for the opening of the Delion account and added that Delion would give a lien and letter of hypothecation over its funds in Ansbacher in support of Chestvale, but that Ansbacher should **"issue a side letter outside the facility letter in relation to this matter"**. It is not clear if that second letter was actually sent to Ansbacher, as it does not appear on their file and Mr. Moloney says that he has no recollection of it, although he did say that it was possible that it was received.

- 6.8.5 By letter of the 20th November 1989, Mr. Desmond wrote to Mr. Moloney referring to a recent meeting, but stating that the proposed sale to Chestvale by UPH of the JMOB site for £6.3m had fallen through. He added however that a UK Property plc had agreed to purchase the property for £5.8m (which of course was £500,000 less than Chestvale were to pay UPH), of which £4m was to be by way of a cash payment and £1.8m by way of deferred loan notes. He added that the £1m paid by the original purchasers should be returned by Chestvale via NCB "who placed the monies with yourselves in the first instance" and added that the UK Property plc would borrow £4.5m from Ansbacher and would arrange to place £2m on deposit with one of Ansbacher's foreign affiliates or alternatively provide Ansbacher with a bank guarantee. Mr. Desmond subsequently informed me, through his solicitors, that the UK Property plc referred to by him in the letter was Clayform although Mr. Moloney stated to me in evidence that he was not aware of the name of the company that had been referred to. The managing director of Clayform informed me that the property was offered to him by Mr. Desmond for £6.3m but that there was no discussion with him in relation to a price of £5.8m and he was not aware that any application for finance had been made on behalf of Clayform by Mr. Desmond nor had he instructed him to do so. I have seen no evidence that the sale to Chestvale had fallen through or that there was a threat of it's collapse at that time.
- 6.8.6 By letter of the 24th November 1989, Ansbacher through Ms. O'Toole replied to Mr. Desmond's letter of the 20th and indicated that the bank was agreeable in principle to grant to the UK Property plc, the facilities requested by Mr. Desmond.
- 6.8.7 As late as 28th November 1989, Mr. Matthews of Ansbacher wrote to Mr. Smyth (with a copy to Mr. Desmond) stating that Ansbacher urgently required details of the UK Property plc that was going to purchase the

JMOB site and in particular the name, address and accounts of that company, its directors, shareholders and a copy of its memorandum and articles of association.

- 6.8.8 By a letter of the following day, 29th November 1989, from Ansbacher addressed to the directors of Chestvale, Ansbacher referring to the recent application made on its behalf by Mr. Desmond (but not specifying what application and when in particular it was made) approved a loan of £4.5m to Chestvale as bridging finance to the 30th April 1990 and stated that its purpose was for bridging finance, to enable the borrower to complete the purchase of the JMOB site. This does not make sense, as the £3m which Ansbacher had advanced in August was used by Chestvale to complete the purchase. However, it may be explicable in the context of the letter of 20th November 1989, when Mr. Desmond told Ansbacher that that sale had fallen through. The representatives of Ansbacher, interviewed by me, have not been able to explain exactly what they meant by this. The security required by them was again a charge over the property and a promissory note. This facility was accepted by Messrs Smyth and Hannigan, as directors of Chestvale on the 11th December 1989. With the said letter of the 29th November, was a further letter from Ansbacher of the same date, stating that the main facility was conditional on a guarantee from Delion being given to the bank, which guarantee was to be supported by a letter of lien and hypothecation on a deposit of IR£1m and US\$1.5m in the name of Delion with the bank. These terms were accepted by Messrs Hannigan and Smyth on behalf of Chestvale on the 14th December 1989, and between then and 5th January 1990, Ansbacher obtained the security requested by them for their proposed loan.
- 6.8.9 The correspondence files indicate that when first drafted by Ansbacher, the second letter of the 29th November referred to guarantees by NCB Nominees Limited of £1m and Allied Irish Banks of £1m. This was

subsequently changed on or about the 7th December and the revised letter, as described in paragraph 6.8.8, was issued but retained the date of 29th November. In fact, in a letter of 30th November 1989 from Ansbacher to Mr. Desmond, with which she enclosed a draft guarantee to be executed by Allied Irish Banks UK, Ms. O'Toole asked Mr. Desmond to let her know who in that bank was dealing with the matter.

6.8.10 Neither Messrs Moloney nor Matthews of Ansbacher, Mr. Smyth nor Mr. Desmond could explain the sequence of correspondence and discussions between 10th November 1989 and 29th November 1989, although Mr. Desmond did indicate that he was trying to dispose of the Chestvale interest in the property to Clayform on behalf of Mr. Probets as Mr. Probets' existing mezzanine finance and proposed additional mezzanine finance no longer suited him. Mr. Desmond stated in his evidence on 5th April 1992 that "it did not suit him (Probets) and my interest to have £2 million of his money locked in there."

6.8.11 The Ansbacher letter of 29th November 1989 offering the loan facility of £4.5m to Chestvale was reflected in their internal Credit Application Form 912/06 which noted that Chestvale wished to extend and increase their existing bridging facility pending the resale of 4½ acres to Bord Telecom for £7.5 million and that the bank would be well secured by a charge over the site and by a lien over deposits of £2.0 million with the bank. It further noted that the shareholders of Chestvale were "Noel Smyth and Ronan Hannigan". These were the registered shareholders and according to Mr. Matthews of the bank, the bank understood that Mr. Smyth was the beneficial owner. He could not explain to me how the bank's view changed from the July/August application, when they noted different persons as shareholders. In fact, he was not able to explain to me any valid reason for his understanding of Mr. Smyth's interest.

6.9 Bank of Ireland: November 1989 Application

6.9.1 In the meantime, Mr. Smyth, by letter of the 27th November 1989 to Mr. Moriarty in the Bank of Ireland, sought to revive the previous discussions and application on the basis that Chestvale would borrow £4.5m, that the bank would get a charge on the site for £2.5m as a first charge and would have a charge over a deposit with the bank of £2m. Mr. Smyth stated that he required the loan for about 12 months, as there were negotiations in progress to sell on the site and added that the application for planning permission in relation to the property was progressing satisfactorily. Mr. Smyth sent a copy of his letter to Mr. Moriarty to Mr. Desmond and with a covering letter, stated to Mr. Desmond, that the finance had to be available by the 15th December 1989 as he had given a "committed undertaking on behalf of the company confirming that the money would be available on that date as agreed with your good self".

6.9.2 In the course of the discussion which ensued between Mr. Smyth and Mr. Moriarty within a day or two after the letter of 27th November 1989, reference was made to a UK Property plc but Mr. Moriarty in his evidence to me did not remember what its significance was. Mr. Moriarty was informed by Mr. Smyth that a Cypriot company, Delion would have a deposit of £2m in Jersey or perhaps with Bank of Ireland with a guarantee in favour of Chestvale, but that this was not to be mentioned in a facility letter. Mr. Moriarty was informed that Delion and Chestvale were owned as to one-third each by Mr. Desmond, Mr. Magnier and Mr. McManus. He was also informed by Mr. Smyth that negotiations were proceeding for the sale of 4 acres to Telecom which would clear the loan. These items were included in detailed contemporaneous notes that Mr. Moriarty made at the time of his meeting Mr. Smyth.

- 6.9.3 Mr. Moriarty's evidence is that he was also informed by Mr. Smyth that UPH knew of the involvement of Mr. Desmond in Chestvale and was further informed that the shares in Delion were held as to 99 by Mr. Smyth and 1 by Mr. Hannigan and that these persons were also the directors. In fact, 999 shares were held by Mr. Smyth but the remaining share was then held by Totalserve Management Limited.
- 6.9.4 According to Mr. Moriarty, Mr. Smyth added that the company had the possibility of selling to Telecom or alternatively pursuing it themselves to the stage of getting planning permission and then selling it on to developers.
- 6.9.5 On examining Mr. Moriarty on the 19th March 1992 in relation to his meeting with Mr. Smyth, he said that his recollection of the meeting was that initially he was told that the beneficial owners were substantial Irish persons, but that as the conversation developed he sought more information and asked who those persons were and when he was told (Desmond, Magnier and McManus), he wrote it down. He was satisfied that he was told at that time that those three persons were the owners and that this was in answer to a specific question raised by him.
- 6.9.6 Mr. Moriarty was also informed that earlier in the year, 1989, a sale to a group comprising the principals in the present deal was apparently agreed by UPH at £6.3m but that this did not proceed, "**allegedly due to tax complications**". The new proposal was explained as involving consideration now comprising £5.8m, of which there would be cash of £4.3m and loan notes of £1.5m.
- 6.9.7 The plans for disposal were elaborated on by Mr. Smyth and in relation to Telecom, Mr. Moriarty was told that approximately 4 acres of the site might be acquired "**at a profitable price to Chestvale**" by Telecom for a corporate headquarters and that this could proceed before mid 1990

and was not dependant on achieving a particular planning permission before then. It was noted however by Mr. Moriarty, that the bank would not be able to verify this for the moment, because he was informed that there was not yet anything in writing. In the absence of Telecom, the plan was to sell on the site to a developer when planning permission had been received and it was hoped to achieve planning permission in 12 to 18 months. The bank noted that planning approval had been granted just recently for the Sweepstakes site and this was approximately 18 months after its acquisition. Mr. Smyth apparently informed Mr. Moriarty that discussions had commenced with the planning authority for alternative planning submissions including varying ratios of office and residential space and the bank were told that two of the submissions were being favourably considered by the planners.

6.9.8 Bank of Ireland, before it made its decision, had sight of the two letters of approval from Ansbacher dated 29th November 1989, but nevertheless decided not to approve the financing, the primary reason for the negative decision being the absence of planning permission, which it was noted would **"render any independent valuations as largely speculative and conditional"**.

6.10 Dermot Desmond Loan

- 6.10.1 In or about the 15th or 16th January 1990, Mr. Desmond approached Ansbacher for a loan of £500,000. It was considered by Ansbacher as a short term personal facility for Mr. Desmond and he apparently informed the bank that agreement had been reached for the sale of the JMOB site to Telecom for £9.4m and that he required a facility from the bank pending receipt of the sale proceeds. He produced to the bank a copy of his letter of 9th January 1990 to Telecom, offering to sell the property for £9.4m and which was a copy from Telecom's own file, as it showed handwritten notes endorsed by Mr. McGovern and Mr. O'Neill of Telecom, thus indicating that Mr. Desmond got a copy of the letter from Telecom before sending it on to Ansbacher.
- 6.10.2 Ansbacher were apparently informed by Mr. Desmond that they would be secured by a personal undertaking from Noel Smyth & Partners to lodge sufficient from the sale proceeds of the JMOB site to repay Mr. Desmond's loan account with the bank, as reference to this appears on their file and their letter of offer to Mr. Desmond. The period of the loan was noted as three months and interest was to be charged quarterly and payable on maturity.
- 6.10.3 On 17th January 1990, Mr. Smyth sent to Mr. Desmond a copy of a letter of undertaking which he was to send to Ansbacher and asked Mr. Desmond to send to him a letter of irrevocable instructions to give the necessary letter of undertaking in accordance with the draft prepared by Mr. Smyth. On the same day, 17th January, Mr. Desmond wrote to Mr. Smyth confirming his irrevocable instructions to Mr. Smyth to give to Ansbacher such a letter of undertaking which was then issued by Noel Smyth & Partners. Copies of Mr. Desmond's letter of authority and of the letter of undertaking are contained in Appendix 11.

- 6.10.4 Mr. Desmond's letter contained his confirmation of instructions to Mr. Smyth, to undertake to pay the loan out of the net proceeds of sale of the JMOB site to Telecom, either through the sale of the property directly from Chestvale to Telecom or, the sale of the shares in Chestvale to Telecom by Delion or any associated company. This in fact had contemporaneously been suggested to Telecom by Mr. Smyth as a possible method of effecting the sale to them.
- 6.10.5 Mr. Desmond added in his letter to Mr. Smyth that the undertaking was to extend to repay the said loan of IR£500,000 out of the IR£2m which was "liened" and "hypothecated" in Ansbacher, in support of and guaranteeing the Chestvale facilities, so that, in the event of there being insufficient proceeds from the sale of the JMOB site, Mr. Smyth was authorised to utilise part of the said £2m deposit to enable him to discharge his undertaking to Ansbacher. Mr. Desmond added that he understood that Ansbacher may be prepared to waive their right to register as a charge against Chestvale, the undertaking given in relation to the loan, in consideration of the undertaking to be issued by Mr. Smyth. The said £2m. was the deposit in the name of Delion i.e. the "mezzanine finance".
- 6.10.6 As can be seen from the letter of undertaking of the 17th January 1990 Mr. Smyth (i) confirmed that he acted for Mr. Desmond, (ii) that he held Mr. Desmond's irrevocable instructions that on the completion of the sale of the JMOB site, he was to pay to Ansbacher the sum of IR£500,000 out of the net proceeds of sale, and (iii) that he held instructions to sell the said property to Telecom for £9.4m. He enclosed Mr. Desmond's letter of 9th January 1990 to Telecom, with the endorsement by the Telecom executives confirming that the transaction was to proceed. He then undertook to pay, out of the net proceeds of sale after payment of the monies due to Ansbacher and charged on the property, a sum of IR£500,000 with interest accrued thereon and he

added that the sale to Telecom was due to complete in April 1990.

- 6.10.7 Ansbacher sought advice from Hugh O'Neill a partner in Noel Smyth & Partners in relation to the security and on the 18th January 1990, Mr. O'Neill wrote to Ms. O'Toole referring to his conversations of the 17th January with Mr. Moloney and commenting that whilst the letter of undertaking was registerable pursuant to Section 99, Companies Act 1963, that Mr. Moloney was happy to proceed without registering the undertaking.
- 6.10.8 An implication that can be drawn from the said letter of the 18th January from Mr. O'Neill to Ms. O'Toole is that the issue of consideration for the undertaking on behalf of Chestvale arose and that Mr. O'Neill advised that some consideration for a Chestvale guarantee should be shown. Mr. O'Neill enclosed with his letter to Ms. O'Toole a draft letter from Chestvale addressed to Mr. Desmond acknowledging that Chestvale owed Mr. Desmond fees and commission in excess of IR£500,000 and that in consideration of Mr. Desmond waiving for the present, the payment of the fees and commission by Chestvale, Chestvale agreed to give the enclosed letter of undertaking. Mr. O'Neill apparently told Ms. O'Toole that he had advised Mr. Moloney that such consideration and the giving of the undertaking for and on behalf of Chestvale would be adequate in law. It would appear that Mr. Desmond, when told of this requirement, rejected it and it would further appear that the letter and guarantee were not issued by Chestvale and Ansbacher did not pursue obtaining them, but relied instead on the undertaking from Noel Smyth & Partners.
- 6.10.9 The said loan of £500,000 was not repaid directly out of the proceeds of sale of the JMOB site when the sale was closed. The loan was rolled over on a number of occasions, when Ansbacher discussed it with Mr. Desmond. The loan was renewed each time on the same terms as the

initial offer letter of the 16th January 1990 and on the face of it, all the terms of the said letter continued in force including the bank's security of the undertaking from Noel Smyth & Partners.

6.10.10 In his evidence, Mr. Matthews of Ansbacher indicated that the bank did not continue to rely on the letter of undertaking from Mr. Smyth and that fresh arrangements were made with Mr. Desmond. He was unable to explain to me what those were, other than that the bank got the assignment of a life policy on Mr. Desmond's life.

Ansbacher were initially unable to find the original letter of undertaking from Noel Smyth & Partners and informed me that it had probably been cancelled and returned to Mr. Smyth. It did not appear on the files of Noel Smyth & Partners nor was there any evidence on those files or on the Ansbacher file that Ansbacher had released Noel Smyth & Partners from their undertaking.

6.10.11 However, Ansbacher eventually found the said letter of undertaking and Mr. Moloney produced it to me on the 12th May. It was endorsed "cancelled" and he informed me that it had been so endorsed after the loan was repaid on 16th October 1991.

6.10.12 The loan was not repaid directly out of the proceeds of sale but by way of a bank draft drawn on Ansbacher, payable to Dedeir and endorsed by Dedeir back to Ansbacher for crediting to the account of Mr. Desmond. The money for the repayment was actually borrowed by Dagord, a subsidiary of Dedeir, from Ansbacher. The borrowing by Dagord was to be secured, inter alia, by a lien in favour of Ansbacher over a deposit of £500,000 in the name of Freezone, together with a personal guarantee of Mr. Desmond. In fact, the deposit in the name of Freezone was transferred at the request of Freezone, on the 21st October 1991, to Bank Scandinave en Suisse, Geneva, for the account of M. Andre de Pfyffer Etude account reference Amarac; but the security

to Ansbacher for the loan to Dagord was replaced by a guarantee from Amarc Holdings Establishment supported by a letter of lien and a letter of hypothecation over a deposit of IR£500,000 in the bank's books in the name of that entity. Even though the said loan to Mr. Desmond was not actually repaid out of the proceeds of sale of the JMOB site, there was at all times between the closing of the sale and 11th October 1991 (the date on which the balance of the proceeds of sale was transferred out of Ansbacher), an amount on deposit in a Delion account, which was significantly in excess of the balance due on the said Dermot Desmond personal loan account.

6.10.13 Ansbacher, according to Mr. Moloney, did actually continue to rely on the undertaking from Noel Smyth & Partners until the loan was repaid, and in fact as indicated above, Delion did have in an account in Ansbacher, a sum in excess of the amount outstanding on the Dermot Desmond loan. Mr. Moloney has stated in evidence that the bank did not have any lien or right of set off in respect of the Delion deposit and the Dermot Desmond loan, but as long as they held the Noel Smyth & Partners undertaking, they would not appear to have needed any additional express right of set off.

6.10.14 The sum of £500,000 in the name of Freezone referred to in Paragraph 6.10.12 seems to be part of the proceeds of sale by Freezone of its shares in Emmets. The balance of those proceeds of sale were also transferred by Ansbacher to the same account in M. Andre de Pfyffer Etude account reference Amarc.

6.11 Chestvale Borrowing from Ansbacher on 22nd January 1990

- 6.11.1 Despite the additional financing arranged with Ansbacher at the end of November 1989, Ansbacher had still not agreed to guarantee the loan notes to be issued by Delion to UPH. Mr. Desmond in his evidence to me on 12th November 1991, stated that he understood that the application which he made to Ansbacher in November 1989 and which was approved by them on 29th November, was for the issue of a guarantee facility. Mr. Moloney has stated that he does not recollect that issue being raised at that time, but that if it was, it certainly was not agreed.
- 6.11.2 It would appear from a document on a Noel Smyth and Partners file that Ansbacher were not agreeable to give the additional facility of a guarantee, until they were satisfied that a sale on to Telecom had been definitely agreed. Mr. Desmond in his evidence, also on 12th November 1991, stated that he did not think that Ansbacher were aware at 29th November 1989, that Telecom or indeed anybody else had expressed an interest in buying the JMOB site. It would appear that it was only after the agreement for the sale to Telecom for £9.4m, evidenced by the endorsement of Mr. McGovern on the letter from Mr. Desmond to him of the 9th January, that Ansbacher agreed to increase the facilities which they would offer.
- 6.11.3 Accordingly, on 22nd January 1990, pursuant to an application made by Mr. Smyth on behalf of Chestvale, Ansbacher agreed to increase the loan to Chestvale by £250,000 which was repayable on 30th April 1990 and which was to enable Chestvale to discharge stamp duty and other outlays in relation to the transaction.
- 6.11.4 They also agreed at the same time to issue a guarantee for £2,750,000 on behalf of Delion in favour of UPH, the effect of which was to

guarantee the payment to UPH in five years time, of the sum of £2,750,000, in the event that Delion failed to pay the loan note for that amount to be issued by it. By a covering letter of the 22nd January 1990, Ansbacher indicated to Chestvale that they understood that on receipt of the sale proceeds of the JMOB site, the sum of IR£2,750,000 would be placed on deposit and liened to the bank to secure the guarantee and in the meantime the guarantee would be secured by the existing fixed charge over the JMOB site.

The Ansbacher Credit Application 001-33 dated 22nd January 1990 and which was an addendum to Credit Application 912-06 referred to as Paragraph 6.8.11, noted the additional facilities, which when added to the existing facilities, indicated an exposure to Ansbacher of IR£7.5m. In fact, the guarantee by Ansbacher of the loan note and the actual loan note itself were not issued until the 19th April 1990.

6.12 Further attempts by Mr. Smyth to get Bank Guarantee for Loan Notes

- 6.12.1 Although Ansbacher had, by letter of the 22nd January 1990, approved the granting of a guarantee of the loan note or debenture to be issued by Delion in favour of UPH, Mr. Smyth wrote to Ansbacher by letter of 22nd March 1990 indicating that negotiations for the sale of the property had been completed with Telecom, setting out the terms of the sale and stated that he needed to now obtain from Ansbacher "a **full quote as to how much it would cost to actually purchase your guarantee to pay to UPH on the 15th August 1994 £2.75m even**". He added that the intention was to now pay to the bank, the capital sum, which would satisfy the bank to give the guarantee, without recourse to any other security, other than a lien on the said deposit. By letter of the same date to A & L Goodbody, Mr. Smyth approved the draft debenture to be issued by Delion and indicated that he was submitting a bank guarantee to Ansbacher, for their approval.
- 6.12.2 In or about the same time, Mr. Smyth also made a further approach to Bank of Ireland, this being the third approach which he had made to them for financing related to the JMOB site. He applied to them for two separate facilities, the first a guarantee on behalf of Delion in favour of UPH for the sum of IR£2.75m payable on the 14th August 1994 and the second facility was a net borrowing of £2.75m for a three month period, which would in effect be a refinancing of the existing Ansbacher loans which had been drawn down.
- 6.12.3 A Credit Application was prepared by Mr. Moriarty at Bank of Ireland and submitted on the 26th March 1990 to the general manager of Group Credit Control of that bank with a recommendation of acceptance. The recommendation referred to a "spin off" for the bank if they offered the facility. The spin off was to consist of a deposit of £8.5m for six weeks, which amount would represent the proceeds of sale to Telecom on the

assumption, as represented to the bank by Mr. Smyth, that Telecom would be "putting up" the entire proceeds of sale, even though the sale would not close for a six week period. As it transpired, Telecom did not pay the proceeds of sale until the sale was closed at the end of June 1990.

- 6.12.4 Despite the fact that the Bank of Ireland had turned down the proposal on each of the two previous occasions that an approach was made to them, on this occasion, the bank approved the proposal on the assumption that there was a definite sale on to Telecom, and this was relayed to Mr. Smyth by a letter from the Bank of Ireland of 4th April 1990.
- 6.12.5 The internal Credit Application form accompanying the proposal to Group Credit Control described Delion, the proposed borrower, as being a Cyprus company owned by "D. Desmond, J. Magnier and J.P. McManus" and that Chestvale was to become a subsidiary of Delion, UPH being about to sell it. The recommendation referred to UPH as being owned mainly by "D. Desmond, J. Finnegan and M. Smurfit".
- 6.12.6 Mr. Moriarty in his evidence explained that his understanding of the reason for the large amount of money being left on deposit for six weeks, was that there was to be an appropriate lapse of time between UPH selling Chestvale to Delion and Delion selling the JMOB site (the asset of Chestvale) to Telecom, but Telecom wanted to show their commitment to the transaction and hence were putting up the proceeds of sale by way of a deposit, with the interest thereon accruing to Delion.
- 6.12.7 The bank's own memoranda at the time note a certain concern by it on the dual roles of various parties including Mr. Desmond and Mr. Smyth, Mr. Desmond being involved in UPH and Delion and Mr. Smyth being a solicitor having to give solicitor's undertakings to the bank and being

involved in the transactions by having, on the understanding of the bank from earlier discussions with Mr. Smyth, a 10% carried interest. In addition to this express reference to the dual roles, it would appear that concern was also expressed by the managing director of Bank of Ireland in relation to the dual role of Dr. Smurfit. Dr. Smurfit appeared on the Credit Application form as being a shareholder in UPH, whose property was ultimately being bought by Telecom of which he was the chairman. Mr Moriarty's evidence is that in a conversation that he had with the managing director of the bank at the end of March or early April 1990, the managing director expressed surprise at the connection of Dr. Smurfit in this way. Mr. Moriarty and Mr. McIntyre, also of the bank, who gave evidence with him, stated to me that their recollection was that, when preparing the Credit Application in March 1990, a lot of the information inserted in it was gleaned from their earlier discussions with Mr. Smyth, rather than information being repeated at that time and this, in particular, referred to information regarding shareholders in UPH, the new purchasers of the property from UPH and Mr. Smyth's 10% "carried" interest.

6.12.8 Mr. Moriarty informed me that Mr. Smyth, when he saw all the bank's papers, relating to the JMOB site in March 1992, had stated that the only comment he had on their contents (which were contemporaneous notes by Mr. Moriarty of conversations with him) was that the reference to the 10% "carried" interest was not accurate, as it was what had been intended, but that it did not actually transpire. This conforms with what Mr. Smyth told me himself in his evidence.

Mr. Desmond in his evidence denied that it was ever intended that Mr. Smyth would get a 10% "carried interest in the company".

6.12.9 The offer of finance by the Bank of Ireland was not accepted and Mr. Smyth explained to me in evidence that the reason he approached the Bank of Ireland again, was to see if he could get a better interest rate

largely with the intention of persuading Ansbacher to reduce the cost being charged by them, rather than having a real intention of changing banks.

- 6.12.10 By letter of the 30th March 1990, Mr. Smyth wrote to Mr. Moloney of Ansbacher, confirming that contracts would be exchanged that day with Telecom, that the sale was due to complete on the 30th May 1990 and that the net proceeds of sale would be lodged to the credit of Chestvale on completion. He enclosed a letter of undertaking to Ansbacher to that effect.
- 6.12.11 By letter of the 3rd April 1990, Ansbacher issued another letter of approval to the directors of Delion, offering to guarantee the loan note in favour of UPH on terms more or less the same as those proposed by Bank of Ireland, and the letter of offer from Ansbacher was accepted by Mr. Smyth on behalf of Delion on the 10th April 1990.
- 6.12.12 By letter of the 5th April 1990, received in Ansbacher on 10th April 1990, Mr. Smyth sent to Ansbacher, the letter accepting the facility on behalf of Delion, a resolution of Delion, a letter of lien and hypothecation and an approval for Ansbacher to take from the US Dollar deposit which had been opened in December ("**the mezzanine finance**"), sufficient monies to make up an amount of IR£1,780,093.11 (the agreed amount which was to be put on deposit in Ansbacher and which would be the subject of the lien and hypothecation to secure the guarantee by Ansbacher).
- 6.12.13 This conforms with evidence which appears on Mr. Smyth's file to the effect that Ansbacher would only agree to guarantee the loan, when there was separate cash lodged as security or when the sale on to Telecom had become unconditional.
- 6.12.14 There was a further application for bank finance to Ansbacher by Delion

and which resulted in a new facility letter dated 3rd May 1990 being issued by Ansbacher to Delion for a loan of £9.3m. However this financing which was actually taken up, was not required for the financing for the property but rather as part of the tax scheme and will be described in more detail in sections 7 and 8.

Houses of the Oireachtas

7.0 Tax Schemes

7.1 General

7.1.1 There were a number of different schemes proposed, throughout the series of transactions between December 1988 and July 1990, to reduce the impact of capital gains tax liability, corporation tax liability and stamp duty liability. It is not necessary to describe all of these, but an explanation of some of them will help to explain some of the complications in the series of transactions, that ultimately led to the sale to Telecom of the JMOB site in June 1990. However, another reason for analysing the tax schemes is to show their impact on the beneficial ownership of Chestvale and Hoddle between the beginning of August 1989 and the end of June 1990.

7.1.2 The tax advisers involved were Mr. Kenny for UPH, Mr. Cooney for Mr. Smyth's clients and Mr. Bourke whose role is not clear.

7.2 Tax vis-a-vis UPH

- 7.2.1 UPH were advised at an early stage to take the purchase of any property being acquired by them in a separate, wholly owned, subsidiary company as this gave greater flexibility from a tax planning point of view, if and when the property was to be disposed of.
- 7.2.2 Accordingly, in January 1989 after UPH had contracted to purchase the JMOB site and which sale was due to be closed on the 5th January 1989, it was proposed that Rockmar, a shelf company provided by NCB, be used for the purpose of acquiring the site. As the sale did not close at that time, Rockmar was not actually used for that property, but in fact was used for another property subsequently acquired by UPH.
- 7.2.3 In June 1989, when UPH received the offer from Mr. Smyth to acquire its interest in the contract which it had with the liquidator, the offer was structured in such a way as to make it attractive from the point of view of UPH, by seeking to defer the impact of capital gains tax liability. This was to be achieved by furnishing guaranteed loan notes to UPH to be paid four years after closing. As will appear later, a fundamental misunderstanding arose at an early stage on the mechanics of this transaction, which gave rise to considerable confusion in subsequent months. The offer from Mr. Smyth on 19th June 1989 was for a consideration for £6.3m and it was to be satisfied as to £4m payable on completion on the 31st July 1989 and £2.3m to be satisfied "by way of loan papers, in a form to be agreed between us, but which would effectively be secured other than on the property".
- 7.2.4 Mr. Barry of UPH, to whom the letter of offer from Mr. Smyth was addressed, then spoke to Mr. Kenny on 21st June 1989. Mr. Kenny stated that from the point of view of UPH, the proposed deal would be good, subject to the loan stock being bank guaranteed, being secured

other than on the site (to avoid contravention of Section 60, Companies Act 1963) and carrying a commercial rate of interest. He added, however, that from the vendors point of view, it would create a tax problem further down the road as capital gains tax liability would be calculated on a base cost of £4m as opposed to the cost of £6.3m actually being incurred. Mr. Barry contacted Mr. Smyth who, by letter of the 23rd June 1989, confirmed that the outstanding £2.3m would be bank guaranteed.

7.2.5 Mr. Barry then gave instructions to his solicitor, Mr. Bruncker, who stated in evidence that at that time he understood that the property would be transferred into a shelf company which would be a wholly owned subsidiary of UPH and that UPH would then sell the shares of that subsidiary to the clients of Mr. Smyth, in consideration of the guaranteed loan note for the deferred payment of £2.3m and he wrote to Mr. Smyth on the 6th July 1989 to this effect.

7.2.6 In a letter of the 10th July 1989 from Mr. Smyth to Mr. Barry, Mr. Smyth stated that he had been in contact with Mr. Bruncker and that Mr. Bruncker indicated that he was not sure if the price on the contract was to be £6.3m or in the alternative, £4m with £2.3m being then paid for the shares in the company which held the assets. Mr. Smyth asked Mr. Barry to look at the tax implications of this as

"I would be concerned in terms of purchasing the company at a base price of £4m and having a base price and shares of £2.3m. Obviously the higher the base price from our point of view the more important that position is, and in those circumstances perhaps you would be good enough to look into the matter and revert".

There is no indication on any files inspected by me as to what transpired over the next four or five weeks in relation to the tax planning and it is possible, and even likely, that nothing further was done during this period. In particular, there is no evidence that Mr. Barry reacted to

Mr. Smyth's letter of the 10th July.

7.2.7 There is evidence that Mr. Smyth envisaged the necessity for an assignment by UPH to Chestvale of its contractual interest in the JMOB site and that in early August 1989, Noel Smyth & Partners drafted an agreement between UPH and Chestvale, whereby UPH undertook to assign to Chestvale all its rights under the contract with the liquidator of JMOB, for the sum of £6.3m. It would also appear from a conversation in mid August between Mr. Kenny and some person in A & L Goodbody that there was a query as to whether the consideration should be shown as £2.3m or £6.3m.

A letter from Mr. Bruncker to Mr. Barry of 10th August 1989 refers to "the **Sub Sale to Noel Smyth ... the Sub Sale price is £6.3m.**"

The letter of undertaking of 11th August 1989 (i.e. for the closing meeting with the liquidator) from Noel Smyth & Partners to A & L Goodbody, referred, inter alia, to the balance of the consideration amounting to £2.3m being satisfied by loan paper, guaranteed by a bank and being put in place within fourteen days.

It seems clear to me that, at least up to 11th August 1989, Mr. Smyth did not intend that the transaction would involve a sale of shares by UPH to his clients.

7.2.8 As stated by me in paragraph 5.4.13, sometime between 8th August 1989 and 15th August 1989, A & L Goodbody sent to Noel Smyth & Partners a draft of the proposed loan note, as on the 15th August, Ms. Kenny of Noel Smyth & Partners sent it to Mr. Smyth with a letter stating that she understood that there may be more negotiations in relation to it. On the same date, she sent a copy of the loan note to Mr. Desmond. There was some discussion between Mr. Desmond and Ms. Kenny between 15th August and 22nd August, when Mr. Desmond suggested an amendment to the loan note. The amendment was to delete the words "together with all outstanding interest which may accrue from

time to time" from the amount being guaranteed and the insertion of the following

"in the event of the disposal of the shares in the company to the extent that the control of the company is altered or in the event that the company disposes of the property which it is acquiring at Ballsbridge (being the old JMB property) then the company shall procure to furnish to the noteholder a bank guarantee in the amount of all outstanding interest which may accrue from time to time".

7.2.9 In a telephone conversation of the 23rd August 1989, Ms. Kenny advised Mr. Bruncker that the guarantee when produced would only cover the principal and would not cover interest unless the company or the premises were sold and she agreed to send on a copy of the guarantee as soon as it became available. She added that she had sent it on within the previous couple of days to Mr. Desmond for discussion by him with Mr. Barry.

By letter of the 24th August 1989 from Ms. Kenny to Mr. Desmond, she asked Mr. Desmond, inter alia, whether they were taking specific tax advice on what particular companies were taking what portions of the property, as the escrow period was expiring and unless Mr. Desmond could persuade Mr. Grace, the liquidator, to give more leeway, a decision had to be made.

Ms. Kenny added that the other outstanding matters were the assignment of the benefit of the contract from UPH to Chestvale, which she enclosed for execution by Chestvale (and which she said had been approved by Mr. Bruncker), and the loan note.

7.2.10 As the escrow agreed between Mr. Grace and Mr. Smyth was to expire on 1st September 1989, Mr. O'Connor, solicitor for the liquidator delivered the original conveyance and memorial in favour of Chestvale to Mr. Bruncker, solicitor for UPH with effect from 12.30 p.m. on Friday

the 1st September.

On the 31st August 1989, Ms. Kenny wrote to Mr. Bruncker stating that she would let him have "the engrossed Assignment" either later that day or the following morning and further stated that she had furnished the loan note to her client, who was to bring Mr. Bruncker's client up to date on the situation. The only assignment that Ms. Kenny could have been referring to, was the assignment, between UPH and Chestvale, of the contract between JMOB and UPH.

7.2.11 The draft loan note having been submitted to Mr. Barry by Mr. Desmond, was forwarded by Mr. Barry to Mr. Kenny, his tax adviser, who received it on the 1st September. He advised that the loan note **"is okay as such and in my opinion, would constitute a debenture for the purpose of Schedule 2, Capital Gains Act, 1975".**

However he pointed out that a manuscript insertion in Section 1 of the condition to the loan note implied that the company issuing the loan note was the same company that acquired the property and he pointed out that this was not possible and that the procedures required that the owner of the property would be a separate legal entity from the issuer of the loan note, the issuer of the loan note being the proposed purchaser of the shares of the company which bought the property. He added that because of this, there appeared to be some flaw with the structures of the transaction, which needed to be immediately addressed. The handwritten amendments referred to by Mr. Kenny are, I understand, those written in by Ms. Kenny pursuant to her telephone conversation with Mr. Desmond.

7.2.12 On 4th September 1989, Mr. Kenny spoke to Mr. Bruncker who telephoned him, he having been contacted by Mr. Barry or Mr. Desmond. Mr. Kenny, according to Mr. Bruncker's file note said in that telephone conversation that it was possible that the amendment to the loan note had been made by Mr. Desmond but he added that the

property should have been taken in the name of a subsidiary and shares then sold to Mr. Smyth's company. According to the said file note, Mr. Brunker said that these were not his instructions and that he would have to take the matter up with Mr. Barry. In fact, as indicated earlier, they would appear to have been his instructions and to comply with the terms of Mr. Brunker's letter to Mr. Smyth of the 6th July. It is possible that confusion arose between Mr. Brunker and the person in his office who actually drafted the loan note.

7.2.13 By letter of 22nd August 1989 to Mr. Desmond, Mr. Smyth wrote inter alia

"I understand that the other investors may wish to have some input into the tax planning of the transaction in which case I will be happy to meet with them to answer any queries that they may have and work with them to develop any further proposals they may wish to put forward to mitigate the tax".

According to a note on her file, Ms. Kenny appears to have had a telephone conversation with Mr. Bourke on the 31st August 1989, during which she outlined the transaction for him giving him details of the figures paid and to be paid, including stamp duty and fees, the company being used and noting that declarations of trust were to be "done".

On the 4th or 5th September 1989, Mr. Bourke attended a meeting with Mr. Smyth and Ms. Kenny in relation to the transaction and subsequently prepared a memorandum containing "cryptic notes" of the meeting which he sent to Ms. Kenny on 5th September. This memorandum was referred to earlier at Paragraph 6.7.3 and is contained in Appendix 10 ("the Memorandum").

7.2.14 The involvement of Mr. Bourke was consistent, in the eyes of Mr. Smyth, with his letter of 22nd August 1989 to Mr. Desmond and his perception of who the investors were, as he knew that Mr. Bourke was

a well known tax consultant, who then worked for Mr. Magnier and Coolmore Stud.

However, according to the evidence of Mr. Desmond, Mr. Bourke became involved at this stage, because in his capacity as managing the John Magnier family trusts who had invested in UPH, he was pestering Mr. Desmond about the UPH involvement in the JMOB site. His evidence is corroborated by the evidence of Mr. Bourke, who said that he thought he was making a nuisance of himself as far as Mr. Desmond was concerned and that Mr. Desmond told him to find out about the transaction for him as he, Mr. Desmond, didn't have time to get involved in the details himself. Mr. Bourke added that he thought this was to get him **"off his (Mr. Desmond's) back"**.

7.2.15 Mr. Bourke in further evidence to me on 11th June 1992, when asked who he meant by **"the owner"** in his fax to Mr. Kenny, stated:

"It would have been UPH/Dermot Desmond. I would have seen them in my own mind as being one and the same at the same time, because I wasn't aware at the time I was involved, you know, that there was another owner there."

In answer to another question Mr. Bourke said that as far as he was aware at that time

"Chestvale was a subsidiary of UPH and no ownership or no deal had been done as far as I was aware in terms of - which had actually transferred ownership of Chestvale away from UPH".

7.2.16 As appears from the Memorandum, Mr. Bourke's understanding of the **"game-plan"** involved Chestvale, having acquired the property, giving an option to a second company which would be registered in Cyprus and which would get a payment for the option. It would apply for planning permission and on receipt of the planning permission would pay the Cypriot company to abandon the option. As an Irish company, it would get a capital gains tax clearance certificate on a sale of its assets, so

that it would receive the full disposal proceeds without any withholding tax. Chestvale was to be owned by "Offshore Limited" which according to Mr. Bourke would be owned by "L". The memorandum added that the Irish company was to borrow £3m on "a back to back arrangement" with the bankers of "Offshore Limited" and an Irish bank (which would be IIB or Bank of Ireland) and there would then be renegotiation with UPH, to give them a second charge on the property, instead of a guarantee. However, because Ireland had a double tax treaty with Cyprus, the Cypriot company would not be taxable in Ireland; Chestvale would not have a liability to tax nor an obligation to withhold tax in Ireland and tax would only have to be paid at 4.24% in Cyprus.

7.2.17 In further evidence to me, Mr. Bourke said that his opinion was that "Everything looked and seemed to have been screwed up". He added that he informed Mr. Desmond that "(i) if it were me I wouldn't put my money into it for a start. I thought it was a disastrous project" and "(ii) I felt that they had to start at square one again" He also described the transaction as he found it in September 1989 as "a mess" and "a disaster". There is very little reference in the Memorandum to UPH and there is certainly no indication of concern about the interests of UPH. On the contrary, at least on the face of it, it's concern is with the structure of the purchasing company.

7.2.18 On 6th September 1989, Mr. Desmond wrote to Ms. Kenny and copied the letter to Mr. Kenny. He stated that in the absence of Mr. Barry, he was writing on behalf of UPH and suggested that it was not tax efficient for UPH to assign their interest in the contract for the guaranteed loan note. He added that Mr. Kenny proposed that a subsidiary of UPH should acquire the shares in Chestvale and that this subsidiary would then exchange those shares for the guaranteed loan note. He asked Ms. Kenny to liaise immediately with Mr. Kenny "in order that he can fully protect UPH's interests". Ms. Kenny noted that a key issue was

that a direct sale of the property would attract capital gains tax of 60%; and that the reorganisation rules whereby a deferral could be obtained would only apply if there was an exchange of shares for the loan note.

7.2.19 By letter of the 7th September 1989, Mr. Smyth wrote to Mr. Cooney pursuant to a meeting which he had with him earlier that morning and he referred to his letter of offer to Mr. Barry on the 19th June 1989. He stated that that letter presupposed that the contract and purchase price to his client would be £6.3m and that effectively the loan paper was a method of paying the profits to them. He added that the price of the property to his clients would increase by at least £1m in the event of his agreeing to shelter the capital gain of £2.3m, because the base cost would **"fall back"**. He added that there was **"absolutely no way this was ever agreed, negotiated or even considered when the question of loan paper was being discussed"**. He asked Mr. Cooney to take this matter up with Mr. Kenny and added that in relation to the **"shelving of our own tax position"** he would deal with this in a separate memorandum.

7.2.20 The difficulty which was crystallising in early September had its genesis in UPH not making absolutely sure what they understood by Mr. Smyth's letter of offer of 19th June which was not specific on the nature of the **"loan papers"**, but stated that they would be **"in a form to be agreed between us"**. Mr. Smyth identified a misunderstanding in his letter of 10th July 1989 to Mr. Barry, but that appears to have been ignored or alternatively its implications were not understood by Mr. Barry at the time. It would appear therefore that as early as the end of June or beginning of July, the problem was identified but not dealt with and it was because of the failure to deal with it for whatever reason, that amendments subsequently had to be made.

7.2.21 Mr. Kenny in his evidence stated that he understood in September when he became involved again that the **"deal was ongoing"**. He stated that

from his perspective, there was no binding contract between Mr. Smyth's clients and UPH and that both sides could have walked away from the transaction if they so chose. He also stated in evidence that he was not aware at that time that the liquidator had already been paid off, effectively by Mr. Smyth's clients, and that, accordingly, there was at least part performance of an agreement at that stage. He added at a later stage in his evidence that he thought that UPH were "almost in a position to sue somebody" if they did not get what they required but that there was still no legally binding agreement in existence.

7.2.22 By letter of the 12th September 1989, Mr. Brunker sent to Mr. Barry, the assignment whereby the benefit of the contract for the purchase of the Ballsbridge premises was to be assigned to Chestvale and asked that it be sealed by UPH and returned to him. In fact it would appear that this was not executed, as it was realised that this would compound the problem, which had recently been identified in the structure of the transaction.

7.2.23 As the parties realised at this stage that complying with the requirements of Mr. Kenny, on behalf of UPH, would result in difficulties for the purchasers, it was agreed that a meeting would take place between the various tax advisers and this took place on the 18th September 1989 at the offices of Mr. Smyth. It was attended by Mr. Cooney and Mr. Smyth, Mr. Kenny and Mr. Bourke. Mr. Desmond was to attend but did not do so. Mr. Bourke prepared notes of this meeting in the form of a memorandum which he circulated on 19th September 1989. A copy of this memorandum is contained in Appendix 12. It explained the background arising from Mr. Kenny's initial advice to UPH that its tax liability could be mitigated by "dropping" the JMOB site into a subsidiary and selling the shares of the subsidiary and he pointed out the disadvantages from a theoretical point of view in Mr. Kenny's scheme, but did so on the basis that Mr. Kenny's scheme, had not been

previously agreed. He then explained the position as he understood it, saying that none of what Mr. Kenny had required had happened or been agreed to **"by any of the parties involved in the purchasing company"**. He added that it was clear that such a transaction could not then take place and **"a renegotiated transaction would have to be completed"**. He pointed out the disadvantages in the situation as he understood it for UPH, to the effect that it would have to pay capital gains tax at 60% on its **"profit"** of £2.3m and this tax would be payable immediately irrespective of the fact that it would not receive the profit for three to four years.

7.2.24 Mr. Bourke proceeded in his notes to consider possible solutions on the grounds that

"all parties would have to accept that a new deal will have to be restructured as the present deal leaves all parties to the transactions extremely unhappy".

He set out three options, the first of which envisaged UPH's original plan being implemented, but a discount on the £2.3m profit being granted by UPH to take account of the additional tax liability on the purchaser and the restriction on marketability of the property because of the existence of the loan notes. The second option was a variation of the first one, but provided that instead of interest being payable on the loans on an ongoing basis, the loan note would be issued on a **"deep discount basis"**, which would avoid interest accruing on a current basis, but would treat the principal plus interest that would have accrued, as a capital payment at the end of the agreed period. The third option suggested by Mr. Bourke entailed UPH retaining an interest in the property, valued at £2.3m and a restructuring, so that the new purchasers' interest would be adjusted. He added that this could be achieved by UPH acquiring an interest in Chestvale to the value of £2.3m. It was agreed that Mr. Kenny would go back and discuss this with Mr. Desmond. If it was agreed, the mechanics could be worked

out by Mr. Kenny and Mr. Cooney.

7.2.25 By letter of the 20th September 1989, Mr. Kenny wrote to Mr. Desmond referring to the meeting which had taken place and setting out the three alternatives, more or less along the lines outlined by Mr. Bourke in his memorandum, and reciting that Mr. Smyth had stated that the purpose of the loan note proposed by him was merely a method of securing the outstanding £2.3m and was not intended to be part of a share for share transaction. Mr. Desmond endorsed on this letter for Mr. Barry that the deal was to stand and the £2.3m loan note was to be done in a tax efficient way.

7.2.26 Further discussions took place resulting in a lengthy letter from Mr. Kenny to Mr. Cooney dated 28th September 1989 and copied to Mr. Desmond, Mr. Barry, Mr. Smyth and Mr. Bourke. A copy of this letter, with attached diagrams, is contained in Appendix 13. In essence, the scheme outlined by Mr. Kenny was that adopted and involved the JMOB site being conveyed into Chestvale all of whose shares would be held by UPH. He noted that a non-resident person (or persons) were interested in acquiring the site for £6.3m. The next stage of his plan involved the incorporation of a Cypriot holding company which would acquire the shares in Chestvale from UPH, in consideration of the issue of a loan note and stated that if properly implemented, this would not only defer the capital gains tax liability, but would reduce it from 60% to 35%.

The next stage of Mr. Kenny's plan involved the residence of Chestvale being moved from Ireland to Cyprus. Cypriot directors were to be appointed and all directors meetings and major decisions would be made in Cyprus. Accordingly, for tax purposes, Chestvale would be managed and controlled in Cyprus. It would apply for planning permissions etc. on the site and at the appropriate time dispose of the site for its new market value. On the sale of the property, Chestvale

would contend that it had no liability to Irish tax on the grounds that it was a trader in property, it had no permanent establishment in Ireland and that it was resident in Cyprus for the purpose of the Ireland Cyprus Double Tax Treaty. He then pointed out that a difficulty might arise because of Paragraph 11, Schedule 4, Capital Gains Tax Act, 1975 which would require capital gains tax withholding of 15% unless a clearance certificate was obtained from the Revenue. As this was unlikely to be obtained, he felt that a structure should be put in place to avoid the withholding tax. The simplest manner of doing that, was to ensure that the method of payment was other than cash and added that this could be by way of redeemable preference shares, gilts or otherwise. He added that the loan note should be structured as a discounted bond, as interest would not be paid on it and the imputed interest could be rolled up and the entire amount payable at maturity as principal. There was one further suggestion in the plan, which particular suggestion was not ultimately adopted.

Further modifications were suggested by Mr. Cooney and recommended by Mr. Kenny but in fact do not appear to have been implemented either.

7.2.27 In the course of further discussions between some of the relevant parties, it was agreed that the consideration would be reduced from £2.3m to £1.8m, but which when grossed up until August 1994 with the imputed interest, would amount to £2.75m. Accordingly, it was agreed that the loan note would be for £2.75m and would not carry any interest. Mr. Kenny's recollection is that this aspect was negotiated between Mr. Desmond and Mr. Smyth but added that he was not particularly concerned about who was negotiating that aspect of the transaction. Mr. Desmond stated that these negotiations were between Mr. Smyth and Mr. Barry, Mr. Smyth thought the negotiations were between Mr. Desmond and Mr. Barry; and Mr. Barry thought the discussions were between Mr. Desmond and Mr. Smyth and that Mr. Desmond reported

to Mr. Barry with a recommendation that this suggestion be accepted. Mr. Desmond in the course of an affidavit sworn by him in the judicial review proceedings instituted by him and Dedeir against me, stated that Mr. Barry was the person who instigated the price reduction because of a problem with the tax base of UPH.

7.2.28 Mr. Barry insisted in his evidence that the transaction had been completed on 11th August 1989 and the agreement to reduce the price subsequently had more to do with moral reasons than legal reasons. As stated earlier, Mr. Kenny who was advising Mr. Barry and UPH did not think that the transaction was completed on 11th August 1989.

7.2.29 Very little appears to have happened over the next six or seven weeks in relation to the tax scheme, save that in Cyprus, certain reconstruction was taking place in relation to Delion by the issue of new shares to Noel Smyth.

The next substantive matter in relation to mitigation of the UPH tax liability appears to be the preparation of a memo dated 11th December 1989 by Mr. Smyth which is entitled "**Revised Proposal**". This stated that it was necessary for a new agreement to be drawn up immediately to cover the revised proposal as he understood it. It provided for UPH nominating Chestvale to acquire its interest in the JMOB site at the same cost as UPH (£4,000,000), subject to Chestvale agreeing to pay the sum of £1.8m to UPH, being the profit agreed by the parties on the nomination taking place. It added that it was proposed to close the transaction on the 15th December 1989, at which time UPH would be granted a second charge to cover the amount of £1.8m and which would rank subordinate to the charge in favour of Ansbacher, which was limited to a total of £2.5m. Chestvale were to guarantee under seal that, by the 1st April 1990, they would have repaid the £1.8m due to UPH by the provision instead of loan paper which would be bank guaranteed and which would provide for interest to the date of maturity. The

revised proposal was sent to Mr. Barry and faxed by him to Mr. Kenny for his attention.

7.2.30 Mr. Kenny immediately recognised that the revised proposal would not meet the objectives. He wrote to Mr. Barry on 13th December 1989 pointing out that the structure involved the sale by UPH of its interest in the contract to Chestvale and that to obtain "the share for share exemption", UPH must sell its shares in Chestvale to the purchasers company for a consideration of £1.8m to be satisfied by the issue of a loan note in Newco to UPH.

"In simple terms, UPH must sell shares and not property".

He added that what was important was that the loan note in the new company be issued to UPH "at the time of the sale of the shares in Chestvale by UPH" and added that the share for share structure was based on two assumptions, firstly that Chestvale were the owner of the property and secondly that Chestvale was a subsidiary of UPH. This letter was copied to Noel Smyth & Partners who replied by letter of the 14th December to Mr. Kenny stating as follows:-

- "(a) We will immediately cause to hand over to UPH two shares in Chestvale Limited.**
- (b) Chestvale will immediately charge the property in the sum of £4.5m.**
- (c) The shares in Chestvale will then be purchased by Delion Investments Limited for a consideration of £1.8m to be satisfied by the issue of a loan note in Delion in favour of UPH."**

He added as follows:

"The share for share structure we note is based on the assumption that Chestvale is the owner of the property which is in fact correct and secondly Chestvale will be a subsidiary of UPH because all of the shares in Chestvale will be owned by UPH at the time that the transaction is in fact concluded".

Mr. Smyth, in a covering letter, when sending a copy of his letter to Mr. Kenny, to Mr. Barry, told Mr. Barry that he was now in a position to complete the transaction immediately and stated that he was now hoping to complete finally on Monday the 18th December 1989.

UPH in a contemporaneous internal memo noted that the JMOB site was "theoretically bought by a company Chestvale". Chestvale was then to be bought, "as a company by a Noel Smyth vehicle in a paper for paper transaction, loan note for shares".

7.2.31 By letter of the 18th December 1989 to Mr. Smyth, Mr. Desmond pointed out that Mr. Bruner was still awaiting the draft share purchase agreement and asked that Mr. Smyth ensure that he receive it that afternoon. Mr. Desmond copied that letter to Mr. Bruner and to Mr. Barry. On the same date, Mr. Smyth sent to Mr. Bruner, a copy of the loan note as drafted by A & L Goodbody, the draft share purchase agreement and the second charge which was to be granted to UPH in lieu of the guaranteed loan notes.

7.2.32 A meeting took place on the morning of 19th December 1989 to review the transaction and how it might be completed and by letter of the 19th December from Mr. Smyth to Mr. Bruner, pursuant to that meeting, Mr. Smyth forwarded, inter alia, a copy of the original stock transfer forms relating to the Chestvale shares, (presumably of the subscriber shares), duly stamped in favour of Mr. Hannigan and Pauline Hewitt of Mr. Smyth's office. He also enclosed declarations of trust from the aforesaid Mr. Hannigan and Ms. Hewitt confirming that they held their respective shares in trust for UPH, together with all dividends and interest accrued on each share. The declarations of trust also contained an agreement

"to transfer, pay and deal with such share and dividends paid in respect of same and to the vote attached thereto in such manner as the Beneficial Owner shall from time to time direct";

and an undertaking when called upon so to do by the beneficial owner to transfer such share to the beneficial owner or as the beneficial owner should direct.

7.2.33 By letter of the same date, Mr. Smyth wrote to Mr. Desmond bringing Mr. Desmond up to date on the tax structure and pointing out matters to be dealt with to overcome the difficulties for UPH, arising from its low base cost. He indicated that Chestvale was to take up residence in Cyprus, so that on the disposal of the property, it would be entitled under the double taxation agreement to a capital gains tax clearance certificate. He pointed out that if it did not, 15% of the gross purchase money would have to be deducted and retained by the Revenue Commissioners until such time as the matter had been argued with them. Mr. Smyth added that the Revenue would resist strongly the repayment of any tax **"given the methodology that will be used in order to avoid the payment of tax under Schedule D, Case 1"**. An alternative, suggested by Mr. Smyth, was the introduction of an option between Delion and Chestvale, even though it would appear that this alternative had been dispensed with by the tax advisers some time earlier. Mr. Smyth added that he had discussed the matters with Mr. Cooney and that Mr. Cooney was confident that provided **"the necessary steps are taken, subject as usual to the present Section 86 of the 1989 Finance Act, the tax transaction had a good opportunity of success"**.

7.2.34 Based on representations made to him by Mr. Smyth, Mr. Cooney wrote to the Central Bank, Exchange Control Department on the 20th December 1989, stating that the entire share capital of Chestvale was held by UPH and that it intended to dispose of the share capital for IR£2,750,000 to Delion, consideration for which was to be satisfied by the issue of loan notes and he formally asked for Exchange Control permission in respect of the proposed acquisition of the shares in Chestvale by Delion.

7.2.35 Mr. Osborne sent to Ms. Kenny on the 20th December 1989, his amendments to the draft share purchase agreement between UPH and Delion.

At a meeting on the 20th December, it was pointed out by Mr. Osborne that he was unhappy with the declarations of trust in relation to the Chestvale shares, sworn by Mr. Hannigan and Ms. Hewitt and asked for amended declarations which were then sworn on the 22nd December 1989 and which stated in addition to what was stated in the earlier declarations, that Mr. Hannigan and Miss Hewitt respectively held

"and since the incorporation of Chestvale Properties Limited have held one ordinary share of £1.00 in the Share Capital of Chestvale Properties Limited upon trust for United Property Holdings Limited...."

7.2.36 On the same date, 20th December 1989, Mr. Smyth and Mr. Hannigan as directors of Chestvale proposed to swear a declaration for the purpose of Section 60, Companies Act, 1963 on the grounds that Chestvale was effectively giving financial assistance in the purchase of its own shares, and stated on the face of the draft that the financial assistance to be given by Chestvale was a guarantee mortgage to secure a loan being given by UPH to Delion, such mortgage to be a fixed and legal charge over the assets of the company and a second floating charge over the assets and undertaking and added that the financial assistance was being provided indirectly by Chestvale to Delion for the purpose of acquiring two ordinary shares in Chestvale. This would appear to relate to the part of the proposal whereby, pending delivery of the guaranteed loan notes in March or April 1990, UPH would get a second charge over the JMOB site. I am satisfied that UPH never intended to lend money to Delion and that the draft declaration was based on a further misunderstanding of what was intended by the parties.

7.2.37 Despite the preparations to complete the sale of shares to Delion in the last week of December 1989, this did not take place for various reasons, including a difficulty with Delion obtaining Exchange Control approval. A proposal had been made to overcome that difficulty, whereby Hoddle would be introduced as a nominee for Delion and it would purchase the shares of Chestvale, so that it would not have to obtain exchange control approval. It could subsequently transfer the property on to Delion at a later stage, when Delion did succeed in getting Exchange Control approval from the Central Bank. However, the lack of Exchange Control approval was not the only problem delaying completion of the sale of shares, and this completion did not actually take place until the 19th April 1990.

7.2.38 There is a conflict of evidence as to whether UPH retained any security after August 1989 for the outstanding loan note due to them, other than the undertaking contained in Mr. Smyth's letter of 11th August 1989. Mr. Bruncker has stated in evidence, that he is satisfied that he would have handed over the original deed of conveyance and memorial to Ms. Kenny of Noel Smyth & Partners shortly after it was released from escrow to him on the 1st September 1989. He maintains that he did not retain the deed as security and had no instructions to do so, as he was relying on the undertaking from Noel Smyth & Partners. However Noel Smyth & Partners had given an undertaking to Ansbacher on the 11th August 1989 to hold the title deeds in trust for Ansbacher and this necessarily was intended to include the deed of conveyance and memorial. Mr. Smyth has stated in evidence that he himself did not deal with the conveyancing matters as this was dealt with by Ms. Kenny and that it was only noticed by him in November or December 1989 that the undertaking to Ansbacher could not be complied with, if called on by Ansbacher, because he did not have the deed in his possession. Mr. Desmond on behalf of UPH wrote to Mr. Bruncker on the 10th November 1989 authorising Mr. Bruncker to release the Deed of

Conveyance and Memorial to Mr. Smyth but it would appear that this was not done at that time.

By letter of the 22nd December 1989, Mr. Smyth wrote to Mr. Bruncker enclosing the original Declarations of Trust as revised to conform with the requirements of Mr. Osborne, these Declarations of Trust being by Mr. Hannigan and Ms. Hewitt as stated above, and Mr. Smyth confirmed in his letter that in exchange for these declarations, Mr. Bruncker was to hand to the bearer of the letter, the original deed in favour of Chestvale.

7.2.39 I have not resolved yet the conflict of evidence in relation to the delivery of the deed and memorial to Noel Smyth & Partners. However, it would appear that the deed was presented to the Revenue Commissioners for stamping in early January 1990. The deed was executed by Mr. Grace and JMOB on 11th August 1989 but is dated 5th January 1990. In addition the memorial of the conveyance was amended without the consent of the party who signed the memorial nor of the witness, and the jurat indicates that there was a re-attestation thereof by the attesting witness, even though the attesting witness is satisfied that he did not attend for a second time before the Commissioner for Oaths. It seems that the Commissioner for Oaths was incorrect to indicate on the memorial that it was resworn before him.

7.2.40 During January, February and March 1990, lengthy and detailed correspondence ensued between the various parties including Cypriot lawyers, dealing with the drafting of the share purchase agreement between UPH and Delion and the loan note and guarantee from Ansbacher.

One of the changes that ensued during this period was that the loan note was to be renamed a debenture and the guarantee from Ansbacher was to be renamed a covenant. The renaming of the loan note was to make the transaction more conformable with the exemptions in the capital gains tax legislation for deferral of the liability.

7.2.41 On 27th March 1990, Chestvale changed its residence to Cyprus and a special resolution was passed, amending its articles of association to ensure that in future no meeting could take place or decisions be taken as far as the company was concerned, other than in Cyprus, and the Irish directors resigned and Cypriot directors were appointed in their place.

7.2.42 The share purchase agreement and the debenture (loan note) were eventually executed on 12th April 1990, but not delivered until 19th April 1990, when the transaction was finally closed and the guarantee or covenant was executed by Ansbacher and delivered to UPH.

By letter of the 20th April 1990, Totalserve Management Limited, a secretarial company which dealt with Delion in Cyprus wrote to Mr. Cooney stating that they had spoken to the Cypriot lawyers advising UPH and were informed that dates on the share purchase agreement and the debenture were to be changed from the 26th March to the 12th April 1990. They also asked that Mr. Smyth sign a resignation of directorship from Delion as of 20th March 1990 and that he send it to Totalserve. They also asked that Mr. Smyth instruct Totalserve Trustees Limited to hold the 999 shares, which he had been holding in his own name, in trust for him, and that he should prior to that, transfer the shares to Totalserve Trustees Limited.

7.2.43 In April 1992, it was decided by all parties that the debenture be paid off. This was pursuant to a resolution of the directors of UPH on the 14th April 1992 to the effect that the Delion loan note, as guaranteed by Ansbacher, should be discounted and it was agreed that it would be discounted prior to 30th April 1992. Accordingly, UPH requested Delion to cancel the loan note, which they agreed to do by agreement of 24th April 1992 and Delion authorised and directed Ansbacher to act on its behalf in complying with UPH's request for the earlier redemption of the debenture and the payment of the agreed redemption price to UPH.

The agreed amount payable to UPH was £2,175,585.76, which was debited to the Delion account on the 29th April 1992 and paid to UPH at that date. The Ansbacher covenant was cancelled at the same time. On the 30th April 1992 A & L Goodbody wrote to the Cypriot lawyers who were acting as their agents in Cyprus and who had been holding the UPH counterpart of the debenture in Cyprus for stamp duty reasons and requested them to mark the debenture cancelled and return it to Ireland. This was done by letter of the 4th May 1992.

- 7.2.44 It remains to be seen whether the Revenue Commissioners in Ireland accept that UPH successfully deferred a capital gains tax liability. The effect of the 11th August transaction, as subsequently varied, on the beneficial ownership of Chestvale will have to be determined by me at a future stage.

7.3 Tax vis-a-vis Chestvale, Hoddle and Delion

7.3.1 The other significant and relevant tax reduction scheme was effected to reduce and, if possible, avoid the incidence of any tax on the disposal by Chestvale of its interest in the JMOB site to Telecom. Chestvale had acquired the site from JMOB via UPH for £4m and agreement was reached to dispose of the site to Telecom for £9.4m.

7.3.2 One of Chestvale's problems was that its base cost in acquiring the property was £4m, which was low, so that on a straight sale, they would not even get an offset for the profit payable to UPH. Hence the introduction of a Cypriot company. Mr. Smyth circulated a memo on 6th April, 1990 to Mr. Cooney and Mr. Desmond, pointing out the above and adding that the only allowable expense in Chestvale would be its stamp duty and security costs and any other outgoings from the time it acquired the property in August 1989 up to the date of its disposal, which were estimated at approximately £750,000 and which when added to the original purchase price of £4m, would identify the total new base cost of the property. Additional costs in selling to Telecom might bring the total allowable figure to £4.9m but would create a profit in the hands of Chestvale of £4.5m which would be taxable at 43% or a total of £1,935,000.

Under the heading "**proposed mitigation**", he, Mr. Smyth, suggested that the residence of Chestvale be transferred to Cyprus (this had already been done). He then suggested that Chestvale sell to Delion its interest in the property at the cost to it of £4.75m. No money would change hands, as Delion, under the terms of its contract, would agree to assume the liabilities of Chestvale and to discharge these in due course. Delion would then agree to sell its interest in the property to Hoddle for £9.3m, such sale to be satisfied by Hoddle assuming the responsibility of Delion to pay £4.75m to Ansbacher and such other persons as Delion should nominate. Hoddle would sell to Telecom for

£9.4m in cash and obtain a capital gains tax clearance certificate.

The said memo of 6th April added that this would involve the contract between Delion and Hoddle being entered into approximately one week after the contract between Chestvale and Delion and added that Hoddle would give to Delion a second charge over the property for the difference in the purchase price agreed between them, which charge should be stamped and filed in the Companies Registration Office. The memo added that when the purchase monies would come in, the £9.4m would firstly be utilised to discharge the indebtedness to Ansbacher and secondly to discharge the charge in favour of Delion.

7.3.3 Mr. Smyth pointed out a number of caveats to the scheme, stating that it was imperative, for the transaction to work, that Chestvale be accepted as being a non-resident company and taxable under the double taxation agreement by the Cypriot authorities and similarly for Delion. He stated that while every step, care and attention would be made to ensure that this occurs, the final decision as to whether or not they would be treated for tax purposes by the Cypriot authorities, as being Cypriot dealing companies, was a matter for their fiscal authorities. He added that the provisions of Section 86 of the 1989 Finance Act had been considered as far as the transaction was concerned, but given the wide ranging effect of those provisions and the litany of cases against artificial tax planning in the U.K., the steps should be taken,

"in the light of the fact that the entire of the transaction could be disregarded because of the artificiality of the steps and the non commercial viability of what has taken place".

He added that if no steps were taken then the tax would be payable in full. He added

"for the purpose of this transaction, both Terry Cooney and myself have accepted our instructions as being that there are no Irish residents involved as far as Delion Investment is concerned and

that no beneficial interest reposes in any Irish resident so far as any of these companies resident in Cyprus are concerned. Otherwise the provisions of Section 57 of the Finance Act, 1974 could apply to the transfer of assets abroad as far as those parties are concerned although the double tax agreement gives some comfort here".

7.3.4 Mr. Smyth added in this memo to Mr. Desmond, that as far as his instructions were concerned, he had always accepted his instructions as acting in trust for clients nominated by Mr. Desmond and he understood that Mr. Desmond's instructions were that the persons who were beneficially entitled to the ultimate interest in relation to the property were all non resident of Ireland and that therefore the provisions of the 1974 Finance Act would not apply. Mr. Smyth was here setting out the basis on which he had drafted the tax plan and alerting Mr. Desmond to the difficulties that might arise for an Irish resident, regardless of what tax plan might be implemented.

7.3.5 In a covering letter to Mr. Desmond, Mr. Smyth indicated that various things had to be done in Cyprus before he could actually close the sale with Telecom. However, he noted that Telecom had confirmed it's agreement to pay interest in relation to the outstanding purchase money from the scheduled closing date until the actual closing date. He added that while physically he would have been in a position to close the sale to Telecom by the 11th April,

"tax wise it would have caused an unbelievable and unsurmountable problem and therefore we persuaded them to delay the sale and, at the same time, pay us the interest in relation to same".

He added that the sale was hopefully to be closed at the end of April.

7.3.6 Mr. Smyth then added that there was an over riding problem in relation to the matter because, as it was a tax scheme, it was always open to

attack. He suggested that Mr. Desmond bring this to the attention of his partners on the basis that every possible effort would be made to mitigate the tax, but Mr. Smyth could not underwrite or propose to do so, the possibility that the whole transaction could not come under attack and that therefore the tax could eventually become payable. He added, however, that he thought he had taken sufficient steps to try and ensure that this did not occur and requested Mr. Desmond to revert to him if he had any queries in relation to the transaction.

7.3.7 By letter of the 12th April 1990 from Mr. Smyth to Ms. O'Toole of Ansbacher, Mr. Smyth indicated that Delion had agreed to purchase from Chestvale its interest in the JMOB site for the price or sum of c.£4.75m and that Delion had agreed to sell on its interest for £9.3m to Hoddle. He added that Delion would like to discharge the indebtedness that Chestvale had to Ansbacher and to also obtain the necessary release of the charge that Ansbacher had over the property. He further added that for other investment purposes, which he described as the purchase of gilts in the Irish gilt market, Delion wanted to raise further cash in the sum of £4.5m and accordingly asked Ansbacher on behalf of Delion for a loan facility of £9.3m. This loan would be repaid to the bank directly by Telecom, on closing of the sale to them, on the bank giving a release of the charge which it would, in the interim, hold over Delion. Delion would, through their Cypriot directors, give Ansbacher instructions as to the purchase of Irish gilts in the sum of the balance of the monies left in their account, after the Chestvale facility had been discharged.

7.3.8 On 18th April 1990 the contract was executed, whereby Delion agreed to purchase the interest of Chestvale in the JMOB site for a consideration which comprised the assumption by Delion of all the obligations of Chestvale

"in respect of the property and all incidental expenses of every

nature incurred by Chestvale Properties Limited in respect of the property including, but not limited thereto, legal and professional costs, security of the premises and rates, full details of which obligations and costs having been furnished by the Vendor to the Purchaser together with the sum of IR£20,000".

By contract of the same date, Delion agreed to sell on the property to Hoddle for the sum of £9.3m and the special conditions of the contract stated inter alia that Delion did not intend to take a conveyance of the property from Chestvale but would procure a conveyance from Chestvale to Hoddle by way of sub-purchase. It added that the purchase price was to be payable, by Hoddle assuming the obligations of Delion to Ansbacher and that it would also discharge the costs and expenses of Delion to its lawyers and agents in Cyprus and Ireland, which costs and expenses were not to exceed £300,000.

7.3.9 By resolution of the 27th March 1990, passed at a meeting held in Cyprus, the directors of Delion authorised the purchase of the JMOB site from Chestvale at a profit to Chestvale of IR£20,000 and appointed Mr. Smyth as independent agent to do all work necessary in Ireland to give effect to the property purchase. By further resolution of the 28th March 1990, the directors of Delion authorised the sale of the JMOB site to Hoddle for a sum of £9.3m and again appointed Mr. Smyth as independent agent to do all the necessary work in Ireland to complete the contract.

7.3.10 At a meeting on the 3rd May 1990 attended by Mr. Smyth and Ms. Kenny with Ms. O'Toole and Mr. Matthews of Ansbacher, the transaction was explained, although Mr. Matthews in his evidence stated that he did not know what the purpose of the complicated transaction was and in particular, stated that he was not aware that it was a tax reduction scheme.

Ansbacher approved the facility required by Mr. Smyth on behalf of

Delion in the sum of IR£9m noting its purpose was to enable Delion to purchase the property known as the JMOB site and to make a further investment in Cyprus.

- 7.3.11 A drawdown form, dated 3rd May 1990 and signed by the two Cypriot directors of Delion, was sent to Ansbacher and requested that the sum of IR£5,013,764.26 be paid for the account of Chestvale, value 9th May 1990, and that the balance be sent to Bank of Cyprus, Nicosia. By telefax of 3rd May 1990, Mr. Flynn head of the International Division of Ansbacher contacted the Bank of Cyprus Limited in Nicosia and stated that

"as part of a complex tax planning exercise on behalf of a prestigious private client we need to make a substantial overnight deposit of DEM10,700,000 with a Cypriot bank".

It would appear that at that stage, it had been decided that rather than Delion purchasing gilts, it would have its account with Ansbacher debited to a total of £9m and the balance, after paying off Chestvale, would be transferred for a short period to the Bank of Cyprus in Nicosia before being transferred back to Ansbacher. At all times, the account was under the control of Ansbacher and while in the Cyprus bank, was in the name of Ansbacher reference Delion. This had two effects, the first was to show that from a Cypriot point of view, Delion was doing some dealing and secondly and probably more importantly from an Irish tax point of view, it fitted in with the scheme whereby Hoddle would not have to account to the Revenue Commissioners for 15% of the purchase price payable by Delion, even though Delion would not have a capital gains tax clearance certificate.

- 7.3.12 It was not possible for Ansbacher to arrange the overnight deposit with Bank of Cyprus, but a deposit of DM10,600,000 was effected for the period between 10th May and 14th May when the deposit was transferred back to Ansbacher and lodged in a new deposit account in

the name of Delion. The amount of this deposit was German DM10,608,539, to reflect interest accrued while in Cyprus. The amount debited to the Delion account on the 9th May was DM10,600,000, so that on that date, the total debit balance in the Delion DM loan account in Ansbacher (account number 063-01-09448) was DM24,124,915. Interest continued to be debited to this account until 29th June 1990 when the proceeds of the sale to Telecom were credited to the said account.

7.3.13 The DM deposit account, to which the amount transferred from Bank of Cyprus was credited, was account number 061-07-09448 and interest was credited to this account during May, June and July, so that at 9th July 1990, the credit balance on the account was DM10,756,573.64. Mr. Matthews of Ansbacher has indicated that, at all times, Ansbacher believed that they had a right of set off between the two accounts and confirmed that if they were asked at any time between 14th May 1990 and 29th June 1990 what was the balance due to them by Delion, they would have indicated that the outstanding balance was circa DM13,500,000 or circa IR£5m (i.e. the difference between the debit balance on one account and the credit balance on the other account and which more or less equated to the amount used to discharge the Chestvale loan from Ansbacher).

However for capital gains tax purposes, Hoddle and Delion maintained that the balance due to Ansbacher was DM24,600,000 or IR£9m, so that when Telecom paid the proceeds of sale, this did not go to Hoddle but was directed by Mr. Smyth, on behalf of Hoddle, to be used to pay off the Delion loan account in compliance with his undertaking to Ansbacher. In addition £300,000 of the consideration from Telecom was to be used to pay the lawyers fees, so that the only amount in cash to be received by Hoddle, was £100,000 and in fact it did not even receive that in it's own name, as it did not have it's own bank account.

7.3.14 After signing their contracts with Hoddle, Telecom, as was normal in a

conveyancing transaction, sought from Hoddle a capital gains tax clearance certificate (Form CG50A) and an application for this was made to the Inspector of Taxes on behalf of Hoddle by Noel Smyth & Partners. The Inspector of Taxes sought and was given a copy of the contract under which Hoddle acquired the property from Delion, in addition to a copy of the contracts between Hoddle and Telecom, which had been furnished to them with the application. The Inspector of Taxes queried whether any monies had been paid under the Hoddle/Delion contract and stated that if no monies had been paid, they would take the view that Hoddle had no beneficial interest to dispose of and therefore that Telecom should be looking for a Form CG50A from Delion or alternatively deduct 15% of the consideration and remit it to the Inspector of Taxes. Mr. Smyth as Solicitor for Delion and Hoddle obtained counsel's opinion and an opinion from Mr. Cooney. Counsel advised that Hoddle did qualify for a certificate from the Inspector of Taxes on the grounds that they were "the person making the disposal" to Telecom and that they were ordinarily resident in the State. The Inspector of Taxes did then forward a Form CG50A to Noel Smyth & Partners. In his submission, Mr. Cooney added a further ground to those referred to by counsel and stated that the transaction carried out by Hoddle

"is a property dealing transaction and, therefore, falls outside the scope of the Capital Gains Tax legislation. It is accordingly open to the company to contend that a Capital Gains Tax Clearance Certificate should be issued on the basis that no amount of Capital Gains Tax is payable in respect of the disposal".

- 7.3.15 However, the important issue is whether Hoddle was under a liability to deduct 15% of the purchase money from Delion and this was what the "tax plan" sought to avoid. It would appear that in ordinary circumstances, Hoddle was under a liability to deduct tax in accordance with the provisions of Paragraph 11(2) Schedule 4, Capital Gains Tax

Act, 1975, in relation to the contract with Delion, as the contract was a disposal for the purposes of the Capital Gains Tax Act 1975 and Delion as a non-resident of Ireland would not be entitled to a Form CG50A. The scheme however, as prepared, sought to overcome this by availing of the provisions of Paragraph 11(7)(a), Schedule 4, of the Act, which provides, inter alia, that where the consideration for acquiring an asset, is of such a kind that the deduction referred to earlier cannot be made, the person acquiring the asset is merely obliged to give notice to the Revenue Commissioners within three months of acquiring the property if he has not received from the person disposing of the asset a Form CG50A. The obligation to deduct, provided for in Paragraph 11(2), Schedule 4, provides for the deduction to be made out of the consideration paid for acquiring the asset, so that if no consideration was actually paid, no deduction could be made so therefore the provisions of Paragraph 11(7)(a), Schedule 4 as described above, would apply. The tax scheme envisaged that Hoddle would not be paying any consideration to Delion, as it would be paying money to Ansbacher, in accordance with the conditions of sale, which provided that the consideration would be satisfied by discharging the amount due by Delion to Ansbacher, and this had been preordained at IR£9m. In fact, as indicated above, the actual amount of indebtedness to Ansbacher was only c.IR£5m so that Hoddle should have been paid c.£4m, even in accordance with the terms of the contract. It is a matter for the Inspector of Taxes to determine whether in these circumstances, any liability to capital gains tax should be levied.

8.0 The Money Trail

8.1 General

- 8.1.1 From the initial stages in the investigation, it was clear that the establishment of the money trail relating to the purchase and sale of the JMOB site, would be extremely important in trying to ascertain who was financially interested, who controlled, and who influenced, Chestvale and Hoddle, particularly if there were in existence, arrangements or understandings of the nature contemplated by Section 14(4) of the Companies Act, 1990. However as described in Section 3 of this interim report, my efforts to follow "the money trail" resulted in a series of court actions intended to restrain such efforts. The courts have so far upheld my efforts in this regard and I have been able to follow the flows of money at least within this jurisdiction and to a limited extent outside it. It may be necessary for me to seek further information outside the jurisdiction and to avail of laws in other jurisdictions which might help to complete my investigation of the trail. I describe briefly in this section the results of my investigation to date, particularly as it relates to the "money trail".

8.2 Deposit payable by UPH in November 1988

8.2.1 As indicated earlier, when the tender by UPH was submitted, it had to be accompanied by a bank draft for 5% of the amount tendered. Within seven days of the tender being accepted, a further 10% had to be paid. This sum of 15% or £660,105 was funded by NCB on behalf of UPH, as UPH, at the time, did not have any funds. NCB were refunded the money advanced by them in May 1989, when UPH had raised money from shareholders.

8.3 Payment to the liquidator of JMOB on 11th August 1989

- 8.3.1 On 11th August 1989, the sum of £4m was paid to the liquidator of JMOB on behalf of Chestvale by way of bank draft drawn on Ansbacher. In fact this was an overpayment, as it did not take into account the deposit paid, and the apportionment of the rates for 1989. Accordingly a refund of £693,075.50 was subsequently made by the liquidator, which was returned to UPH.
- 8.3.2 The aforesaid sum of £4m from Ansbacher was made up of two amounts, the first being an advance by Ansbacher to Chestvale of £3m described earlier and debited to a Chestvale loan account with Ansbacher. The second came from a lodgment to an account entitled "Noel Smyth & Partners re: NCB" at Ansbacher on 10th August 1989 in the sum of £1m. Padraic O'Connor, the current managing director of NCB Group confirmed to me that £1m was received into their account at Bank of Ireland, 2 College Green on 9th August 1989 and that this £1m came from Bank of Ireland International representing the sale of US\$1,403,400. He further confirmed that the £1m was transferred immediately to Ansbacher. I have been informed by Padraic O'Connor that NCB had no beneficial interest in the £1m and that instructions regarding the receipt and transfer of funds to Ansbacher were given by Mr. Desmond.
- 8.3.3 On checking further with Bank of Ireland International Division, I was referred to Bank of Ireland Group Treasury, who informed me that on 8th August 1989, they purchased US\$1,403,700 for NCB Stockbrokers, which equated to IR£1m, and this transaction was effected for value on the 9th August 1989. The Irish pound amount was credited to NCB Stockbrokers account at Bank of Ireland, and NCB Stockbrokers were requested to pay the US\$1,403,700 to the Bank of Ireland US\$ account at Morgan Guarantee Trust Company, New York for value 9th August. The Morgan Guarantee Trust Company statement for that day to Bank of Ireland shows that the appropriate amount of US dollars were paid

to them by UBS with the following details:-

"Ordering Customer: SELON INSTRUCTION RECUE

Payment Details: J. PERIOD - L. PERIOD"

which I understand means, that the Ordering Customer is noted by the bank as merely "according to instruction received" and that the only Payment Details disclosed are J.L.

8.3.4 I have endeavoured, both directly and through NCB and Bank of Ireland Group Treasury, to obtain further information from UBS as to the source of the said payment. However, it has not been possible to obtain such information from UBS, who have advised that, due to their banking secrecy laws, they cannot indicate the name of the remitter of the funds even though they sought consent from the remitter to disclose the information. I am pursuing the issue of whether I can obtain an order from the Swiss courts directing UBS to furnish the information required by me.

8.3.5 The said payment of £1,000,000 would appear to be part of what Mr. Desmond in his evidence described as "the mezzanine finance" and which he stated was provided by Mr. Probets. Mr. Probets in a Statutory Declaration dated 23rd October 1991 stated that he arranged on or about the 10th August 1989 for the said sum of £1m to be transferred to Ansbacher and that it was paid at his direction. I wrote to Mr. Probets by letter of the 27th April 1992 stating that I had traced the funds back to an account in UBS in Geneva and that the bank had refused to give further information, without the consent of the "remitter" of the funds. I added that, if Mr. Probets was the remitter of the funds, I would expect that he would authorise UBS to confirm that for me, to certify for me the name of the account from which the monies came, the mandate under which it was operated and, if the funds were transferred into that account from another source, details in relation to that source. I added that if UBS were not aware of that other source, that I presumed

furnish equivalent certificates to me.

8.3.6 Mr. Probets has not replied to me, but by letter of the 13th May 1992 from Lennon Heather & Company, they referred to the letter which I wrote to him and stated inter alia that the information sought in my letter of the 27th April 1992 was not in any way relevant to my inquiry into the **"ownership etc. of Chestvale and Hoddle under Section 14 of the Companies Act, 1990"**. The same letter asked that I explain as to how and why I felt the information in that letter, and in a subsequent letter of 8th May, was relevant to my inquiry under the terms of my Warrant, to which I replied by letter of the 19th May 1992. I have not received a response to my letter of 19th May save for the issue of injunction proceedings against me attempting to restrain me from receiving information in relation to other matters referred to in the letter of 8th May 1992 and which will be dealt with later. It is to be noted that in the judicial review proceedings commenced by Mr. Probets and Freezezone against me and which are described in Paragraph 3.6.5, counsel for Mr. Probets and Freezezone acknowledged the relevance of my enquiry into the payment of the **"mezzanine finance"**.

8.3.7 I noted from an Ansbacher file inspected by me in March 1992 a copy letter dated 10th August 1989 from Mr. Desmond as executive chairman of NCB to Ansbacher, which states:

"Dear Sirs,

Further to our conversation of this morning, you will receive IR£1,000,000 from external sources with the reference "Chestvale".

These are sent on behalf of Mr. Colin Probets"

The representatives of Ansbacher, interviewed by me, did not recollect this letter and could not explain it, nor could they find the original of it. They noted that it was not addressed to any particular person in Ansbacher although it referred to **"our conversation"**. The funds that came into Ansbacher on 10th August 1989 were not marked with the

reference "Chestvale" and if they were sent "on behalf of" Mr. Probets, it would seem to contradict Mr. Desmond's earlier oral evidence to me that the funds were sent directly by Mr. Probets. This letter was not mentioned to me by Mr. Desmond at any of the five interviews which I had with him. If the letter was sent to Ansbacher on the 10th August 1989, it raises further questions requiring an explanation.

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8.4 Payment of US\$1,500,000 to Chestvale/Delion; December 1989

- 8.4.1 As described earlier in Paragraphs 6.7.1 to 6.7.7, Mr. Smyth was under pressure from Ansbacher to repay the £3m borrowed from them, as it had been represented to Ansbacher, that it was only required for a one month period and Mr. Smyth in turn was applying whatever pressure he could on Mr. Desmond. Both Ansbacher and Bank of Ireland were informed in November 1989 that, as part of a restructuring of the loan, if the loan was increased to £4.5m, a deposit of £2m would effectively be made with the lending bank or secured to it by way of guarantees, and in the case of Bank of Ireland, they were informed that the deposit would be made by Messrs. Magnier and McManus although their names would not appear.
- 8.4.2 However, as it transpired, the additional lending was made by Ansbacher, who agreed to advance to Chestvale the sum of £4.5m, of which £3,181,787 was used to repay the existing short term Chestvale loan (with accrued interest); £90,000 was used for payment of rates; £10,000 for the bank fee; and £218,212 transferred to a Noel Smyth & Partners client account for various fees and disbursements. The remaining sum of £1m was transferred to a US\$ deposit account number 031-01-09448 in the name of Delion by transaction of 22nd December 1989.
- 8.4.3 On the same date, a lodgment of US\$1.5m was made to the same account of Delion for value from the 7th December 1989. This money, as indicated earlier, came through Bankers Trust, New York, which I understand acts as correspondent bank of AIB (CI) Limited, to Manufacturers Hanover Bank in New York, as correspondent bank for Ansbacher, and was held in a suspense account for Ansbacher pending instruction being given to Ms. O'Toole of Ansbacher as to what was to be done with the deposit. I have traced this deposit back to an

account in AIB (CI) Limited in the names of J. & N. McMahon. Ansbacher received a letter dated 21st October 1991 from AIB (CI) Limited, stating that, on 7th December 1989, they received instructions from their clients, J. & N. McMahon, to transfer the sum of US\$1.5m to Ansbacher for reference "**Chestvale**". The letter added that the specific instructions of their client were complied with and the funds transferred to the account of Ansbacher, with Manufacturers Hanover Trust Company in New York, on that date. The letter added that J. McMahon had, on the 21st October 1991, provided them with further information which he requested that they pass on, to the effect that the said payment was "**for the account of Mr. Colin Probets, reference Chestvale**". The said letter from AIB (CI) Limited added that the information was being passed to Ansbacher in accordance with Mr. McMahon's instructions but that they were "**unable to comment thereon**".

8.4.4 Mr. Desmond has indicated in his evidence that this payment represented the second tranche of the "**mezzanine finance**" arranged by Mr. Probets. Mr. Probets in his statutory declaration of 23rd October 1991 stated that he arranged this payment also, but he did not indicate its source, nor its path. Mr. Desmond, when I asked him on 5th April 1992, who J. & N. McMahon were, said that he didn't know, that it was just another name, not of real people and that it was not an alibi or name for Mr. Probets. He added that "**You pick out references that suit in the transfer of funds**".

8.4.5 It is interesting to note that the monies, when received by Ansbacher, were ultimately lodged to an account in the name of Delion and not in the name of Chestvale and the instructions to make this change appear to have been given by Mr. Desmond. Notwithstanding the instructions in the letter of the 21st October 1991 from AIB (CI) Limited that the payment was for the account of "**Mr. Colin Probets, reference**

Chestvale;" there has not been any other claim or statement that the money was for the account of Mr. Probets and indeed the Ansbacher representatives, interviewed by me, have stated that they do not have, nor did they ever have, an account in the name of Mr. Probets.

8.4.6 My letter of the 27th April 1992 to Mr. Probets also requested, that if he controlled the account in AIB (CI) Limited in Jersey in the name of J. & N. McMahon, he should authorise them to confirm that for me, to certify for me the name and address of the holder of the account, to furnish me a copy of the bank mandate under which the account was operated, a certified copy of the bank statement from 1st December 1989 to 31st December 1990 and of any other documents or information which might be of assistance to me in my investigation.

Again as with my request in relation to the payment in August 1989, no information has been received from Mr. Probets nor have AIB (CI) Limited been authorised to release the information to me.

8.4.7 I noted from an "Account Instruction Memo" of Ansbacher dated 22nd December 1989, when the Chestvale account was being debited with £1m, and the Delion account was being credited with that amount, an instruction as follows:

"\$1.5 in Ansley (Suspense) should also be placed in this a/c and this a/c blocked for loan to Chestvale"

When queried by me in relation to the reference to "Ansley", Mr. Moloney said that that must have been a clerical error and stated that "Ansley" were not involved in any way with the transactions.

8.5 Movements on the Bank Accounts

- 8.5.1 On 22nd January 1990, Ansbacher advanced a further £250,000 to Chestvale and this was then paid to Noel Smyth & Partners and used to pay stamp duty and other incidental expenses on the purchase deed from the liquidator of JMOB to Chestvale.
- 8.5.2 The Chestvale loan account of £4.5m, referred to at Paragraph 8.4.2, continued to accrue interest until the entire account was discharged on 4th May 1990, by a credit of £5,009,938.67 from a Delion DM loan account.
- 8.5.3 The Delion DM loan account was opened on 4th May 1990 pursuant to the loan offer to Delion of 3rd May 1990. It was immediately debited with the sum of DM13,454,190.30 which amount when transferred to Irish pounds was credited to the Chestvale account, as indicated above. The other major debit to that account was the sum of DM10,600,000, which was transferred to Bank of Cyprus on 9th May 1990, and then returned to a DM deposit account in the name of Delion at Ansbacher, account no. 061-07-09448.
- 8.5.4 When a contract was signed by Hoddle for the sale to Telecom, a deposit of £940,000 was paid to Noel Smyth & Partners as stakeholder and was placed in a stakeholders deposit account in Ansbacher. This deposit account was used partly to repay the "mezzanine finance" when the sale to Telecom was closed and partly to pay legal fees and other similar disbursements.
- 8.5.5 When the sale with Telecom was closed on the 29th June 1990, a sum of £8,460,000 was lodged to another account in the name of Noel Smyth & Partners at Ansbacher. On 3rd July 1990, this account was cleared by a credit to the Delion DM loan account which had been opened on

the 4th May and which is referred to at Paragraph 8.5.3 above. On the same date, the sum of £676,998.30 was debited to the Noel Smyth & Partners stakeholders account and credited to the Delion DM loan account which effectively cleared that loan account.

8.5.6 The Delion US\$ account, which had been opened in December by the transfer from Chestvale and the lodgment from AIB (CI) Limited, continued until 30th July 1990. On 5th April 1990, the sum of US\$2,814,863 was debited to the account and transferred to a new IR£ deposit account in the name of Delion, in the amount of IR£1,780,882.68. This was intended as specific security for the guarantee or covenant which Ansbacher issued to UPH, in respect of the deferred payment due by Delion to UPH for the Chestvale shares. The said IR£ deposit account in the name of Delion continued until the end of April 1992, when UPH agreed to an early discharge of the loan note by Delion and the release of Ansbacher's covenant. The only other significant debit to the Delion US\$ deposit account was on 26th July 1990, when the sum of US\$291,413.37 was debited to the account and used as part of the payment to Bankers Trust New York described below.

8.5.7 On the 26th July 1990, a second payment was made to Bankers Trust, New York in the amount of US\$1,288,576 by debiting the Delion DM deposit account number 061-07-09448. The two of these payments to Bankers Trust, New York appear to represent repayment of the advance of US\$1,500,000 which came from AIB (CI) Limited on 7th December 1989. The transfer to Bankers Trust New York was to account number 04-057-960 reference Montezuma. I was informed by Mr. Desmond that that is not the name of the account and I understand that the identity of the account is AIB (CI) Limited in Jersey, i.e. the monies appear to have simply passed through the account in New York.

8.5.8 Two other significant debits were made from the Delion DM deposit account, also on 26th July 1990, the first being the sum of £1,131,170 to account number 30021386 at Trustee Savings Bank, Grafton Street, Dublin 2 and the other on the same date, being the sum of IR£1,300,000 to the same account. This left a credit balance at the end of July 1990 of DM2,133,656.59. Interest continued to accrue on this account until 11th October 1991, on which date, the balance in the account was transferred to an account in the name of P.J. Doherty in AIB (CI) Limited in Jersey. It represented the balance of the proceeds of sale of the JMOB site to Telecom.

8.5.9 The three payments described above to Bankers Trust and TSB were effected on the oral instruction of Mr. Desmond. According to Mr. Moloney, he received instructions on the telephone from Mr. Desmond to make these payments and he did so on an assurance from Mr. Desmond that Mr. Desmond would arrange that the proper written instructions, in accordance with the mandate, would be given to Ansbacher. In fact, this was not given until October 1991 when the mandate had changed, Mr. Doherty became a signatory and, at the request of Ansbacher, Mr. Doherty ratified the earlier payments.

8.5.10 There were outstanding at 31st July 1990, two loans granted by Ansbacher, one to Mr. Desmond in January 1990 of IR£500,000 ("**the Dermot Desmond loan**") and the other to Freezone in March 1990 of IR£814,000, where in each case, Ansbacher, in their credit approval, noted that repayment would be made from the proceeds of sale of the JMOB site, or in the case of the Freezone loan, from that or the sale of certain Emmet shares and the surplus arising on disposal of a property at the Customs House Docks site. These loans were outstanding until October 1991, during which time, there remained in a Delion account, the balance of the proceeds of sale of the JMOB site.

8.6 Proceeds of Sale of JMOB site to Telecom

8.6.1 The total amount received from Telecom amounted to £9,621,034, of which £221,034 was for interest, which Telecom agreed to pay because of the delay in closing the sale. In fact, as described later, the delay resulted from the vendor's attempts to mitigate it's tax liability rather than any default by Telecom. Other receipts by Chestvale/Hoddle and Delion were the two tranches of £1m in August and December 1989, deposit interest of £230,946 and miscellaneous receipts of £4,254. The principal payments between 11th August 1989 and 30th September 1991 were as follows:

Ansbacher - Interest, Bank charges and guarantee fees.	£674,234
Legal Fees: Noel Smyth & Partners and McKeever & Son	£387,699
Professional Fees: Architects, Property Management, Accountants, Tax Advisers.	£155,006
Liquidator - JMOB	£4,000,000
UPH Profit	£1,780,882
TSB Grafton Street (Freezone a/c)	£2,431,170
Bankers Trust New York (AIB (CI) Ltd)	£956,118
Site Clearance Retention	£100,000
Stamp Duty	£250,984
Rates	£139,968
Loss on Foreign Currency Transactions	£120,741
Miscellaneous Expenses	£85,402

8.6.2 The payment to Bankers Trust, New York was made by Ansbacher on 26th July 1990, on the instructions of Mr. Desmond. It involved debits to two separate Delion accounts, the US\$ deposit account as described in Paragraph 8.4.2 and the DM fixed deposit account number 061-07-09448. It was made to account number 04-057-960 Ref: Montezuma at

that bank. Mr. Desmond in evidence told me that Montezuma was the name of "the Aztec King" and in response to my query, as to what that had to do with Bankers Trust in New York, he replied

"When you move money around, when you pick them out of the air.

This is the way of identifying".

I have learned separately that the address for the account is c/o AIB (CI) Limited, Jersey but I have not as yet been able to obtain any further information on the account. I believe that it is likely that this relates to the J. & N. McMahon account in Jersey. The evidence of Mr. Desmond and the information contained in the Statutory Declaration of Mr. Probets, furnished to me before I had even seen the Ansbacher bank accounts, was that a payment was made to Bankers Trust, New York in July 1990, and that that was repayment of the £1m, received from there in December 1989.

8.6.3 The payment to TSB, Grafton Street, account Freezone was, as stated earlier at Paragraph 8.5.8, comprised of two payments, the first of IR£1,300,000 and the second of IR£1,131,170. As soon as the Freezone account was credited with the £1,300,000, an equivalent amount was transferred to an account at Irish Intercontinental Bank (IIB) in the name of Messrs. Quinn and Naughton.

8.6.4 The reason for the transfer of £1,300,000 was that in late September 1989, Mr. Quinn was approached by Mr. Desmond who informed him that he urgently needed cash to meet a demand by Allied Combined Trust ("ACT"), who had sued him in relation to an investment by them in Financial Coursewear Limited, a company owned by Dedeir. Mr. Desmond offered to sell shares in Emmets to Messrs Quinn and Naughton (who happened also to be shareholders in UPH) and explained to Mr. Quinn that he didn't want to approach banks, as if they knew of his liquidity problems, they would use it against him. Messrs Quinn and Naughton had sympathy for Mr. Desmond's position but did

not want to acquire shares in Emmets. However as they wanted to help him out, they agreed to borrow the money (£1,300,000) themselves from IIB on their personal security, and advance it to Mr. Desmond, which they did on 27th October 1989. Mr. Desmond, as security for this loan, delivered to Messrs. Quinn and Naughton

- (i) declarations of trust in favour of Colin Probets in respect of the two issued shares of Freezone;
- (ii) an original option agreement between Colin Probets and Mr. Desmond, whereby Mr. Desmond was granted an option to acquire the entire share capital of Freezone for £1 at any time within 10 years from June 1988, the date of the option agreement;
- (iii) an executed assignment, in blank, of that option agreement;
- (iv) share certificates representing shares of Dedeir in NCB.

→ Copies of documents (i), (ii) and (iii) above are attached in Affidavit 14

Mr. Desmond used the money received through Messrs Quinn and Naughton, to pay to ACT, part of the money owed to them plus interest and costs. Mr. Desmond had assured Mr. Quinn that the money would be repaid before 31st March 1990. When it wasn't, Mr. Quinn became a little disturbed, but by the end of July, the money was repaid. Mr. Quinn was not informed what the source of repayment was and did not concern himself with that, once the loan had been repaid. Messrs Quinn and Naughton believed that they had security over the shares of Freezone, by virtue of the declarations of trust, the option agreement and the assignment of the option agreement. Mr. Desmond however maintains that the option was conditional on the death of Mr. Probets, and that it was never relied upon, although he did agree in evidence on 5th April 1992, that the transaction with Messrs Quinn and Naughton described above, did take place.

8.6.5 However in March 1992, Mr. Desmond informed Mr. Quinn that the source of repayment of the £1,300,000 was part of the proceeds of sale of the JMOB site to Telecom. Mr. Desmond, according to Mr. Quinn,

had denied any connection when asked by Mr. Quinn about the matter in September 1991, but thought it better to notify Mr. Quinn when he did, as, according to Mr. Quinn's evidence, it appeared to Mr. Desmond at that stage that I was going to succeed in tracing the proceeds of sale through the TSB account to the account in IIB and that I would be asking Messrs Quinn and Naughton to explain the payment.

8.6.6 The other payment of £1,131,170 was lodged to the ordinary operating account of Freezone at TSB. This account was operated on the mandate of Mr. Desmond. I received from TSB on 10th April 1992, pursuant to the order of Mr. Justice Costello on that day, copies of the statements of all the Freezone accounts at the bank. In the period shortly after receipt of the said amount, emanating from the JMOB site sale to Telecom, a number of significant debits were made on the account. These included a withdrawal on 31st July 1990 of £400,000 in cash by Mr. Desmond, three payments to NCB totalling £470,231.03, three payments to Hill Samuel totalling £148,148.61, one payment to Dedeir of £80,000 and one payment to Mr. Probets at a bank account in Guernsey of £55,493.89. However with the exception of the £400,000 cash, the other payments do not appear to be untypical of payments out of the account since the opening of the first account by Freezone at TSB in April 1988. I also noted that on 23rd July 1990, there had been another cash withdrawal by Mr. Desmond of £100,000. On the face of it, this debit, by way of cash withdrawal from the account, bore more similarity to the cash withdrawal on 31st July 1990, than to any of the other numerous debits on the Freezone accounts since they commenced, and it is likely that the said two cash withdrawals were related. Accordingly, I found it necessary to examine all the transactions on the said account more closely to ascertain, firstly if there was any connection between earlier transactions on the account and the transactions immediately after 31st July 1990 and secondly who ultimately benefitted from the payments made to Freezone from the

Delion accounts in Ansbacher and thus who was financially interested in the success or failure of Chestvale and Hoddle through this part of the sale proceeds.

8.6.7 The payments from the accounts in Ansbacher described in Paragraphs 8.6.1 to 8.6.3, left a credit balance in a Delion deposit account at Ansbacher, at the end of July 1990, of DM2,133,656.59. On 11th October 1991, the balance in this Delion deposit account, which represented effectively the remainder of the proceeds of sale of the JMOB site, was converted to GBP763,916.47 and paid out to P.J. Doherty at an account in AIB (CI) Limited, Jersey. On that date, instructions were received by Ansbacher, from the mandate holders in Cyprus, that the payment should be made. The mandate holders appear to have been informed on 9th October 1991 that instructions should henceforth be accepted by them from Mr. Doherty rather than from Mr. Smyth and Mr. Smyth confirmed that to them.

As indicated earlier, I have sought information in relation to the said account but have not yet received that information.

9.0 Freezone

9.1 Initial Enquiries about Probets and Freezone

9.1.1 As Freezone received a substantial part of the proceeds of sale of the Telecom site, I have felt it necessary to consider in further detail, who are or have been the beneficial owners of Freezone, as they would appear to be persons who were financially interested in the success or failure (real or apparent) of Chestvale and Hoddle or who were able to control or materially to influence the policy of those companies, whether directly, or through arrangements or understandings which may not have been legally binding, but were observed in practice.

9.1.2 Freezone Investments Limited ("Freezone") is a company incorporated in the Isle of Man on the 19th March 1985. It has two issued shares which are presently in the names of Alan Gough and Paul Moore and its directors are Gordon Mundy and Paul Moore, two chartered accountants practising in the Isle of Man.

9.1.3 Mr. Desmond has stated previously in evidence and in the course of affidavits sworn by him in the Desmond and Dedeir -v- Glackin and ors. Judicial Review proceedings that **"Colin Probets and his investment company, Freezone, are indistinguishable"; "that Mr. Probets and Freezone have at all times been an indistinguishable entity"; and "that Colin Probets and Freezone are one and the same entity".**

9.1.4 Mr. Desmond in his evidence to me on the 11th November stated that the mezzanine financier was Mr. Probets and that

"he (Mr. Probets) put money in from his own resources and he used a vehicle called Freezone".

Mr. Probets swore a statutory declaration dated 23rd October 1991 and sent this to me through his Irish solicitors, Lennon Heather & Company

on the 13th November 1991. This statutory declaration stated inter alia that in or about the month of July 1989, on the recommendation of Mr. Desmond, he, Mr. Probets, agreed to provide mezzanine finance of IR£2m for the funding of the purchase of the JMOB site and added that he arranged for the sum of £1m to be transferred to Ansbacher on the 10th August 1989 and for a further sum of US\$1.5m to be transferred via Bankers Trust, New York to Ansbacher on the 7th December 1989. He further stated that the sum of approximately US\$1.5m was transferred on or about 30th July 1990 to Bankers Trust in New York and that at the same time, two payments of £2,431,000 in total were transferred from Ansbacher Bank to Trustee Savings Bank, for credit of an account in the name of Freezone, in respect of which he stated that he was the sole and absolute beneficial owner. He added that either, personally directly or indirectly through Freezone, of which he was then and at all times, the sole and absolute beneficial owner, he, and, or Freezone was the only and absolute beneficial owner of the monies invested by way of mezzanine finance in the purchase of the property and the owner of the profit earned on the provision of the mezzanine finance and further that no one other than himself and, or Freezone had at any time any interest therein. He added that insofar as the mezzanine finance and the profits earned thereon were concerned, that no person other than himself and/or Freezone were or had been financially interested in the success or failure (real or apparent) of Chestvale and, or, Hoddle and he added that as regards the mezzanine finance and the profits earned thereon, there was not then nor at any time in existence an arrangement or understanding which, whether legally binding or not, is or was observed or likely to be observed in practice and which was relevant to the purposes of my investigation.

- 9.1.5 The statutory declaration added that neither he, nor any person, entity or company on his behalf, had made any payment by way of fees or otherwise to Mr. Desmond, UPH, NCB or any associated person in

relation to the mezzanine finance or the profits thereon.

9.1.6 Although the statutory declaration corroborated Mr. Desmond's evidence in that regard, I was not happy with the status of this declaration as his only evidence on this aspect of the matter. I therefore wished to examine Mr. Probets personally. However, as I was informed by the Irish solicitors for Mr. Probets and Freezone, that Mr. Probets would not make himself available to me for examination because of ill-health, I drafted a further declaration which I submitted to him through his solicitors on 9th December 1991. This draft declaration was rejected by Mr. Probets through his solicitors and he has failed to give me any relevant information since that time. Copies of Mr. Probets' actual declaration of the 23rd October and of the draft prepared by me for him are included as Appendix 15.

9.1.7 Since the 9th December 1991, Freezone and, or Mr. Probets have been involved in five separate High Court proceedings, endeavouring in each case to prevent my obtaining and, or, using documents or information which I considered relevant to the inquiry being conducted by me. Some of that documentation and information is described below. However, it is noteworthy that in none of those proceedings has Mr. Probets sworn an affidavit, as one would have expected and all relevant affidavits have been sworn on his behalf by his Irish solicitor.

9.1.8 It was my understanding, that merely accepting Mr. Probets' statutory declaration and Mr. Desmond's oral evidence, that Mr. Probets was the sole beneficial owner of Freezone, would not have been complying with my obligations to determine the true persons who benefitted financially from the success or failure of Chestvale and Hoddle. This was so, particularly as Mr. Desmond informed me in the course of evidence on the 5th December 1991 that he had a Power of Attorney at all relevant times from Freezone and I ascertained from answers to inquiries made

by me to the Minister for Industry and Commerce and through him to the Minister for Finance, that the Central Bank had granted approval in 1988 for Mr. Desmond to give his personal guarantee for a borrowing by Freezone of £8m from an unnamed foreign bank. Mr. Desmond was also given approval to pledge his personal assets including his shares in NCB as collateral security for the said loan. The information from the Central Bank disclosed that there were a number of dealings between Freezone and Mr. Desmond and Dedeir, in circumstances which I considered unusual and perhaps not at arms length, but when I questioned Mr. Desmond in relation to them, he refused to give me any information and shortly thereafter initiated High Court proceedings, seeking injunctive relief and declarations that the scope of my inquiry had become unlawful and that the Central Bank had acted ultra vires in releasing information to me. Those are the Judicial Review proceedings entitled Desmond and Dedeir -v- Glackin and ors. referred to in paragraph 3.6 earlier. Freezone and Probets commenced proceedings along similar lines in January 1992 and both sets of proceedings were heard before Mr. Justice O'Hanlon as described earlier. In each case, the ruling of the court was that I was entitled to continue the inquiries which I was conducting but they are each subject to appeal to the Supreme Court which appeal was heard on the 13th, 14th, 15th and 16th July 1992 and in respect of which, judgment was reserved. On 30th July 1992, the Supreme Court issued its judgment and dismissed the appeal.

9.1.9 In his judgment in the Desmond case delivered on the 25th February 1992 O'Hanlon J. stated that my investigation

"may well involve asking about the association of the applicants or either of them with other companies and as to the conduct of the affairs of those companies so far as this is known to the applicants if those matters in the reasonable opinion of the Inspector appeared to impinge on the involvement of Chestvale and Hoddle

with the Ballsbridge property".

In the Probets judgment O'Hanlon J. stated that

"if the Inspector has reasonable grounds for believing that close inquiry into all links between Mr. Desmond on the one hand and Mr. Probets and Freezone on the other hand is relevant to the ascertainment of the identity of the persons who benefitted by the dealings involving Chestvale, Hoddle and the Ballsbridge property, then he is, in my opinion, entitled to pursue such inquiry, notwithstanding that it may involve questioning Mr. Desmond or Mr. Probets about financial transactions involving UPH, Chestvale, Hoddle, Delion and Freezone as well as transactions involving Mr. Desmond and Mr. Probets in their personal capacity. On the information hitherto made available to the Inspector, I believe it is reasonable for him to pursue the inquiries he has already initiated."

- 9.1.10 On 2nd March 1992, I wrote to John Wintle, an English accountant and stated that I understood that he acted as financial adviser to Mr. Probets and Freezone and I requested that he attend before me, to assist in the investigation. I sought from him, books and records that he might have relating to the Probets and Freezone involvement in the JMOB site. Mr. Wintle replied by letter of the 16th March and stated that prior to 23rd October 1991, when he accompanied Mr. Probets to Dublin for the purpose of swearing the statutory declaration, he had no knowledge of the Companies and had no other knowledge of any relationship they may have or may have had with Mr. Probets and Freezone or any involvement by Mr. Probets or Freezone in Chestvale or Hoddle or the JMOB site and accordingly that he could not be of any assistance to the inquiry. If Mr. Probets or Freezone, had been the parties who had arranged the mezzanine finance and were as claimed, the beneficiaries of the profit arising, it is surprising that Mr. Wintle, as their accountant, did not know of it.

9.1.11 On 11th November 1991, when Mr. Desmond first attended before me for interview, he was accompanied, inter alia, by senior counsel who made representations to me on behalf of Mr. Desmond before any questions were asked. In the course of these representations, counsel stated that "he, (Mr. Desmond) never was in any sense a person who had ... any financial interest within the meaning of the Section (14) in their (the Companies) success or failure." Mr. Desmond also stated to me at least once in his evidence under oath and on a number of occasions in affidavits sworn by him, that he never got any benefit, direct or indirect in the JMOB transaction or through Freezone, Proberts, Doherty, Smyth or Telecom

9.2 Option Agreement dated 15th June 1988

9.2.1 On the 20th March 1992, I received in evidence from Mr. Quinn, a copy of an option agreement dated 15th June 1988, which had been executed by Mr. Probets and Mr. Desmond, whereby Mr. Probets granted to Mr. Desmond an option entitling him to call on Mr. Probets to transfer to Mr. Desmond or his nominee for the sum of £1, the beneficial interest in the entire issued share capital of Freezone, to which he stated he was legally and/or beneficially entitled, which option could be exercised at any time within ten years of the date of the agreement (see Appendix 14). This document indicated to me that Mr. Probets was not, at least since 15th June 1988, the absolute beneficial owner of Freezone. I was informed on the 30th March 1992 in oral evidence by Mr. Quinn, that Mr. Desmond had granted an assignment of that option to himself and Mr. Naughton, as security for a loan of £1,300,000 given indirectly by them to Mr. Desmond in the manner described in Paragraph 8.6.4.

9.2.2 In his verbal evidence to me on 5th April 1992, Mr. Desmond did not deny the validity of the agreement but stated that it had been cancelled **"a year or a year and a half ago, some time. I haven't exercised any option over Freezone. The second point is this was done in relation to the protection of my interest in the event of any demise of Mr. Probets"**.

I stated to Mr. Desmond that no qualification or precondition appeared on the face of the agreement and he replied that he didn't know what other communication or correspondence he had with Mr. Probets at that time. I asked Mr. Desmond what protection he required if Mr. Probets died and he replied

"I would require protection of the phantom option in the Emmet shares and Freezone, part of the performance related fee over Emmets and that in the event of his death that I could get the shares, I could not get the shares, but I could get the value on

disposal".

I then asked Mr. Desmond if Freezone entered into any other transactions where he, Mr. Desmond, got the benefit and he replied that he was not at liberty to talk about Freezone without Mr. Probets permission.

9.2.3 I received a letter, dated 8th April 1992 from Mr. Desmond's solicitors which referred to the option agreement dated 15th June 1988. This letter reiterated some of the points made by Mr. Desmond in his verbal evidence as follows:-

- "(a) The option was granted to our client as a mere security in transactions. In particular it did not purport to transfer any beneficial interest. This would be confirmed by other evidence obtained by you.
- (b) The option was conditional on the death of Mr. Probets.
- (c) The option was cancelled.
- (d) The option was never exercised.
- (e) Company Law or Stock Exchange regulations were not contravened."

This response failed to address the point made by me that the option agreement is, on the face of it, unconditional. In addition, it failed to explain why an assignment of the option agreement was given as security by Mr. Desmond, for a personal loan of £1,300,000.

9.3 Freezone Account in the TSB

- 9.3.1 I subsequently noted from documentation held by Ansbacher, which they eventually furnished to me after a number of court hearings, that sums of £1.3m and £1.131m (being part of the proceeds of sale to Telecom) were transferred from Delion's account to a specified numbered account in TSB, Grafton Street, Dublin on the express instructions of Mr. Desmond. I then sought information from the TSB in relation to the said account, including details of the transactions on the account, the name of the account holder, the mandate under which the account was operated and any correspondence in relation to it. Eventually, pursuant to an order of Mr. Justice Costello, TSB released the said information to me and I noted that the bank mandate for the operation of the account was in the name of Mr. Desmond.
- 9.3.2 Accordingly I considered it necessary to examine further the details of the account in the TSB. This was particularly so because Mr. Proberts would not make himself available to me for examination and he would not allow the directors of Freezone, who were in the Isle of Man, to do so either. I noted that there were a very large number of transactions on the Freezone account in TSB in addition to the credits of £1.3m and £1.131m received from Ansbacher on 30th July 1990. I noted that a sum of £1.3m was immediately transferred from the TSB account to an account in IIB to discharge a loan from that bank to Messrs Quinn and Naughton in the manner described in Paragraph 8.6.3. I am satisfied from the evidence of Mr. Quinn and Mr. Desmond that this payment was the effective repayment of the loan of £1.3m granted by Messrs. Quinn and Naughton to Mr. Desmond personally, and that even though the payment can be traced back to the proceeds of sale of the JMOB site, neither Mr. Quinn nor Mr. Naughton were financially interested, as a result of this payment, in the success or failure of Chestvale and Hoddle because their security for the loan did not relate to the JMOB site and

the liability of Mr. Desmond to repay the loan to them, was not contingent in any way on his receiving money from the said sale although they did remain shareholders in UPH.

9.3.3 The other payment of £1.131m was mixed with other monies in the Freezezone account. As explained in Paragraph 8.6.6, I considered it necessary to examine transactions on the account, both before and after the receipt of this sum of £1.131m, with a view to ascertaining whether other transactions related to this payment and in addition who was the true person who benefitted from it.

9.3.4 I examined as witnesses, four parties who appeared to have received payments, directly or indirectly, from the said Freezezone account. Each of the said four persons indicated that the payment, as far as they were concerned, was from Mr. Desmond and not from Freezezone and in addition, each of the four indicated that they had never been employed by nor acted as consultant for nor provided any services to either Mr. Proberts or Freezezone. It subsequently transpired from further evidence adduced to me, that one of the said four may have performed some services for Freezezone but it is possible that that was in his capacity as an executive of another of Mr. Desmond's companies. None of the four were aware that the payment came from Freezezone, and one stated that he had never heard of Freezezone at the time. I am satisfied that none of those four persons were financially interested in the success or failure (real or apparent) of Chestvale or Hoddle or able to control or materially to influence their policies either directly or through arrangements or understandings and accordingly I do not consider it necessary to name these persons.

9.3.5 A number of payments were made to NCB. I have been informed by NCB that some of these payments were used to discharge amounts due by Mr. Proberts and Malesh Holdings through nominee accounts, and

another was used to pay an account of Dedeir. Substantial purchases of shares in a particular public company quoted on the Stock Exchange had been made through the relevant nominee accounts, which apparently gave rise to these debts to NCB. However it is not clear to me whether the true beneficial owner of the nominee accounts, was as stated or whether it was another party. It is equally not clear whether, if the true beneficial owner was Mr. Probets, that he was being repaid for the advance of mezzanine finance to Chestvale or whether he was being repaid by Freezone for earlier substantial advances he made to Freezone and which appear on the said TSB accounts.

Malesh Holdings Limited, according to the Companies Registration Office, has its registered office at Ferry House, 48-53 Lower Mount Street, Dublin 2 and its directors are Mr. Desmond, Mr. Barry, and a Sheila Dwyer.

9.3.6 A substantial amount of cash was withdrawn in two separate amounts by or on behalf of Mr. Desmond, the first being an amount of £100,000 and the second being an amount of £400,000 on the 23rd July 1990 and 31st July 1990 respectively. Mr. Conan (who at that time was secretary of Dedeir) and who arranged for these payments, said that he did so on the instructions of Mr. Desmond.

9.3.7 As Mr. Desmond had a Power of Attorney and a mandate from Freezone and a mandate over the account in TSB, I wrote to him by letter of 8th May 1992 and asked him inter alia for an explanation of these payments. Mr. Desmond refused to give that information until after the Supreme Court appeal by himself and Dedeir against the judgment of Mr. Justice O'Hanlon referred to earlier, on the grounds that it would be a breach of privacy. I did not accept that he was entitled to refuse on these grounds, but having regard to the anticipated short interval until the Supreme Court heard the appeal, I decided on practical grounds not to pursue the matter for the time being.

9.3.8 I then examined further payments, a number of which appeared to have been made to Hill Samuel Bank (Ireland) Limited ("**Hill Samuel Ireland**") and one large payment was made to Industrial Credit Corporation plc ("**ICC**"). The payments to Hill Samuel Ireland related to a borrowing by Freezone from Hill Samuel & Co. Limited in London (the unnamed bank referred to in the information furnished by the Central Bank in December 1989) ("**Hill Samuel London**").

9.3.9 The loan granted by Hill Samuel London on 13th April 1988 was initially £8m of which £6.5m was transferred to the account of Freezone at TSB. I then wrote to Hill Samuel Ireland, who informed me that they were merely sub-participants in the loan, the loan having been granted by Hill Samuel London. At my request and having taken legal advice because Freezone had threatened to sue them, Hill Samuel Ireland furnished to me papers which they had in relation to Freezone and which they believed might help to determine the true persons who were financially interested in the success or failure (real or apparent) of Chestvale and Hoddle or able to control or materially to influence the policy of those companies. I have not as yet been able to obtain from Hill Samuel London all the papers which they hold in relation to this matter, but have commenced the process through the Department of Industry and Commerce, whereby such documentation might be made available to me, pursuant to the provisions of Sections 82-91, Companies Act 1989 in the U.K.

9.3.10 On the 5th and 9th June 1992, I received from ICC, certain documents which they had in their possession and extracts from some other documents, which they "**in their honest opinion**" considered would be of assistance to me in the investigation.

9.3.11 I had also learned from the inspection of Ansbacher files in relation to Chestvale and Hoddle and my examination of Mr. Moloney, and Mr.

Matthews, that Ansbacher also had dealings with Freezone and accordingly, I sought from them documentation which was in their power or custody, which might be of assistance to me. I received a considerable amount of documentation from them on the 4th June 1992 and some further documents on the 11th June 1992.

9.3.12 Having considered and reviewed all the documentation which I have been able to obtain in relation to Freezone, I believe it is necessary to analyse and explain a number of the documents which these banks had on their files in relation to Freezone, which I do below and I attach as Appendix 16 some of the documents from the Ansbacher files. In my opinion the information contained in the Hill Samuel, Ansbacher and ICC files will be important in the determination by me of who are the true persons who were financially interested, through Freezone, in the success or failure (real or apparent) of Chestvale and Hoddle or who were able to control or materially to influence the policy of those companies.

9.4 Hill Samuel Bank (Ireland) File

9.4.1 I understand that this file represents copies of part of the file of Hill Samuel London which was sent, from time to time, to Hill Samuel Ireland as it was a sub-participant in the loan.

9.4.2 The file commences with a "**Proposition**" from IFD, the Investment Funding Division of Hill Samuel London, to two of its senior executives and which is dated 19th January 1988. The purpose of the Proposition was stated to be a recommendation that Hill Samuel would lend £8m to Mr. Desmond, secured upon part of his personal assets which were stated to have a net value in excess of IR£25m, and which were held mainly in the form of shareholdings in three private businesses in Ireland. The three businesses were described as "**NCB, EFS and R. & J. Emmet plc**" (EFS was described as a Dublin based group of companies which had developed and owned a number of sophisticated computer based training products for the financial services area).

9.4.3 In relation to Emmets, it was stated that Mr. Desmond
"purchased this company through an Isle of Man holding company, Freezone Investments Limited, with a partner in June 1986".

It added that Mr. Desmond had recently purchased his partners 50% shareholding for a consideration of IR£3.5m and stated inter alia that Mr. Desmond intended to float the company on the Unlisted Stock Market (USM) in February 1988. The proposed borrower was stated to be Mr. Desmond or a corporate entity owned and fully guaranteed by him and the proposed security was to be a legal charge on all the shares of Emmets held by Freezone, together with the personal guarantee of Mr. Desmond and a charge on Mr. Desmond's shareholdings in NCB and EFS. In addition, there was to be a profit sharing arrangement between Hill Samuel London and Freezone based on the increase in value of the Emmet shares. I understand that this

proposition was based on information furnished to Mr. Williams of Hill Samuel London by Mr. Desmond. There is a further document entitled "Proposition" dated 5th February 1988 which is in very much the same terms but is an updated version.

9.4.4 Subsequently, on 16th March 1988, Hill Samuel London issued a letter offering a loan facility to Freezone in the sum of IR£8m to be secured by

- (i) a first legal mortgage from Freezone over all of the Emmet shares which Freezone was to hold from time to time;
- (ii) the personal guarantee of Mr. Desmond for the principal amount and interest, charges and costs;
- (iii) the guarantee of Dedeir for the same;
- (iv) a first legal mortgage from Dedeir over 20% of the issued share capital of NCB; and
- (v) a charge over the benefit of a life policy on the life of Mr. Desmond in the amount of £2m.

It appears that the profit sharing arrangement was subsequently replaced by an option to Hill Samuel to acquire 20% of the Emmet issued share capital for Freezone for £1.6m. One of the obligations imposed on Freezone and Desmond, by a condition in the letter, was that Mr. Desmond was not to incur any other liability for the borrowing of monies or the giving of guarantees in excess of £3m in aggregate. It was also stated to be an event of default of the loan, if a change in voting control of Freezone and/or Dedeir occurred, with the effect that persons other than Mr. Desmond held or were to become beneficially entitled to shares in the capital of Freezone and/or Dedeir carrying the right to cast more than 50% of the votes at a general meeting of those companies.

9.4.5 This was followed by a slightly amended letter of offer of 7th April 1988,

in substitution for the letter of 16th March, but which contained all the provisions outlined above with the exception of the guarantee by Dedeir. The loan was drawn down as envisaged on 13th April 1988 and the security was put in place then. Freezone disposed of shares in Emmets to each of ICC and Kiril Limited ("Kiril") at the beginning of April 1988 shortly before Emmets was floated on the USM of the Stock Exchange and the proceeds of sale of these shares were used to reduce the Hill Samuel loan.

9.4.6 It appears that during 1989 and early 1990, Mr. Desmond was having difficulty in meeting further capital repayments on the Hill Samuel loan. According to Hill Samuel's file notes Mr. Desmond gave reassurances to Hill Samuel London about his ability ultimately to meet his liabilities and referred to his proposed development in the Customs House Dock development in Dublin ("CHDD"). According to the file, a telephone conversation took place on 5th April 1990 between Mr. Watson of Hill Samuel London and Mr. Desmond when it appears that Mr. Desmond sought to give comfort to Mr. Watson about the progress he was making in getting tenants for his South Block of the CHDD.

9.4.7 It seems that Mr. Desmond had earlier requested some adjustments to the loan agreement including the release from the Hill Samuel charge, of 814,000 Emmet shares, so that Mr. Desmond could use them as security to raise cash "from personal sources to bridge a period prior to his realising a profit from a transaction in the Far East". On receipt of that profit, which was estimated in 3/4 months time, and the repayment of the bridging loan, the shares would then be charged back to Hill Samuel. The cash raised was used by Freezone to make a capital repayment to Hill Samuel. An internal note of Hill Samuel dated 27th March 1990 noted that they remained

"secured upon the fortunes of Emmet and its share price, and upon NCB. These represented our primary risk. "

It added however that the

"original loan transaction has now effectively disappeared and we are acknowledging that our repayment will be from either the sale of Emmets/NCB, the realisation of the South Block, or from an as yet unidentified source. We are now following the fortunes of the South Block transaction and our proposed reward now reflects the shift in the timing of our repayment. We remain in a position to be able to force a sale of Emmet/NCB if we ever lost faith in the South Block transaction".

Although it is not absolutely clear, the "unidentified source" referred to by Hill Samuel may have been the proceeds of sale of the JMOB site, as at that time negotiations were well advanced with Telecom also, and as will appear from the Ansbacher documents analysed below, the bridging finance, referred to above, secured by the 814,000 Emmet shares released by Hill Samuel, was from Ansbacher and Ansbacher were informed at that time, that the sources of repayment of that bridging finance would be from the sale of Emmet shares or the realisation of the South Block or from the surplus anticipated from the sale of the JMOB site.

- 9.4.8 On the 16th March 1990, a meeting was held in Dublin by Mr. Watson of Hill Samuel London, Mr. Kennedy of Hill Samuel Ireland and Mr. Desmond for the purpose of updating Hill Samuel London on the trading results and outlook for Emmets and to ascertain progress made by Mr. Desmond on the Custom House Dock development site at South Block and further **"to chart out a plan for our repayment"**. Mr. Watson prepared a detailed memorandum of the discussions. The memorandum of the meeting states, inter alia, that **"the present corporate activity of Emmets consisted of acquiring the property group owned by DFD, Smurfit, Goodman and other friends at a cost of IR£13m"**.

This appears to refer to UPH, as in or about that time, Mr. Desmond

made an approach to the board of UPH on behalf of Emmets to acquire all its shares and as explained in Paragraph 9.7.1 et seq., this was considered at a board meeting of UPH on the 29th March 1990. As indicated in the section dealing with Mr. Desmond's attempts to raise finance for the JMOB site, some banks noted that they were informed that one of the UPH shareholders was Mr. Goodman. However both Mr. Goodman and Mr. Desmond have denied in evidence that that was the case and indeed Mr. Desmond denied that he told any bank that Mr. Goodman was involved.

9.4.9 A further review meeting took place on 22nd August 1990 attended by Mr. Desmond, Mr. Conan who was described as financial assistant to Mr. Desmond, Mr. Watson and Mr. Ramsey. The memorandum of this meeting states that its purpose was to bring Hill Samuel

"up to date with the financial position of each of the companies with which Freezone and Dermot Desmond was involved, to set an end date for the repayment of our loan to Freezone and to negotiate an increased reward for the bank out of any profit which Desmond is able to extract from the South Block".

The memorandum then considered some detail in relation to Emmets and Dedeir before considering in detail the involvement of Mr. Desmond in the South Block, Dublin Financial Services Centre, the profit to be made from that and the tax scheme to shelter the profit and then went on to discuss an additional fee for Hill Samuel London out of the proceeds of sale of the South Block.

9.4.10 Subsequent to the review on 22nd August 1990, Mr. Watson of Hill Samuel wrote to Mr. Desmond by letter of the 29th August 1990 to consider further the question of the additional fee for Hill Samuel London and stated that

"there was agreement between us that Hill Samuel is now inextricably linked with the CHDD project, in part because the

Emmet shares which we released temporarily from security now form part of your guarantee arrangement with Smurfit Paribas, partly because the timetable of repayment is directly linked to the realisation of your interest in the South Block and partly because the resources for repayment are likely to come from realisation of that interest".

In fact, the Emmet shares released by Hill Samuel were charged to Ansbacher and it is unlikely, although possible, that they were also charged to Smurfit Paribas, as Hill Samuel had believed.

- 9.4.11 Further memoranda on the Hill Samuel Ireland file, resulting from telephone conversations with Mr. Desmond on 3rd December 1990, 17th December 1990, 11th February 1991 and 21st February 1991, all centred on Mr. Desmond's ability to ensure repayment of the Freezone loan from his interest in the South Block at the CHDD.
- 9.4.12 A further telephone conversation took place on the 8th April 1991 between Mr. Ramsey and Mr. Conan, when information was again given in relation to the South Block. However, the memorandum also refers to interest being received in two equal amounts, one of which came out of Ireland and required Exchange Control permission and the other came from what Hill Samuel described as "**presumably the source in Switzerland**". It is not clear to me what Hill Samuel understood by "**the source in Switzerland**" and whether this relates in any way to two payments which I have traced back to Union Bank of Switzerland in Geneva, the first being the subscription of £125,000 to UPH on the 15th June 1989 for the shares allotted to a nominee for Joe Lewis and the second being the payment of £1m "**mezzanine money**" into the Noel Smyth & Partners account at Ansbacher on 10th August 1989. I am endeavouring to obtain further information in relation to the said payments from UBS and it may be that information which Hill Samuel London have will be of assistance in identifying those payments.

9.4.13 It is clear from the above that all reviews which Hill Samuel had in relation to the outstanding loan to Freezone, which was primarily secured by the Emmet shares, also looked at Mr. Desmond's other personal assets including the South Block at the Financial Services Centre, Quay Financial Software and Dedeir on the basis of their understanding that Freezone was owned by Mr. Desmond and that if repayment of the loan could not be sourced from one of his assets, then it could be from another. It is also worthy of note that Hill Samuel London did not appear to concern themselves with the assets of any other person, whether Mr. Probets or otherwise.

9.5 Ansbacher Bank

9.5.1 It would appear that at some time in early 1989, when Mr. Desmond first seems to have experienced difficulties with repayments to Hill Samuel London, he discussed the matter with Mr. Smyth, who proposed a plan whereby a new company, Delion would be formed in Cyprus, which company would borrow from Ansbacher £8.4m, and which would be used indirectly to pay off the Hill Samuel loan, which at that stage had approximately £5.8m. outstanding.

9.5.2 This proposed transaction does not appear to have proceeded, but in March 1990, it seems that Mr. Desmond approached Mr. Moloney and arranged to obtain for Freezone, a loan of £814,000. The stated purpose of the loan was to pay Hill Samuel and the primary security was to be a charge over 814,000 shares in Emmets which were being released by Hill Samuel. This conforms with the Hill Samuel file as outlined in Paragraph 9.4.7 above.

9.5.3 Among the documents furnished to me by Ansbacher, were two declarations of trust by Mr. Dougherty and Mr. Gough of the Isle of Man, indicating that they held one share each in Freezone as nominee and trustee for Mr. Probets, which declarations of trust appeared to have been signed on an unspecified date in 1988 (copies of these declarations of trust were among the documents furnished as security to Messrs. Quinn and Naughton see Paragraph 8.6.4). With those declarations was a copy of the option agreement between Mr. Probets and Mr. Desmond executed by Mr. Desmond, but also on an unspecified date in 1988. This would appear to be a copy of the option agreement received by me earlier and referred to above at Paragraph 8.6.4. Also enclosed were copies of the security documents received by Hill Samuel London and dated 12th April 1988 relating to the loan by Hill Samuel to Freezone. These consisted of

- (i) a Deed of Charge by Mr. Desmond to Hill Samuel of all his NCB shares;
- (ii) an Assignment by Mr. Desmond to Hill Samuel of life insurance policies for an aggregate insured amount of £2m;
- (iii) a personal guarantee by Mr. Desmond; and
- (iv) a Deed of Charge by Freezone over its shareholding in R. & J. Emmet plc.

Included also was a letter from Mr. Desmond to Hill Samuel, also dated 12th April 1988, which stated that in consideration of Hill Samuel agreeing to make a loan of £8m available to Freezone and himself, he personally covenanted and undertook with Hill Samuel, that he would **"not effect any expansion, development or evolution of my business interests in relation to the drinks, food, beverages industry and related areas except through the medium of R. & J. Emmet plc or a wholly owned subsidiary of such Company"**

and added that in the event that he did not make any such investment through the medium of Emmets, that he would make such investment through another company whose shares were or were about to be quoted or dealt with on a Stock Exchange in Ireland or England and that he would grant to Hill Samuel an option to acquire 20% of the shares in such company on similar lines as the option granted in Emmets or a subsidiary thereof.

9.5.4 Also enclosed was an internal memorandum of 21st March 1990 from Mr. Moloney to Ms. O'Toole. This memorandum was entitled **"Dermot Desmond/R. & J. Emmet"** and related to a proposed transaction whereby R. & J. Emmet would make a bid for UPH (see Paragraph 9.7.1 et seq.). A copy of this memo is contained in Appendix 17. The transaction would involve, at that stage, a borrowing by Kiril from Ansbacher of IR£1.8m to purchase 1.8m Emmet shares from Freezone at IR£1 each, which monies would be used by Freezone to repay part of the Hill Samuel loan. The memorandum stated that when the JMOB

deal had been completed and the offer by Emmets had been accepted by all the shareholders of UPH, Emmets would then own the loan paper issued to UPH, which would have been guaranteed by Ansbacher. The Ansbacher guarantee was to be secured by a deposit with Ansbacher of IR£1.8m, out of the proceeds of the JMOB deal, but Emmets would release Ansbacher from their guarantee, which in effect would release the deposit of IR£1.8m and Mr. Desmond indicated to Ansbacher that they could have that £1.8m as secondary security for the loan to Kiril, the primary security being the shares in Emmets. According to the memorandum, Mr. Desmond indicated to Mr. Moloney that Ansbacher would receive IR£9.4m from the sale of the JMOB site. As they had on deposit circa. IR£2m (the Delion deposit), there would be a total amount of IR£11.4m from which the Chestvale loan and Dermot Desmond's loan (£500,000 taken out in January 1990) would be repaid, which would leave about £6m on deposit with Ansbacher. The memorandum added that Mr. Conan of NCB would be coming to talk to Ms O'Toole, but that he was not aware of the source of the £1.8m, other than that it was from a foreign source. He would be aware that the guarantee was backed by cash and that on the release of the guarantee the cash would be used to repay the loan, but **"he does not know the source of the funds and does not need to be told or to know"**. The memo then dealt with the further proposals for Emmets after it had acquired UPH.

9.5.5 One of the strange things about this proposal is that Mr. Desmond does not appear to have told Mr. Conan, who was described in another document as his personal assistant, about the JMOB transaction and apparently did not want him to know about it. This is borne out by Mr. Conan's evidence to the effect that he knew nothing about that transaction or about Chestvale or Hoddle or Delion. The memorandum of the 21st March 1990 does however imply that Mr. Desmond was perceived by Ansbacher as having control over the proceeds of sale of the JMOB site and of the £2m (or US\$3m) deposit in Ansbacher in the

name of Delion.

- 9.5.6 The Ansbacher document entitled Credit Application 003/20 dated 22nd March 1990 dealt with the loan to Freezone of the DM equivalent of IR£814,000, the purpose of which was stated to be enabling Freezone to refinance borrowings with Hill Samuel, which had been used for the purpose of purchasing Emmet shares. In the details relating to Freezone, in that document, the "**Beneficial Owner**" is noted as "**Dermot Desmond**". The period of the loan was noted as "**until 31st December 1990**" and it was to be repayable from the sale of the shares, as Mr. Desmond was to enter into an option to buy back the Emmet shares at the end of the term of the loan, at a price to include interest for the term. This was to be done from his own resources i.e. from the estimated surplus of £10m from the Customs House Dock project and the estimated surplus of £5m from the JMOB site. The security was to comprise (i) a lien over the 814,000 shares, (ii) a personal guarantee by Mr. Desmond supported by a put option in favour of the bank for Mr. Desmond to purchase the shares by 31st December 1990 on the basis outlined above and (iii) a letter signed by Mr. Desmond confirming that in the event of the guarantee in favour of UPH being lifted, the cash deposit could be utilised against that borrowing, (that cash deposit being in the name of Delion). This document was marked approved by Mr. Matthews an associate director of the Bank and by Mr. Moloney on the 22nd March 1990. At this time, Ansbacher were closely involved in the JMOB site, having lent money to Chestvale and having received a deposit from Delion. If Ansbacher believed that the surplus from the sale of the JMOB site was available as "**own resources**" to Mr. Desmond and that the cash deposit in the name of Delion could be utilised against the Freezone borrowing, there is an inference that could be drawn to the effect that Ansbacher believed that Mr. Desmond was not only the owner of Freezone but also the owner of Chestvale and Delion or that at least he controlled them. The credit application document

refers to the bank holding a statement of net worth of Mr. Desmond as of April 1988 in the sum of £23m and that they understood that this had increased at this stage. Ansbacher have refused to furnish that statement to me and in a letter of 10th June 1992 from their solicitors stated that **"as exercising it's honest opinion it is not a document which falls within the criteria for disclosure as set out in the Judgment of Mr. Justice Murphy"**.

In a letter of 18th June 1992 to Ms. O'Toole, who, I understood had drafted Credit Application 003-20, I asked her what information had been received by her which stated that Dermot Desmond was the beneficial owner of Freezone and that repayment would be

"from his own resources including the estimated surplus of £5.0m from the JMOB site"

Ms. O'Toole replied through the Ansbacher solicitors, McKeever & Son, to the effect that no information was received by her to that effect and that the record on the Credit Application was incorrect as it was based on Ms. O'Toole's perception that Mr. Desmond was the **"Risk"** to be considered by the bank's credit committee. It added that as to the information regarding the source of the repayment of the loan, Ms. O'Toole could not now be certain of the exact source of the information. She believed however that it was general **"but important background information gleaned from a variety of sources which she considered pertinent to place before the bank's credit committee as part of it's "brief"."**

9.5.7 Ansbacher issued a facility letter to Mr. Desmond on the 10th April 1990 reflecting the aforesaid credit approval of 22nd March, save only for the letter in relation to the UPH deposit, which was to be dealt with separately by Mr. Desmond. I understand from Ansbacher that they did not pursue this issue with him.

9.5.8 A further Ansbacher document, Credit Application 107-18 dated 25th

July 1991, sanctioned a loan of IR£5.1m to Freezone to enable Freezone to repay the loan to Hill Samuel, so that the Emmet shares could be released. The source of repayment of this loan was to be the proceeds of the offer for Freezone's 50.7% shareholding in Emmets by Gilbeys of Ireland Group, a subsidiary of Grand Met plc, who were to make an agreed bid of IR£2.25 per share. The security was noted as: firstly, a first fixed charge over Emmet's shares which on the basis of the offer price from Gilbeys were valued at £15.3m; and secondly, the personal guarantee of Mr. Desmond supported by an assignment of life policies on his life and

"the procuring by him that the shareholders of the borrower grant a lien over their shares to the bank and lodge their share certificates with the bank".

Under the heading of "General Comments and Recommendation", it was stated that

"this application is made on behalf of Freezone Investments Limited by Mr. Dermot Desmond on behalf of Mr. Colin Probets, the owner of Freezone Investments Limited".

It also stated that the managing director and financial director of Gilbeys had confirmed at negotiation meetings with Mr. Desmond and Mr. Moloney that the agreed offer would be put formally by the 14th August 1991 and that Freezone and Kiril Limited who owned in total between them 66.2% of R. & J. Emmet plc would sign "irrevocables" as and when the formal offer was made and would formally accept the offer by 22nd August. Attached to the aforesaid Credit Application was a letter from Gilbeys of Ireland Group dated 17th July 1991, setting out the terms of the proposed offer.

- 9.5.9 It would appear from this document that Mr. Desmond was dealing not only with the Freezone shares but also the shares owned by Kiril. It is not clear what the exact involvement of Kiril was, save that it was the owner of shares in Emmets and was to become involved, at least

indirectly, with the JMOB site if the proposal referred to in the 21st March 1990 memo from Mr. Moloney to Ms. O'Toole was implemented.

9.5.10 This reference to Mr. Probets in the Credit Application 107-18 is the first reference to him among the Ansbacher documents relating to Freezone which were furnished to me, but it does not appear to have caused any concern to Ansbacher and Ansbacher did not seek any security from Mr. Probets save a reference to Mr. Desmond procuring that the shareholders grant a lien over their shares to the bank and lodge their share certificates with the bank. This, in fact, was not obtained by the bank. It is noteworthy that, as with Hill Samuel, the personal assets of Mr. Probets were not sought as security. This credit application was followed by a letter of the 19th July 1991 to Freezone, which reflected the credit application document, save that it did not refer at any stage to Mr. Probets. Its terms appear to have been agreed with Mr. Desmond.

9.5.11 On 15th October 1991, Freezone executed a letter of hypothecation in favour of Ansbacher stating that they had deposited with Ansbacher, the sum of IR£500,000 as security for Ansbacher continuing loan facilities to Freezone. This was pursuant to a letter of 15th October 1991 from Freezone to Ansbacher, requesting that Ansbacher retain out of the proceeds of sale of Freezone's shareholding in Emmets, which was due to be received on 18th October 1991, the sum of £500,000 to be hypothecated to secure the liabilities of Dagord to the bank. It would appear that Freezone were to guarantee the liabilities of Dagord. On 15th October, Dagord's account at Ansbacher was debited with the sum of £500,000 in respect of a bank draft for that amount in favour of Dedeir, which bank draft was endorsed back to Ansbacher, to be used to discharge the Dermot Desmond loan of £500,000 drawn down in January 1990 (see Paragraphs 6.10.1 et seq. and 9.2.1 et seq.). Even though the proceeds of sale of Emmet shares was not due until 18th

October, 1991, Ansbacher would have felt secure, as they had a charge over the Emmet shares to secure all of Freezone's liabilities to them and Freezone had granted a power of attorney to Mr. Moloney of Ansbacher, as part of the bank's security requirements.

- 9.5.12 Subsequently, on 21st October 1991, Freezone requested the release of monies pledged to Dagord and the payment of such monies in Deutschmarks to Amarac Limited. This was effected on 21st or 22nd October 1991 by transfer to "**Banque Scandinave en Suisse, Geneva, account Mr. Andre de Pfyffer Etude a/c Ref. Amarac**" to which account the remaining proceeds of the sale of Freezone's shares in Emmets had been transferred on 18th October 1991. In lieu of the Freezone security, Ansbacher received security by way of guarantee from Amarac supported by a letter of lien and a letter of hypothecation over a deposit of £500,000 in the bank's books in the name of that entity. It also had additional security including a personal guarantee by Mr. Desmond.

9.6 ICC

9.6.1 As stated in Paragraph 9.3.10 above, I received certain documents from ICC together with extracts from other documents. The documents related to two transactions in which ICC had an involvement; the first being a loan in May 1987 to Colin Probets to acquire from Freezone, shares in Emmets; the second being the purchase by ICC from Freezone of 1.3m shares in Emmets on the 28th April 1988.

9.6.2 It would appear that sometime on or shortly before 19th May 1987, an application was made to ICC by Mr. Desmond for a loan to Mr. Probets to enable him to acquire shares in Freezone, as an ICC Internal Report dated 19th May 1987 states that the loan

"would subsequently facilitate a rights issue for shares to enable funds to be provided to Freezone or Emmets. If necessary, Freezone would provide a letter that it would reinvest the funds in further acquisitions. Freezone is the company which owns 100% of Emmets. He (Mr. Desmond) said he could not disclose to ICC the ownership of Freezone".

The statement is contained in an extract from an ICC internal report to its Credit Committee and attached to that was an appendix which stated, inter alia, that in June 1986 Mr. Desmond arranged to buy Emmets through an Isle of Man investment company, Freezone Investments Limited, at a total cost of £6m.

Mr. O'Nuallain of ICC stated in evidence that the reference in the appendix to Mr. Desmond arranging to buy Emmets through Freezone did not necessarily refer to Mr. Desmond doing this personally, but possibly as a broker.

9.6.3 A memo of 21st May 1987 of a meeting, attended by Mr. Probets, Mr. O'Dwyer of Dedeir and three representatives of ICC, noted that the relationship of Mr. Probets with Mr. Desmond was discussed.

Apparently Mr. Probets, or Mr. O'Dwyer on his behalf, said that he had developed a very close relationship with Mr. Desmond from a business and social point of view over the previous few years and that Mr. Desmond now advised him. He said that Mr. Probets, was the front man for Freezone in the past, involving an Irish millionaire. As a result of this, he was given an option in respect of 40% of the shares in Emmets, but ICC were not told who the Irish millionaire was. An internal memo from the ICC representatives at that meeting to their law agent on the same day, noted that Mr. Probets had previously fronted for the undisclosed owner of Freezone and

"it may be that the present transaction represents a continuation of Mr. Probets "fronting" role although the facts of the case as presented to us do not indicate this".

ICC were given a copy letter of 27th June 1986 from Freezone to Mr. Probets, whereby Mr. Probets was granted an option to purchase from Freezone 40% of it's shares in Emmets, at a cost of £2,400,000, such option to be exercised before 31st May 1987.

- 9.6.4 A note of a telephone conversation of 22nd May 1987 by a further representative of ICC, indicated that Mr. Desmond was reluctant to disclose the ownership of Freezone and it was suggested that he should talk to Mr. Casey, the managing director of ICC to disclose this to him. The conversation with Mr. Desmond related to the loan application of Mr. Probets for the STG£2.2m. A note to the ICC board, also dated 22nd May 1987, noted in relation to Freezone that at the present time, it owned 100% of Emmets and that it was resident in the Isle of Man. It added that, according to a bank inquiry report, it commenced business in 1985 and its ownership was divided equally between Mr. Alan Gough and Mr. Paul Morris (Moore). It added that ICC had not been given any information on the company save that they were informed that **"a prominent well known Irish businessman is behind it"**. A further extract from the report to the board again indicated

that Mr. Probets had fronted for the Freezone undisclosed shareholder and that perhaps the present transaction represented a continuation of that "fronting" role.

9.6.5 The board decision of ICC on the 26th May 1987 approved the loan, but indicated some concern about the non-disclosure of the name of the main shareholder in Freezone, although Mr. Casey, the managing director indicated to the board that Mr. Desmond had given him some information in that regard.

9.6.6 Also disclosed to me by ICC, was a draft undated agreement of 1987 whereby pursuant to an agreement between Freezone and Mr. Probets, Mr. Probets agreed to acquire from Freezone, 40% of the Emmets shares and NCB, also a party to the agreement, agreed to purchase the shares from Probets at the price paid by Mr. Probets, if he failed to dispose of his shares by 30th November 1987, at a price equal to or in excess of the price paid by Mr. Probets to Freezone. This would indicate that the transaction may not have been a genuine share purchase by Mr. Probets, but was a method of raising short term finance. The loan was granted to Mr. Probets and drawn down, on or shortly after 5th June 1987. Mr. O'Nuallain informed me that the scheduled date for repayment of the loan was 30th November 1987, as Mr. Desmond had informed ICC that Emmets was to "go public" and seek a listing on the USM of the Stock Exchange before that date.

9.6.7 I was also given by ICC, a certified copy resolution of a meeting of the directors of Emmets held on 5th June 1987 and signed by Mr. Desmond and John O'Dwyer as directors, which noted and approved the transfer of 1,041,280 ordinary shares in the company from Freezone to Probets, instructed the issue of a share certificate to Mr. Probets and noted that Mr. Probets was to be appointed a director of the company with effect from 5th June 1987. I was informed by Mr. O'Nuallain that a share

certificate was issued and given to ICC as security for their loan.

9.6.8 According to an ICC file memo, at a meeting of 23rd September 1987, dealing with the proposed flotation of Emmets, Liam Booth of NCB informed ICC that there was to be no further identification of the parties behind Freezone and said that Mr. Desmond was not disposed to disclose the identity of the Freezone owner, even though ICC said that, as sponsors of the flotation, they would need it and anticipated that the Quotations Department of the Stock Exchange would also need it.

9.6.9 According to a further file memo of ICC, at a meeting of 25th September 1987 between Michael Ahearn of ICC Corporate Finance and Liam Booth of NCB, Mr. Ahearn queried why Mr. Probets did not appear as a shareholder in Emmets in the draft prospectus. According to the said memo, Mr. Booth explained that he understood that Mr. Probets had taken a shareholding in Freezone and added that following the flotation, the shareholdings in Emmets would be:

Freezone 40%

NCB Nominees 20%

Swiss Bank 20%

Public 20%

Mr. Booth, in his evidence to me, stated that he did not recollect his making such an explanation nor did he recollect reference to a Swiss Bank becoming a shareholder.

9.6.10 At a further meeting of 21st October 1987, Mr. Ahearn pointed out again that ICC held a share certificate for 1m shares in Emmets, yet the draft prospectus stated that Freezone owned all the shares. According to an ICC file memo, Mr. Booth again explained that it was originally envisaged that Probets would get shares in Emmets but that he ultimately got them in Freezone. ICC did not pursue at that stage the validity of their security arising from this information, as Mr. O'Nuallain

was happy to rely on the certified copy resolution of Emmets and the share certificate issued to Mr. Probets, which was held by ICC.

9.6.11 Sometime on or shortly before 13th November 1987, the Quotations Department of the Stock Exchange enquired why the company should be controlled by Freezone and asked for the identity of Freezone. At a further meeting of 1st December 1987 between Mr. Booth and Mr. Ahearn, the confusion in relation to the ownership of Emmets shares was referred to again. It was also noted that ICC had still not been told who the owner was.

9.6.12 Subsequent memoranda, one being undated and the other being dated 26th February 1988, indicated that ICC were concerned about the failure to disclose in the draft prospectus of Emmets, the loan which they granted to Mr. Probets which was to be repaid out of the placing and the security for which included an undertaking by NCB to purchase the shares from Mr. Probets and pay off the ICC loan and they were also concerned about the fact that they held a share certificate in the name of Mr. Probets in the company. It was also noted in one of these memoranda that Mr. Desmond opposed the inclusion of any reference to the material interests of ICC and NCB in the prospectus and it was noted in the memo of the 26th February 1988 that Mr. Probets was to acquire all of Freezone. According to the said memorandum of 26th February, Mr. Desmond sought to assure Mr. Ahearn that this transaction was genuine, but Mr. Ahearn noted his lingering suspicion that it was not and that it was being arranged purely to comply with Stock Exchange disclosure requirements. It would appear that the information, that was given to the former managing director of ICC in May 1987, when the loan to Mr. Probets was first approved by the ICC board, was that Freezone was owned by Mr. Probets.

9.6.13 It would appear that Mr. Desmond sought to circumvent the concerns

of ICC, by arranging for the repayment of the Probets loan and subsequent purchase of shares by ICC and Kiril, before the prospectus was issued for the placing of shares with the public in conjunction with the flotation of the company.

9.6.14 On 22nd April 1988 a recommendation was made to the ICC Credit Committee that ICC agree to purchase 1.3m shares in Emmets on or about the 28th April and that ICC enter into a placing agreement to place 2.6m shares with the public on the flotation. ICC appears to have ignored their earlier concerns in relation to the share certificate in the name of Mr. Probets and the non-disclosure in the prospectus, even though they were aware that the Probets loan was being repaid out of a bridging loan which itself would be repaid out of the sale of shares to ICC and Kiril.

9.6.15 I was also furnished by ICC with a draft agreement of April 1988 in relation to the security for ICC in acquiring the shares from Freezone, prior to Emmets going public. This provided for an undertaking by Freezone to buy back the shares at effectively the same price, but Mr. Desmond undertook that he personally would procure that Freezone would comply with its obligations and indemnify ICC against any loss or damage that they might suffer arising from the failure on the part of Freezone to repurchase the shares as agreed.

9.6.16 There was also produced with these documents, a letter from Freezone signed by its directors on the 9th June 1987 indicating that the Power of Attorney dated 10th December 1985 to Mr. Desmond was still valid and accepted by the company, but the Power of Attorney itself was not made available to me, as it was returned to Dedeir when the Probets loan was repaid.

9.7 Emmets/Freezone offer for UPH

- 9.7.1 At a board meeting of UPH on 27th March 1990, Mr. Barry, as a director advised the meeting that he had been approached by Mr. Desmond on behalf of Emmets expressing an interest in acquiring UPH. Mr. Desmond had asked Mr. Barry that Emmets' interest be communicated to the board of UPH. At the said board meeting, the chairman, Mr. Pairceir advised that UPH should talk to Emmets as they would talk to any seriously interested party and Mr. Barry recommended that the board of UPH employ NCB Corporate Finance as advisers. It was decided that Mr. Barry should inform Mr. Desmond that the UPH board was willing to enter into negotiations with Emmets and that a formal written expression of interest should be sought from them.
- 9.7.2 Mr. Pairceir wrote on behalf of UPH to Mr. Desmond on 29th March 1990. Further correspondence ensued between UPH, NCB Corporate Finance and Mr. Desmond and sometime between March 1990 and June 1990, the offer changed from an offer by Emmets to an offer by Freezone. The offer by Freezone involved an obligation to convert into shares in Emmets. NCB Corporate Finance prepared a preliminary valuation of the proposed offer on the 19th June 1990 and this was reviewed by the board of UPH at its meeting on 21st June 1990. The NCB Corporate Finance recommendation was to reject the offer as then currently constituted.
- 9.7.3 Mr. Pairceir reviewed in detail the reasons outlined by NCB Corporate Finance for rejecting the offer and when Mr. Barry was asked for his view, Mr. Barry indicated that the offer should be rejected because it was not bank guaranteed. He suggested that there were two options viz. to seek a semi-cash offer i.e. bank guaranteed (his preferred option), or alternatively, seek a higher valued paper offer. NCB Corporate Finance had recommended that UPH seek a higher paper

offer that would be convertible, redeemable and bank guaranteed and the board of UPH decided to instruct NCB Corporate Finance to pursue with Freezone their recommendation, with a view to determining whether Freezone would change its offer to suit the UPH requirements. Mr. Pairceir as chairman then advised, that given the board's previous decision to explore the option of "exiting" the property market and notwithstanding the Freezone offer, they should ask NCB Property to assess the potential demand for their properties in the market. He added that this would assist the board in putting an overall value on UPH. That board meeting then arranged the first AGM of the company, UPH, to be held on Thursday, 19th July 1990.

- 9.7.4 The next board meeting of UPH was held on 25th October 1990 at which meeting the board approved the transfer by NCB Group of its shareholding in UPH to Pegasus at a price of £2.30 per share and by Pepper Canister Nominees of its shareholding to Pegasus at the same price. It had earlier been intended that NCB Group would transfer its shares to Dedeir but the actual transfer was made to Pegasus.
- 9.7.5 The next board meeting of UPH was held on the 14th January 1991 and under the heading "**Matters Arising**", the Chairman noted that Freezone had not pursued its interest in acquiring UPH.
- 9.7.6 Although, the proposed acquisition by Freezone of UPH did not proceed, its significance lies in the plans as outlined in the Ansbacher memorandum of 21st March 1990 described in Paragraph 9.5.4 to use the entire proceeds of sale of the JMOB site including the profit of UPH for the benefit of Freezone.

10.0 Involvement of Telecom

Because it was Telecom that bought the JMOB site from Chestvale, Hoddle and Delion and because the issues arising from my warrant are so complex and yet all arise from the series of transactions that led up to that purchase, I consider it necessary to analyse in detail the involvement of Telecom in that series of transactions.

10.1 January/February 1989

10.1.1 I have been informed by Mr. Walsh (who was acting as chief executive of UPH) that during early 1989 and in particular at the end of January and beginning of February, he discussed with Mr. Finnegan of Finnegan Menton, the possibility of a deal being put together with Telecom whereby Telecom would agree to take a thirty five year lease of an office building, to be erected on part of the JMOB site, for their corporate headquarters. As indicated earlier, Mr. Walsh had formed the view that there was a better chance of getting planning permission for offices which were of the corporate HQ type as distinct from an office park type development. He, in conjunction with Mr. Finnegan, considered some likely tenants for a corporate HQ and Telecom emerged as the most suitable and likely tenant. Mr. Walsh referred in his evidence to a particular meeting with Mr. Finnegan on 6th February 1989 when the issue was discussed and according to Mr. Walsh's evidence, these discussions were the culmination of discussions which had taken place over the previous few weeks. This meeting and the discussions leading up to it were described in Paragraphs 4.6.1 - 4.6.4.

10.1.2 Each of Mr. McGovern, the chief executive of Telecom and Dr. Smurfit have stated in evidence that they were not aware of any such plans or discussions.

10.2 June 1989 Board Meeting

10.2.1 At a board meeting of Telecom on the 9th June 1989 Dr. Smurfit, for the first time, formally raised the issue of a new corporate headquarters for Telecom. The issue arose under "**Any Other Business**" and the relevant extract from the minutes of the meeting is as follows:

"(iii) Corporate Headquarters

On the Chairman's suggestion, it was agreed that initial enquiries be instituted to find a suitable location for a new corporate headquarters where the board, offices and senior corporate management could be brought together."

10.2.2 According to the evidence of Dr. Smurfit, the question of a corporate headquarters had been referred to by him informally, on a few occasions at board luncheons, prior to January 1989. Mr. Johnson, a director of the company, has said that he never heard of any reference to such a suggestion. Mr. McGovern, the chief executive, thought it might have been mentioned at a Christmas lunch but stated in evidence that he was very surprised to hear it raised at a board meeting without any advance discussion with him. Ms. Meehan another director of the company stated that she recollected an earlier reference to a corporate headquarters on some informal occasion but could not pinpoint when exactly she did hear it. At the board meeting of 9th June 1989, there was some suggestion of the headquarters being on the south of the city. According to his own evidence and that of Dr. Smurfit, Mr. Johnson stated that other parts of the city and in particular the inner city or north side should be looked at. Dr. Smurfit then asked Mr. Johnson to join him on an informal sub-committee to look at possible sites.

10.2.3 Mr. McGovern has furnished documentation to me which show that

between mid 1980 and April 1982, while the interim board was in existence (pre formal vesting by the Department of Posts and Telegraphs to Telecom), consideration was being given to a headquarters for Telecom, but this was on the basis that all of Telecom's office personnel in Dublin would be located together. Sites then being looked at were in the city centre including a site then owned by the Dublin Port and Docks Board on which has been built the Financial Services Centre; a site owned by Irish Life at Georges Quay and a site owned by Hardwicke at Parnell Street, opposite the Irish Life Shopping Centre. For various reasons, these plans did not proceed at that time and the idea appears to have been shelved for a number of years.

- 10.2.4 The first formal reference to the Telecom board on 9th June 1989 was within ten days of the receipt by UPH of the offer from Mr. Smyth, made at the request and on the instructions of Mr. Desmond, as described in Paragraph 5.2.10 and around the time when discussions between Mr. Desmond and Mr. Smyth were allegedly taking place about the formation of a consortium to buy the property from UPH.

10.3 September Board Meeting

10.3.1 Although there was a board meeting of Telecom in July 1989, the issue of the headquarters does not appear to have been mentioned. At a further board meeting (in Dundalk) on the 6th September 1989, although it was not on the agenda circulated to the board beforehand, the issue of corporate headquarters was again raised by Dr. Smurfit as chairman and the minute of that meeting reads as follows:-

"(iii) Corporate Headquarters

The Chairman said that he was still investigating this matter and would report further to the Board in due course."

10.3.2 Immediately before or after that meeting, in an informal discussion with Mr. McGovern and Mr. Johnson, Dr. Smurfit asked Mr. Johnson to look at the Crampton site in Shelbourne Road, Ballsbridge, but to be careful that the owners would not be alerted to any interest on the part of Telecom in the site. Dr. Smurfit in his evidence in October 1991 stated that Mr. Johnson was only asked to look at the Crampton site because at that time, "the JMOB site was not in my focus".

10.4 Pre June 1989 Inquiries by Dr. Smurfit

10.4.1 In fact, prior to the board meeting in June 1989, Dr. Smurfit had initiated enquiries for a site for the headquarters. On the 5th May 1989, Dr. Smurfit wrote to Mr. Strudwick of Ryde International plc in which letter he stated

"Telecom Eireann are considering the purchase and development of a new head office, between 35-50,000 square feet, which would have to be located in the centre of Dublin. If you have any ideas perhaps you would let me know".

Dr. Smurfit subsequently met Mr. Strudwick on the 16th May in relation to the Sweepstake site in Ballsbridge which was owned by one of Mr. Strudwick's companies. Mr. Strudwick produced a series of plans for that site but according to Dr. Smurfit they did not suit the design that he had in mind. These plans were not shown to the board of Telecom nor was the board made aware of the letter or the meeting. Dr. Smurfit, when asked by me why he asked Mr. Strudwick and not any other developer, replied that he had met Mr. Strudwick some months earlier at a race meeting for the first time and had got chatting to him. He then got to know that Mr. Strudwick was a property developer in London and was going to do something in Ireland. He added that Mr. Strudwick turned out to be the owner of the Ballsbridge site so he was looking to him for any ideas and he was just **"a chap I wanted to get to know and I just wrote to him"**. Dr. Smurfit stated that he had not written to any other developer or discussed it with anybody else and when I asked him again, why he chose Mr. Strudwick rather than any of the other property developers in Ireland, particularly when Mr. Strudwick was not long in the country, he replied **"these are things I just do, pick it up and write"**.

10.4.2 Also on the 5th May 1989, Dr. Smurfit sent a memo jointly to Mr. Finnegan of Finnegan Menton Auctioneers and Mr. Hassett of Hassett

& Associates, Auctioneers. This memo stated:-

"Gentlemen:

Telecom are likely to need a new head office of between 30,000 to 50,000 square feet in the next few years. Please let me know what is on the market, sites etc. as I would like to design and build our own."

10.4.3 Dr. Smurfit said in evidence to me on the 25th October 1991 that he did not have any response to that memo from either Mr. Finnegan or Mr. Hassett, at least as far as he could recall.

10.4.4 Although Mr. Finnegan had been instructed in mid April 1989 by UPH to sell the JMOB site, and as recently as 28th April 1989, had sent out a brochure and covering letter from a selected list of possible purchasers, he has said in evidence that he did not think of matching what were, at that time, among the biggest sale and purchase commissions in the Dublin property market and accordingly did not consider bringing the JMOB site to the attention of Dr. Smurfit. He explained that he had not considered that Telecom would take on a development role (i.e. buying a site without planning permission) and that it had not occurred to him that they would be looking for a five to six acre site. He also stated in evidence that he did not mention to Mr. Desmond or Mr. Barry the fact that Telecom were looking for a site for a corporate HQ. This is consistent with the evidence of Messrs. Desmond and Barry.

10.4.5 When UPH advised Mr. Finnegan in mid April, that a decision was made to sell the property, Mr. Finnegan and/or some of his employees drew up a list of "potential" or "target" purchasers in conjunction with UPH, with the intention that invitations to tender for the property would be sent to him. A number of drafts of this list was prepared and on the first or second draft of the list, Dr. Smurfit's name appeared with

that of Mr. Goodman. These names were then crossed out manually and did not appear on the final list. Mr. Finnegan cannot explain why the names appeared and why they were then crossed out, but thought that it related in some way to Dr. Smurfit and Mr. Goodman having jointly bought the Setanta Centre in December 1988 (when Mr. Finnegan acted for Dr. Smurfit). Dr. Smurfit has stated in evidence that he was unaware of this fact and that he did not receive a brochure. Mr. Goodman also stated in evidence that he was not aware of the fact and he could not recollect whether or not he got the JMOB brochure, as he regularly got brochures from estate agents which "tended to end up in the bin".

10.4.6 Mr. Finnegan's initial evidence to me in October 1991 was that he did not have any communication with Dr. Smurfit about his memo and this was consistent with Dr. Smurfit's evidence that he did not receive any response to his memo of the 5th May 1989. However, on further examination of Mr. Finnegan and his file, it transpires that there had been some communication with Dr. Smurfit, and Mr. Finnegan actually wrote to Dr. Smurfit on the 24th May 1989, referring to the memorandum of the 5th May, and suggested a meeting, as he wished to explain to Dr. Smurfit some views he had on the matter.

On the 29th May 1989, Mr. Finnegan circulated a memorandum among his sales staff stating that a client had a requirement for a site of 50,000 square feet of offices "preferably on the city outskirts". I infer from this that Mr. Finnegan either met or spoke to Dr. Smurfit between the 24th May and the 29th May, as his internal memorandum is more specific than the memo from Dr. Smurfit. Mr. Finnegan in his evidence to me on 12th June 1992 stated that he mentioned to Dr. Smurfit a site in Dun Laoghaire (the Adelphi Centre and a site in Blackrock (owned by IBM on Merrion Avenue)). Dr. Smurfit in his evidence on 14th June 1992 stated that he did not recollect getting a copy letter from Mr. Finnegan dated 24th May and did not recollect any discussion where

he might have used the phrase "city outskirts", on the grounds that it was not a term he would use. However, when I referred him to the Adelphi site in Dun Laoghaire, he stated that it struck a cord and added that he went to school in Presentation College next door and then recollected saying to Mr. Finnegan "I know the site". He added that he could not remember saying to Mr. Finnegan that that site was too far removed but that that would have been his reaction. He added that he did not recollect any reference to the IBM site in Blackrock. Mr. Finnegan, in his evidence to me on 24th October 1991, stated that the memo of 5th May 1989 was not treated seriously by him, as it did not show any urgency and he had done some work looking for a site for Telecom some years before that, which had not come to any conclusion. In his evidence of the 12th June 1992, Mr. Finnegan again stated that he did not know how serious and indeed how urgent the inquiry from Dr. Smurfit was. However the letter of Mr. Finnegan and his subsequent discussions with Dr. Smurfit belie his initial suggestion that he did not do anything in relation to the memo.

10.4.7 Although Dr. Smurfit stated in his evidence to me in October 1991, that he could not recollect any response from Mr. Hassett to his memo of the 5th May 1989, Mr. Hassett in evidence to me stated that he had a number of discussions with Dr. Smurfit, in particular about a site at City Quay. He said that his firm had done a considerable amount of work in investigating the suitability of the site (which was originally considered unsuitable because it was not large enough). According to Mr. Hassett, Dr. Smurfit also discussed with him the Sweepstake site and his discussion with Palmer McCormack, and Mr. Hassett stated that he was also aware of the plans drawn up by Mr. Strudwick. He said that he also mentioned to Dr. Smurfit a site at Shelbourne Road ("the Crampton site") and a site on Merrion Street where there had been a church. Mr. Hassett added that he was told by Dr. Smurfit that the site required, had to be "a prime site", and that the head office

"would have to be one of the best head offices in the country".

According to Mr. Hassett, the discussions with Dr. Smurfit took place after he received the memo of the 5th May 1989. Dr. Smurfit in his evidence to me in October 1991, said that the only site that Mr. Hassett mentioned to him was the Crampton site.

10.4.8 Mr. Hassett's explanation, as to why he did not consider the JMOB site and suggest it to Dr. Smurfit, is that, he was piqued by the appointment of Mr. Finnegan by UPH to act in relation to the sale of the property. He stated that he had been aware of the purchase of the property by UPH/Mr. Desmond from a very early stage after the initial indicative tender in August 1988, and prior to the final and successful tender in November 1988. He was also aware of a view, which he said had been expressed by Mr. Desmond, that the property would be sold on. Mr. Hassett stated that he was aware of the decision in April 1989 by UPH to sell the property and in fact had complained to Mr. Desmond that he should have been involved in the sale (he had also sought to advise UPH in relation to this property, in a memorandum dealing with a number of UPH properties on the 13th September 1988). Even when he received a second memorandum from Dr. Smurfit on the 18th August, and notwithstanding that he had been unable to find a suitable site, he says that he never actually thought of that site for Telecom. He stated that in retrospect, he wondered whether he had "a mental block because I was not involved and I was kept out of it". Mr. Hassett has said that he never discussed the JMOB site with Dr. Smurfit at all (until the article in the Irish Independent in February 1990). Mr. Hassett has further said that he was not aware of the eventual sale by UPH to, as was reported in the media, a European Property Consortium, and that he had never heard of the subsequent sale to Telecom until the period immediately prior to the Telecom Inquiry.

10.4.9 On the 6th June 1989, Dr. Smurfit wrote to Palmer McCormack & Partners (who were the auctioneers/letting agents acting on behalf of Mr. Strudwick's companies) and stated

"I am examining the possibility of building a new headquarters for Telecom and the space required would be in the 20,000 to 40,000 square feet area preferably with surrounding land for the building of telecommunication equipment facilities".

The reference to **"surrounding land for the building of telecommunication equipment facilities"** is significant, at least, in that it is the only time where that requirement is mentioned in all of the memos written by Dr. Smurfit, at least until early 1990. Dr. Smurfit, in his evidence to me on the 14th June 1992 stated that what he meant by this was **"the interpretative centre"**. I asked him if there was any reason why Palmer McCormack were told of this requirement and the others weren't and he replied **"well they weren't"**. I stated that Palmer McCormack were told that there was something more than offices required, that Dr. Smurfit wanted additional lands for a telecommunications equipment facility and Dr. Smurfit replied

"well they were already under way with the programme, as I understood it, from them, a presentation to me, if my memory serves me correctly showing what they were going to do in Ballsbridge and I wanted something different than what they were doing so they would have to have had full planning permission which they were getting and I can't remember exactly".

Dr. Smurfit explained that his major problem with the Palmer McCormack plan was that they were fixed with what they were doing, that they had got or were getting planning permission for a restaurant and three blocks of houses, so that he couldn't have got the interpretative centre on to the site. Dr. Smurfit however did not satisfactorily answer the question I had put to him as to why Palmer McCormack were the only party to whom this additional requirement was mentioned.

10.5 August 1989

10.5.1 On or about 13th August 1989, (i.e. two days after Chestvale had paid £4,000,000 to the liquidator of JMOB for the site), Dr. Smurfit's secretary contacted Mr. Finnegan with a view to his accompanying Dr. Smurfit on an inspection of the Carysfort site in Blackrock, Co. Dublin on 15th August. Mr. Finnegan and Dr. Smurfit have stated that during their return from that visit to Blackrock on the 15th August, the issue of a site for a headquarters for Telecom was discussed and it was suggested by Mr. Finnegan that Dr. Smurfit look at the JMOB site. While Mr. Finnegan was aware that the site had been sold by UPH (Mr. Finnegan had acted on behalf of UPH in relation to its sale) and indeed the papers that day had reported its sale to a "European Property Consortium", he stated that he still considered that the new purchaser (whose identity he was not aware of) might be interested in a further sale-on.

10.5.2 Mr. Finnegan stated in his evidence, that Dr. Smurfit and he walked around the perimeter of the JMOB site, and that he told Dr. Smurfit that the site was sold and that Mr. Desmond was involved. He added that Dr. Smurfit enquired "what numbers were involved" and Mr. Finnegan stated that they were in excess of £6,000,000. Dr. Smurfit has stated in his evidence that he does not recollect any such discussion and stated that his recollection was that he and Mr. Finnegan merely passed by the site on that occasion. He added that while he may have expressed interest in the site, no further serious discussions took place about price or value. Mr. Finnegan in his evidence stated that he advised Dr. Smurfit on the planning position with the site. Each of Mr. Finnegan and Dr. Smurfit stated in evidence that Dr. Smurfit made it clear to Mr. Finnegan that he was viewing this site in his capacity as chairman of Telecom and that he had been looking at the Carysfort site on his own behalf and not on behalf of

Telecom or any other party.

10.5.3 Mr. Finnegan stated in evidence that he showed Dr. Smurfit the Sweepstake site in Ballsbridge and the Crampton site on the same occasion but that they merely drove by the sites.

10.5.4 On the 18th August 1989, Dr. Smurfit sent another joint memo addressed to Messrs Hassett and Finnegan which stated:-

"Gentlemen, as you know I am anxious to acquire for Telecom Eireann a site in the centre of Dublin for a 40,000 square foot building. I need to have some information and certainly no later than the end of this year. Please let me have the options as soon as possible".

Neither Mr. Hassett nor Mr. Finnegan could explain why the memo was sent out in such general terms notwithstanding their respective communications with Dr. Smurfit since the previous memo. Dr. Smurfit did not consider the absence of any reference to the May memos unusual, nor the fact that the size referred to was different than that indicated earlier.

10.5.5 At a board meeting of Telecom on 6th September 1989, Dr. Smurfit reported that he was continuing his search for a site. During brief discussions, either before or after the board meeting he asked Mr. Johnson to have a look at the Crampton site in Shelbourne Road, but to be very discreet, as he did not want Cramptons to know that Telecom might be interested.

10.5.6 On the 8th September 1989, Dr. Smurfit wrote to Mr. Hassett in relation to the Crampton site and requested Mr. Hassett to
"write formally to Crampton on my behalf (for Telecom) indicating that I would like to meet them to discuss the matter. You can also say that I was around the site some time back and was impressed

by it".

Pursuant to that request, Mr. Hassett wrote to Cramptons by letter dated the 11th September 1989, in which he stated that:

"We are actively looking for a site suitable for a head office for Telecom Eireann and I was wondering if you would be interested in selling or developing your site at Shelbourne Road, as the location would be suitable to our requirements.

If you are interested, please let me know and I can arrange a meeting with yourself and Dr. Michael Smurfit, Chairman of Telecom Eireann, when the matter could be discussed. Dr. Smurfit was around your property some time back and feels that it will be an ideal location if an amicable agreement could be reached.

I am sure that you will appreciate that this matter be treated in the strictest confidence.

Yours sincerely "

10.5.7 The instructions of Dr. Smurfit to Mr. Hassett contrast sharply with the instructions to Mr. Johnson. I indicated my concern about this contrast to Dr. Smurfit on the 14th June 1992. He explained that

"What I was trying to get over there was that if a director started appearing on the surface as against an agent that would have appeared as a sort of "maybe, what if" type of situation that they would get a confident belief that we were going to do it and the price would go up".

I pointed out to Dr. Smurfit that his instructions to Mr. Hassett and the letter from Mr. Hassett to Cramptons indicated that Dr. Smurfit as chairman was interested and that that would obviously be far more important than coming from a director. Dr. Smurfit replied that in retrospect I was correct and that he should have informed Mr. Johnson of Hassett's letter. He added

"The fact is that I didn't. It was a mistake I made. I didn't focus on it."

- 10.5.8 According to Mr. Hassett, there were some discussions with Cramptons but the matter did not progress as he understood that Cramptons had some difficulties with their planning application and that Telecom personnel having looked at the site "went cold on it". Mr. Hassett has also stated in evidence that he did not hear anything further in relation to the Telecom requirement for headquarters until he read about it in the Irish Independent in February 1990.
- 10.5.9 Dr. Smurfit stated to me in evidence in October 1991 that he was familiar with the Crampton site as there had been a suggestion some time previous to that, that Cramptons would swap their site with the Smurfit De La Rue site in Clonskeagh.
- 10.5.10 Dr. Smurfit did not tell the Telecom board nor Mr. Johnson who had been appointed to the sub-committee with him, of any of his communications with Messrs. Finnegan, Hassett, Strudwick or Palmer McCormack, even though these had been initiated by him in May 1989, prior to his first reference to the issue at the board meeting in June and his further report to the board meeting in September 1989. Indeed it would appear that the Telecom board were not notified of Dr. Smurfit's discussions with these third parties at any time and the management were not aware at least until May 1990, when Mr. Finnegan submitted a fee account to Telecom for his work in relation to the purchase of the JMOB site.

10.6 Superannuation Committee

- 10.6.1 At a board meeting in July 1989, Dr. Smurfit suggested to Ms. Meehan, another director of Telecom that he and she should swap the chairmanship of two board committees, so that he would become chairman of the Superannuation Committee and she would become chairman of the Executive Committee. Ms. Meehan has stated to me in evidence that she then informed Dr. Smurfit that the Superannuation Committee met very seldom, as it had very little work to do by that stage.
- 10.6.2 At the board meeting on 6th September 1989, Dr. Smurfit proposed that he replace Ms. Meehan as chairman of the Superannuation Committee and that she replace him as a member of the Executive Committee and that Mr. O'Sullivan another director of Telecom and a member of the Executive Committee, should become it's chairman. Ms. Meehan stated in evidence that she did not actually attend the board meeting in September 1989. Ms. Meehan also explained to me that the Superannuation Committee is a committee of the board and that it's initial and primary function was to design the superannuation schemes for employees of Telecom and to, thereafter, review that scheme from time to time, to see if any amendments were necessary or improvements could be made. She added that the committee was entirely separate from the trustees of the superannuation fund and that it had no function whatsoever in determining the investments of the fund. She added that in the early years of Telecom, the superannuation committee met at least three or four times a year, but by 1989 the committee would not have been meeting more than once a year or twice at the very most.
- 10.6.3 After the board meeting on the 6th September 1989, Dr. Smurfit convened a meeting of the Superannuation Committee which was held

that day. The minutes noted that Dr. Smurfit advised the committee that

"he would have some proposal to put to the superannuation fund trustees relating to a possible future development."

and said that the board had deputed himself and Mr. Johnson to review the options available. Mr. Johnson, who was a member of the superannuation committee, said in evidence to me that he believed that Dr. Smurfit when he became a member of the superannuation committee, thought he was going to become a trustee of the pension fund. When I suggested to Dr. Smurfit that Ms. Meehan was surprised when I informed her (she was not aware of it before that) that the first meeting of the superannuation committee dealt with a probable future investment in property, he replied **"new chairman, new work ways"**. I added that Ms. Meehan had not seen the role of the superannuation committee as dealing with investments, that that was for the trustees and Dr. Smurfit then referred to his having a disagreement with the trustees at a later stage, (referring to a letter which he wrote to the trustees on the 24th October 1989 recommending that they sell the Gaiety Centre and purchase a site for the headquarters - see Paragraph 10.8.1, et seq.).

10.7 October 1989

10.7.1. There does not appear to have been any reference at the October board meeting of Telecom to the corporate headquarters site nor indeed was there at the November board meeting.

10.7.2 On the 9th October 1989, Dr. Smurfit again wrote to Mr. Hassett suggesting that an ideal site for Telecom would be near the docks area and the letter went on to state

"the ideal site would have been the old Henry Jackson site which was owned by Smurfit. I do not, however, want any association with Smurfit sites for optical reasons. Notwithstanding this there might be other sites in the area which might be suitable. We need a rather large site for the building we are proposing which is between 40,000 to 60,000 square feet".

This appears to be at least part of the site at City Quay, Dublin, which according to the evidence of Mr. Hassett, he discussed with Dr. Smurfit shortly after receipt of the memo of 5th May, and in respect of which, he stated that he and his firm did quite a bit of work in trying to assemble a site.

10.7.3 On the 17th October 1989, Mr. Finnegan had an appointment with Dr. Smurfit to show him the Setanta Centre which Dr. Smurfit had at that time acquired. Although, according to the evidence of Mr. Finnegan, he had no instructions whatever from the then owners of the JMOB site, or from UPH, to try and seek a purchaser, (nor was he aware whether a sale-on by the new purchasers was under consideration), he thought that Dr. Smurfit might still be interested in the site. He added that he brought aerial photographs to the meeting and suggested to Dr. Smurfit that he again look at the site on his way back to Donnybrook. Mr. Finnegan together with his assistant, Mr. Carty, drove out with Dr. Smurfit. According to the evidence of each of Dr.

Smurfit and Mr. Finnegan, they walked the perimeter of the site, and Dr. Smurfit said that when he stood in Herbert Park and visualised the site empty, that he realised that it was what he required. He added that he thought he was being careful to hide his interest in the site from Mr. Finnegan and in his evidence on 14th June 1992, Dr. Smurfit stated that he was trying to hide his excitement from Mr. Finnegan. Mr. Finnegan in a letter of 24th May 1990 to Dr. Smurfit, when seeking to justify a claim for fees of 2.5% of the consideration of £9,400,000 paid by Telecom, stated inter alia:

"Among the many sites I introduced to you was the former Johnston Mooney & O'Brien site. We had a number of visits to the site, culminating in our final visit to the property on the 17th of October last when you had decided to move forward on the acquisition..."

When I suggested to Mr. Finnegan that this letter indicated that he was aware, that as of mid October 1989 Dr. Smurfit intended to acquire the JMOB site, because in his letter he was effectively saying to Dr. Smurfit that he had persuaded him on the 17th October 1989 to purchase it, Mr. Finnegan replied that he meant that

"after that they did move forward to buy it and I was not involved".

I pointed out to him that he had used the term

"culminating in our final visit when you decided to move forward"

and that he was effectively saying that he had showed it in August and he was making a decision then in October. Mr. Finnegan replied:-

"No - on reflection he did not decide on 17th October but after that he did - maybe I phrased it badly."

Dr. Smurfit's evidence is that it was at the October site visit that Mr. Finnegan advised him that Mr. Desmond had sold the site. Dr. Smurfit understood this reference to mean Mr. Desmond personally and not any investment property vehicle that he might have had an involvement in.

10.8 Pension Fund Trustees

10.8.1 On 24th October 1989, Dr. Smurfit wrote to Ms. Meehan in her capacity as chairman of the Telecom Superannuation Fund Trustees suggesting that they sell the Gaiety Centre (which he had been involved in acquiring) and that they buy the JMOB site for a proposed corporate HQ of Telecom.

10.8.2 I asked Mr. Johnson, in the course of his attending before me, if he became aware of the letter from Dr. Smurfit to Ms. Meehan. He replied that he was not a trustee of the pension fund and accordingly he was not directly involved. He added that Dr. Smurfit got confused personally about the relative roles of the superannuation committee and that of the pension fund trustees and that it was when he convened a meeting of the superannuation committee that he found out that it was not the committee he thought it was. He added:-

"He obviously got his jerseys mixed up and did not run any thing in substance. I think it was pointed out to him that he was knocking on the wrong door."

I then asked Mr. Johnson how he became aware of the fact that Dr. Smurfit had written to the trustees about selling the Gaiety Centre and Mr. Johnson replied that he couldn't describe exactly how he came to have that knowledge and added

"I think it was probably common enough knowledge what his intention was from the time he actually ran to the Superannuation Committee and then realised that it was not for them but the cat would have been out of the bag into his kind of intentions at that stage so I think it was from around that time that I was basically knowledgeable."

I replied to Mr. Johnson

"But, there did not seem to be anything untoward in that"

And Mr. Johnson replied:

"No. Again I asked a few questions around and I was told "yes, he has done this before", - in fact the Gaiety building was very much another one of those that (he) evolved and manned (ran with), but ultimately he had to put it to the Board."

Mr. Johnston added that Dr. Smurfit was looking for "off the Balance Sheet methods of financing this thing without effecting the bottom line". He added further:

"It was obvious from again around that time that he was trying to run it through the Superannuation Committee, he wanted to get this particular property and he was anxious that it was off the main balance sheet so as not to affect the bottom line and adversely affect the borrowing situation which was very poor. So, he saw this as an opportunity of a lease back situation where everybody would kind of bring something to the party. That was the rationale".

10.8.3 In fact, Ms. Meehan replied by letter of the 5th December 1989 stating that the trustees of the superannuation fund had decided not to dispose of the Gaiety Centre and she set out a number of reasons which influenced the trustees in reaching their decision including the potential difficulties of replacing the Gaiety Centre investment, ("a prime property with Telecom as it's sole tenant"), with property suitable for acquisition by a pension fund with the investment objectives of the Telecom fund, and the fact that a sale of the Gaiety Centre at that time would not reflect the true value of it's potential long term contribution to the fund. She added that in relation to the question of the superannuation fund financing the development of new headquarters for the company, that they would be prepared to consider a formal proposal from the company, should the company decide to pursue it, but that any proposal would, of necessity, have to be considered on a fully commercial basis from the funds perspective and in the light of the returns which the fund could generate from alternative property investments.

10.8.4 By letter of the 15th December 1989, Dr. Smurfit replied to Ms. Meehan noting the decision of the trustees and stating

"In order to put the record straight the interest in the matter is only on the basis of the pension fund taking responsibility for the proposed new head office as I do not believe it is right to have two of our major buildings rented from the fund at this time. My view was that the proposed new office would be of superior quality and return to the fund rather than to the Gaiety Centre...

In view of the trustees decision I will not be recommending the proposed new head office be financed by the fund. I believe that the trustees decision is incorrect".

This appeared to be the end of the matter for the moment, but as will appear later, some of the senior managers of Telecom seemed to understand during the early part of 1990, when continuing negotiations for the purchase of the site, that the development of the offices on it might still be funded by the pension fund.

10.9 Negotiations by Telecom for the Purchase of the JMOB Site

10.9.1 Dr. Smurfit stated in his evidence that some time in late October or early November 1989, he contacted Mr. Desmond with a view to discussing the JMOB site. He was, however, vague in his evidence about such discussions, as was Mr. Desmond, who placed the discussions in mid November. Both parties however agree in their evidence, that in the course of that contact, which was by telephone, that Dr. Smurfit indicated that he was interested in the JMOB site for a headquarters for Telecom and that he asked Mr. Desmond to find out the details about the site and whether it was for sale. Mr. Desmond has stated in evidence that, at no time prior to this, was he aware that Telecom was planning to build a corporate headquarters.

10.9.2 Mr. Desmond says that he immediately contacted Mr. Doherty and Mr. Smyth separately. Mr. Desmond said that Mr. Doherty was not particularly interested in a sale, as by that time, the finance for the site that had been arranged via Ansbacher and Probets/Freezone was in place. (However it was only on the 29th November 1989 that Ansbacher formally wrote to Mr. Desmond approving the extended loan required by him and during the period between 8th September and mid November, there was considerable pressure exerted by Ansbacher to have it's short term loan repaid. In addition Mr. Desmond offered the site in mid November 1989 to Clayform Properties (U.K.) plc for £6,300,000 and said that Mr. Doherty agreed to that sale).

Mr. Smyth has said in evidence that he was contacted by Mr. Desmond at some stage at the end of November or beginning of December and asked what he thought about the then state of the property market, but he could not recollect Mr. Desmond advising that there was going to be a sale-on and he certainly was not advised that an inquiry had been made by Dr. Smurfit on behalf of Telecom. On the

other hand, it would appear from documentation relating to his discussion with Bank of Ireland at the end of November 1989, that Mr. Smyth had been told by then of the possibility of a sale to Telecom.

10.9.3 I asked Mr. Desmond, in the course of our interview on the 12th November 1991, if Mr. Smyth gave Mr. Desmond any guidelines on what the price should be and whether in particular Mr. Smyth suggested that he should look for £10m for the site. Mr. Desmond stated that:

"The general view that was taken, that with planning permission the site was worth £10m"

I asked him in clarification, when he referred to planning permission, whether he was referring to planning permission for what Mr. Smyth wanted, to which he replied:

"Correct, that you could sell it on in the order of £10m at that stage".

As appears from the proposal from Mr. Smyth of 17th May 1989 to UPH (Appendix 4) and a subsequent proposal of 26th July 1989 to the bank (Appendix 7), Mr. Smyth envisaged getting planning permission for 20 houses of not more than 2,000 square feet each (but costing £500,000) and offices of c.150,000 square feet (the May proposal); and 100,000 square feet offices, 45 town houses and a hotel or private club, shops, commercial development and multi-story car park (the July proposal).

10.9.4 On the 29th November 1989, Mr. Desmond met Dr. Smurfit at his request, at the Blackrock Clinic and told him that the vendors would sell 4 acres for £7,500,000 and that they wanted to develop the residential element of the site themselves. Mr. Desmond in his evidence has stated that Dr. Smurfit asked who the vendors were and that he told him that they were clients of Mr. Smyth and gave him the name of the company Chestvale. According to Mr. Desmond, Dr.

Smurfit did not ask then who owned Chestvale, nor does he appear to have asked at any time subsequent to that. Dr. Smurfit in his evidence stated that he told Mr. Desmond that he wanted an option on the site but that Mr. Desmond said that the sellers would not be interested in that. The question of an option does not seem to have been pursued further by Dr. Smurfit.

10.9.5 In the course of his evidence to me on the 14th June 1992, in response to my question as to whether Dr. Smurfit remembered when he was told that there would not be an option, he replied that it was when Mr. Desmond visited him in hospital on the 29th November. I pointed out that it would appear that the Bank of Ireland were told shortly before that, that Telecom were going to buy the property and it would not be subject to planning permission or at least that they did not require it subject to planning permission to which Dr. Smurfit replied "I can't recall, well, I don't know". I then asked him if it was a matter that was discussed with Mr. Desmond prior to the 29th November which he replied:

"No. The planning permission thing was something which I didn't think we in Telecom would have a great deal of problem, mentally from day one, because of the interpretative centre. Once the interpretative centre came through, as to what I wanted to achieve I felt that would be a self seller, if you will"

I then asked him from whom Mr. Desmond was getting the information that was being given to the banks to which Dr. Smurfit replied:

"He wasn't getting it from me,"

It seems surprising that Dr. Smurfit so readily accepted without any further negotiation or discussion the statement that the vendors would not be happy with an option.

10.9.6 On the same day (29th November), Mr. Johnson met Dr. Smurfit at the Blackrock Clinic and visited with him the Sweepstake site, the

Crampton site and the JMOB site, all of which were viewed from the road and no further inspection took place. Mr. Johnson has stated in evidence that there was no discussion with Dr. Smurfit on any aspect of the site, or the requirements for the corporate headquarters, and that the only issues discussed were the suitability of the location and whether he enjoyed being a director of Telecom. Other than the conversation with Dr. Smurfit after the September board meeting, no other meeting of the "sub-committee" took place. Mr. Johnson in his evidence said he was then and is still satisfied, that of the three sites he inspected, the JMOB site was clearly the best. However prior to the 29th November 1989, he was not aware that Dr. Smurfit was considering the JMOB site or the Sweepstake site and he himself did not examine any other sites. I asked Mr. Johnson if he raised with Dr. Smurfit, the issue of an inner city site as opposed to the Dublin 4 site, and he replied that he may have made some minor remarks but that it was obvious to him at that stage that Dr. Smurfit was controlling the issue. He added

"I was only a secondary member of the committee which he controlled. I had no means of introducing business into that arena and I was unfamiliar with the property world. I didn't know what was available or what might be suitable and effectively we were stuck on a Dublin 4 location and there was nothing I could do to shift that I must say that I went into that with a view from the time I was put on the sub-committee because I felt that it was Hobson's Choice. If I declined to go on the sub-committee I could make no other valid comment on it because I would have been told "you had your opportunity and you did not take it", by the same token I was on the sub-committee and he wished to drive in a certain direction and quite frankly I had not got the power or personality to be able to kind of put him on the different tracks and I didn't see the merit in doing so"

10.9.7 Notwithstanding, that Dr. Smurfit stated that he told Mr. Desmond on the 29th November that he wanted an option on the site based on planning permission, and that it was Mr. Desmond who told him in reply that Mr. Smyth's clients would not be interested in that, Dr. Smurfit wrote as follows to Mr. Desmond by letter dated 30th November 1989:

"Dear Dermot,

I am sorry to have taken so long to negotiate on the Johnston Mooney & O'Brien site. I have examined all the alternatives and I am pleased to inform you that the one I favour most is the 4.5 acres offered to us by the Chestervale Company. I understand the full site of 6.8 acres is not available and we would, of course, have been interested in that. My offer to Chestervale is subject to approval by the board of Telecom Eireann and the Superannuation Committee.

We are prepared to offer £7.5m for the site. I had originally thought of taking an option on the site but understand that this would not be attractive to the sellers. If this offer is acceptable I will require early acceptance for discussion at the next board meeting of Telecom Eireann which is scheduled for January 10th, 1990."

(Although Dr. Smurfit, as it transpired later, wanted the land at the front of the site, there is no reference in this letter to what part he is offering to buy. It also transpired that an option was subsequently available.(see Paragraph 10.14.22 et seq.))

10.9.8 In his evidence to the Telecom Inquiry, Mr. Desmond was unable to explain the reference to delay and negotiations in the first sentence of the letter. He was not able to advance matters during the course of his evidence to me. Dr. Smurfit explained the reference to the delay as being consistent with the way he worked and added that it could mean anything from a few hours to a few days. He also accepted my submission that it was consistent with a reference to his earlier

discussions with Mr. Desmond in late October or early November. The figure of £7.5m, offered for the site, was arrived at by calculations done **"on the back of an envelope"**. Dr. Smurfit neither sought nor obtained professional advice on value, planning, size of site, plot ratio, law or general feasibility before making his offer. His view was that those matters would all be done at a later stage. He added that the object of his letter was to **"throw Telecom's hat into the ring, I kick started the operation which is my style and got the train on the track"**.

10.9.9 The only condition, to which the offer was made subject, was approval by the Telecom board and the Superannuation Committee. Dr. Smurfit in his evidence to me on the 14th June stated that the terminology in his letter was very poor and in retrospect he would draft it differently if he had the chance. He added that he should have referred to the board or the Superannuation Fund trustees. I asked him if it was correct that the superannuation committee as a board committee would not have had any role in a decision on the offer. Dr. Smurfit replied that the committee might have been empowered to negotiate with the trustees **"the terms of rental of the head office which would give capital value if the pension fund decided to take it on"**, but accepted that the purchase was not to be subject to their approval. When I suggested to Dr. Smurfit that he misunderstood the role of the superannuation committee, he indicated that he would not respond to that but added that he had a great deal of work on most of the time and couldn't get everything absolutely 100% correct.

10.10 Introduction of proposal re JMOB site to Management and Board

10.10.1 On the 30th November 1989, Dr. Smurfit wrote to Mr. McGovern, the chief executive of Telecom, enclosing a copy of his letter to Mr. Desmond which he described as "self explanatory". This was the first indication to Mr. McGovern that matters had progressed beyond the reference at the September board meeting that the Chairman was still investigating the matter of corporate headquarters and would report further to the board in due course. Dr. Smurfit, in the course of his letter, explained calculations which put an approximate cost on the development, including the site, of £16 million and stated that he estimated the value on completion of £20 million based on a rental value of £1 million per annum, (£16.66 per square foot) and a yield of 5%. There is no reference in the calculation to the cost of the interpretative centre, which, Dr. Smurfit has maintained, was a fundamental part of the project. Neither does it take any account of the cost of building a bridge from Anglesea Road over the Dodder, which was known to those who had checked with the planning department, as one of their likely requirements. Equally, it does not take any account of stamp duty on the purchase price, or fees for the design team - architects, engineers, quantity surveyors which normally aggregate to 12% of the building cost (unless they were included under "miscellaneous costs", for which he provided a figure of £500,000).

In the letter, Dr. Smurfit suggested that Mr. McGovern and his colleagues visit the site with Mr. Desmond before the next board meeting in January.

He also made the interesting comment in his letter that:-

"This is by far the best site for Telecom from a security point of view (near Cablelink etc.)"

I refer to the Cablelink connection later in Paragraphs 10.18.1 and 10.18.2.

The juxtaposition of the letters of 30th November 1989 to Mr. Desmond and Mr. McGovern with the internal documentation in Ansbacher and Bank of Ireland based on information given to them on or before 29th November 1989, referring to a sale of 4.5 acres to Telecom for £7.5m in the case of Ansbacher, and in the case of Bank of Ireland the possible sale of 4 acres to Telecom, is interesting. It should be noted also that the Bank of Ireland from their internal memorandum of a meeting on the 29th November 1989 were aware that the sale "could proceed before mid 1990 and is not dependant on achieving a particular planning permission before then. "

10.10.2 By letter of the 1st December 1989, Dermot Desmond wrote to Dr. Smurfit thanking him for his letter of 30th November and stating:-

"Unfortunately, we cannot advise on this transaction. However, we disposed of the property to Chestvale and if I can influence the Chestvale people in any way, I would be delighted to do so."

It is not clear why Mr. Desmond wrote in this manner as there is nothing in the letter of the 30th November 1989 from Dr. Smurfit to him seeking advice and there is no evidence that in their oral discussions, Dr. Smurfit had sought such advice. Dr. Smurfit, in his evidence to the Telecom Inquiry and to me, stated that as far as he was aware, Mr. Desmond was not acting on behalf of Telecom and that his function was to facilitate the transaction. He added, and this is confirmed by Mr. Desmond, that the object of the exercise from Mr. Desmond's point of view was that he would gain the goodwill of Telecom and Dr. Smurfit as chairman of the Smurfit Group, which he anticipated would ultimately be of benefit to NCB.

Mr. Desmond has stated to me that he did not advise Dr. Smurfit or anybody in Telecom subsequently that he had acted on behalf of Mr. Doherty when introducing Mr. Doherty into the purchase deal from UPH, nor that he arranged finance on his behalf, nor that he acted or continued to act on behalf of the mezzanine financier. Mr. Desmond

in evidence stated that he did not see any reason why he should have advised Dr. Smurfit of these roles.

Despite the view expressed elsewhere in his evidence, Mr. Desmond stated that he perceived that he might be in a conflict situation, and hence the reason why he wrote to Dr. Smurfit the letter dated 1st December 1989 quoted above. According to the evidence of Dr. Smurfit, he did not query why Mr. Desmond could not advise in relation to the transaction, and did not pay any further attention to this aspect. Mr. Desmond's agreed evidence to the Departmental Inquiry was

"... he did not want to act lest NCB be seen to be greedy, NCB had already been involved in the site and would have been aware of previous commercial or "inside" information on the site and he admitted that maybe Dr. Smurfit and his own links with UPH came subliminally or subconsciously into his mind."

Mr. Desmond also said that he always considered Chestvale as owners. Asked if he knew the Chestvale people, Mr. Desmond responded that

"he knew Mr. Smyth was involved and there was paper in his office on various options for the site which Mr. Smyth had submitted to UPH."

I asked Mr. Desmond on two occasions, in the course of his interview with me on 12th November 1991, to explain what he meant by the reference in the letter of 1st December that he couldn't advise on the transaction, but he did not provide a satisfactory explanation. He firstly said

"Well we were prepared to offer - if this required acceptance what he is doing here, he is making an offer, right. He is asking me - I would take that as a kind of an indication for me to help Telecom and pass on the offer for Telecom".

On the second occasion when I pressed him he stated:

"The next thing I would say I would do then I would write to

Chestvale and on NCB paper saying that I have been instructed by the Chairman of Telecom that he wished to make an outline offer subject to Board approval. That would be the letter. So do Chestvale or do I write your offer has been accepted".

I pointed out to Mr. Desmond that the letter from Dr. Smurfit of the 30th November appeared to be written by him on behalf of Telecom to Mr. Desmond on behalf of Chestvale. I asked him if it was possible that Dr. Smurfit had asked him, on the 29th November at their meeting, if Mr. Desmond could advise him and that he was replying to that, rather than to the letter of the 30th November, to which Mr. Desmond replied:-

"I don't think so. All I could hear was Dr. Smurfit. That meeting, my recollection of Dr. Smurfit being enthusiastic about the site having a dream about the site I would think I would have a little bit of understanding the way Dr. Smurfit thinks about quality and about culture and about attitude".

I was unable to get any more definite answer from Mr. Desmond to my questions.

10.10.3 In response to another question put by me to Mr. Desmond in relation to his meeting with Dr. Smurfit at this time, he stated:-

"There was no negotiations with Dr. Smurfit. I had no negotiations whatsoever. I got a request from him to get information on the site. I met with him, I gave him that information, I got that letter. I responded to him. To the best of my knowledge I had no other discussions with Dr. Smurfit other than that, other than those three instances".

This statement is significant because if Dr. Smurfit did not have "negotiations" with Mr. Desmond, he does not appear to have had them with anybody else and as will appear from the evidence in relation to discussions in January 1990 on the price, subsequent to the mandate from the board meeting of 9th January 1990, those January

discussions could hardly be termed "negotiations" either.

Houses of the Oireachtas

10.11 Initial Consideration of JMOB site by Telecom board and management

10.11.1 Without referring to his earlier letter of 30th November, Dr. Smurfit wrote another letter to Mr. McGovern dated 5th December 1989 and which was received by Mr. McGovern on the 7th December 1989. In this letter he informed Mr. McGovern that he and Mr. Johnson had been to see the JMOB site and that they both agreed that the location was first class for a head office. He added that his understanding from Mr. Desmond was that:

"All of the site is not for sale from the owners but that 4 acres at the front can be bought, which is what we require for the proposed new Telecom Centre. I have come to the view that we should do this ourselves rather than through the Superannuation Fund. We can always sell the assets later to them or another person at an attractive price, but I believe we should use our own covenant as being the least expensive way at this moment in time. In any event, I see Telecom in a few years being in a very strong cashflow position. I would like you to visit the site with Mr. Desmond before the next board meeting as I intend to bring the matter up for approval in principle and I want to be sure that you and the management are happy about (a) location; (b) price; and (c) development costs. My own agreement in discussing the matter with a number of architects is that for £110 per square foot we should get a really outstanding building, maybe £120 at the full finishing out. I suggest we select three architects, have a design competition and pay them a reasonable sum to make submissions and give them a clear brief. I would welcome your views on this in due course.

Yours sincerely "

In his evidence to me in October 1991, Dr. Smurfit stated that the letter was very important, its purpose being to ensure that the Chief Executive and the Management were happy about location, price and

development costs. He felt that it was "very very important that the Management were totally au fait with it" and that there was no point in proceeding if the project did not make sense.

In the course of his evidence on the 14th June 1992, I referred Dr. Smurfit to the penultimate paragraph of the letter and asked him what architects did he discuss it with. He replied that the paragraph was "very very wrongly put" and that it should not refer to "agreement". He said it should be, "my own understanding in discussing the matter with an architect", and that it would have been with Mr. O'Halloran. He added that he thought that he might also have asked Mr. Holly, who was building the "K" Club for him at the time, what an office block would cost. He added that he may have asked it of somebody else, but that it was probably Mr. O'Halloran who would be the person that he primarily chatted with.

10.11.2 The next board meeting of Telecom was actually on the 15th December 1989 and not in January 1990 as suggested by Dr. Smurfit in earlier letters. The minutes of this meeting record the position as follows:-

"(iii) Company Headquarters

The Chairman said that he and Mr. Johnson had examined a number of possible sites for a new company headquarters. The most suitable site appeared to be the former Johnston Mooney & O'Brien complex in Ballsbridge. Following a discussion, the Board authorised management to enter into negotiations to acquire the site in question and to revert to the Board with proposals in due course".

Although not noted in the minutes, Ms. Meehan has stated in evidence to me that at that meeting, she raised the desirability of the site being bought subject to planning permission being obtained. She felt that while there was not a formal proposal in this regard, she would have

expected management to look at it, even though her recollection is that the meeting was advised by Mr. McGovern that the likelihood of such a condition being agreed was extremely remote. Ms. Meehan's recollection is that the issue of planning was not discussed at any subsequent meeting of the board. Mr. McGovern's understanding is that this reference by Ms. Meehan was likely to have been at the board meeting of January 9th, 1990 rather than at the meeting in December 1989.

10.11.3 Dr. Smurfit, in his evidence, stated that he recollected that at that meeting, Mr. O'Neill made a presentation in relation to the site. He had assumed that Mr. O'Neill had seen the site (whereas in fact Mr. O'Neill did not see the site until the 18th or 19th December). Mr. O'Neill has indicated that he did not become involved with the JMOB site until after that board meeting of 15th December 1989.

10.11.4 At the time of this board meeting of 15th December, the only two members of the board who had examined any possible sites were Dr. Smurfit and Mr. Johnson. Mr. Johnson informed me that no discussion took place either at board level or to the best of his information at executive director level to consider in detail the need or requirement for a corporate headquarters or the reasons why such a headquarters should be located in Dublin 4. It would appear from records produced to me by Telecom in relation to executive director meetings, that the first record of the corporate headquarters being discussed at executive director meeting was a meeting of the 2nd January 1990, the minutes of which state:

"Mr. McGovern said that he wished to bring this matter to the Executive Committee for information.

The Chairman had raised with the board the matter of a new corporate headquarters. A site of 5 3/4 acres had come on the market where the Johnston Mooney & O'Brien factory had

operated. The land is zoned as industrial. Portion of the site may have to be rezoned residential. It may be possible to acquire portion of it for offices.

Mr. McGovern said the site was the best one left within the business sector area of the city. The matter is still under discussion with the vendor; the final decision will be taken by the Board. "

10.11.5 Mr. McGovern, in his evidence, explained that the JMOB site was convenient as being at the half-way point between the board's then headquarters at Merrion House and the offices of the executive directors at the St. Stephen's Green premises. It is not clear whether this advantage had been perceived in December 1989, as there is no evidence of any detailed and professional analysis in relation to costs or efficiency, or analysis of the relevant time scale and any other consequential matters, that such rearrangements would have on existing management and office space. This type of exercise does not appear to have been done by Telecom management until after agreement on the price was reached with the vendors on 11th January 1990.

10.11.6 According to his evidence to me, Mr. McGovern's understanding, of information conveyed by Dr. Smurfit to the board meeting of 15th December, was that the figure of £7.5m was "a ball park figure". He added that he did not understand that an offer had in fact been made and he did not envisage that the board was legally bound. He added also that he did not consider that the board would contemplate a purchase of only part of the site, given the difficulties that would then arise in obtaining planning permission, when Telecom did not own the entire site. He stated that this was a problem that he, in conjunction with the property department, had identified at a very early stage. He added that it was not going to be possible to identify from the outset

which part or parts of the site might get permission for a commercial development and which part or parts might get permission for a residential development and that from the outset the professional advice from within Telecom, was that the site would have to be treated as a complete unit for the purposes of a planning application.

10.11.7 Prior to the board meeting of the 15th December, Mr. Johnson understood that he and Dr. Smurfit would be returning to the board with a recommendation that the preferred site was the one at Ballsbridge. He was very surprised to discover in hindsight (only in September 1991) that prior to that meeting, an offer had been made by Dr. Smurfit for the site. He had understood that had the board approved of progressing matters, the purchase would then go through the usual executive channels and that at the end of the day, it would be the senior executives in the company who would determine whether and how the project proceeded.

10.11.8 On the 19th December 1989, Mr. O'Neill, of the Telecom property department visited the site with Mr. Finnegan. According to Mr. O'Neill and Mr. Finnegan, no discussion on price or value took place. On the following day, 20th December, Mr. McGovern met Mr. Desmond. His understanding of Mr. Desmond's role (in particular following up on the letter from Mr. Desmond of the 1st December 1989) was that he was **"purely a postman, purely a conveyor of messages, that he was the link of information with the then owner of the site"**. Although Dr. Smurfit had not advised Mr. McGovern that Mr. Desmond had a previous involvement in the site, Mr. McGovern stated that Mr. Desmond made this known to him. He added that while he could not recall the specifics of the conversation, he is clear that Mr. Desmond conveyed the impression that he had at that time, no contact or involvement whatsoever in the site. He added that, at no stage during the course of the transaction between then and July 1990, was he

aware of any involvement, nor was anything said to him by Mr. Desmond or any other party that would have made him conscious of such a possibility. Mr. McGovern stated in evidence that had he been aware of any involvement or interest, he, Mr. McGovern, would not have dealt with him at all. The only information given by Mr. Desmond as to who the purchasers were, was that they were clients of Mr. Smyth and that the name of the vendor company was Chestvale. He added that the impression conveyed by Mr. Desmond was that the then owners were not concerned as to whether or not they sold the property and that all communications with them would be via Mr. Desmond. Mr. McGovern stated that his concern in identifying the purchaser, was not so much as to who they were, but rather what they intended to do with the site, and he did not pursue, either then or at a later stage, the issue of identity.

10.11.9 According to the evidence of Mr. McGovern, during the course of his meeting with Mr. Desmond, he stated that the purchase of a portion of the site would not be acceptable to Telecom, as their advice was that that would effect Telecom's chances of obtaining appropriate planning permission. He expressed concern that Telecom would be purchasing one part of the site, not knowing what would happen on the adjoining part.

10.11.10 Following on the meeting of the 20th December 1989, Mr. Desmond wrote to Mr. McGovern by letter dated 21st December as follows:-

"Dear Fergus,

Further to our meeting yesterday, I have spoken to the owners of the Johnston Mooney & O'Brien site (circa 5.75 acres) and they have advised they would consider the following options:-

- A. In conjunction with Telecom they would design, construct and let offices to your good selves at a pre-agreed rent.
- B. They would be prepared to sell the entire site for

£10,000,000.

C. They would favourably consider the sale of 4 acres for £7.5 million and retain the balance, which they would covenant that it would only be developed for residential purposes.

D. At this point in time, it would not be possible to split the site into two, with each owner making independent planning application.

If any of the above is of interest to you please revert.

With kindest regards.

Yours sincerely, Dermot F. Desmond. "

It is clear that, what is referred to as option D, is not in fact an option at all and that has been confirmed by Mr. Desmond, who stated that it arose out of discussions with Messrs Smyth and Doherty, in relation to the need to treat the unit as a complete site for the purposes of obtaining planning permission. Apparently, further discussions ensued by telephone between Mr. Desmond and Mr. McGovern, during which, the only information that Mr. McGovern was able to elicit from Mr. Desmond in relation to the owners, was that they were represented by Mr. Smyth. Mr. McGovern stated that he recollected this conversation, because he noted the name "Noel Smyth" in manuscript on the letter of 21st of December.

- 10.12 Relevant matters in the week prior to the January 1990 Board Meeting
- 10.12.1 Mr. O'Halloran of O'Halloran and Associates, Architects was appointed by Telecom management on the 22nd December 1989 to carry out an appraisal of the site. Mr. O'Halloran had done work for Telecom on previous occasions, and in his evidence to the Telecom Inquiry, Mr. O'Neill said that he recommended his appointment. There had been the suggestion that the appointment of an architect would take place by way of an open competition. This was dropped subsequently, as it was considered inappropriate to have such a competition, when there was no planning permission for business development on the site, and it was thought that such a competition might focus greater opposition to the development from the local residents and politicians. However, according to Mr. O'Neill, it was made clear to Mr. O'Halloran that his initial appointment was merely to carry out the appraisal and was not an appointment to design a building and apply for planning permission.
- 10.12.2 As stated earlier, the issue of a corporate headquarters was first raised at a meeting of the Telecom executive committee on the 2nd January 1990. The executive committee comprised the executive directors and Mr. McGovern. It normally met in advance of and subsequent to board meetings and was reported to by Mr. McGovern after those meetings. There is no evidence of any detailed discussion taking place at that meeting in relation to the corporate headquarters.
- 10.12.3 A further executive committee meeting took place on the 8th January 1990 and the minutes of that meeting record:
- "Corporate Headquarters**
- Mr. McGovern reported that an architect looked at the site and had produced some drawings, which he showed to the Executive Committee. The matter had been discussed with the Dublin**

Corporation who regarded it as a prestigious one and considered it's proper development would greatly enhance the surrounding environs.

The cost of buying and developing the site were fully discussed and it was agreed that a recommendation for its purchase be brought to the Board meeting on Wednesday".

10.12.4 On the following day, the 9th January, according to Mr. McGovern, he again spoke directly to Mr. Desmond by telephone, although Mr. Desmond cannot recollect whether the conversation took place at a meeting or by telephone. Mr. McGovern, in his evidence, stated that he told Mr. Desmond that Telecom preferred option B in the letter of 21st December 1989, which was to purchase the entire site for £10,000,000 but that £10,000,000 was too high. According to Mr. Desmond, a discussion then ensued about obtaining the lowest price and he stated that he advised Mr. McGovern that he should offer less than £10,000,000. Mr. Desmond stated that, although he at that point accepted that he was in a conflict situation, he took the view that he was in a position to continue in the transaction without revealing his position to Telecom. His view of his own position is best outlined in his evidence to me as follows:-

"I saw myself in a conflict situation but I point out again, I am a moneybroker and a stockbroker. A broker is a person in between the buyer and the seller. His objective is to make the buyer and seller happy in concluding the deal. So, on the one hand, somebody is buying and somebody is selling. You give the reasons why somebody should sell. You give the reasons why somebody should buy. You agree a price in the middle, you agree. In this situation I am an agent. I am an agent, basically for the Chestvale people but Telecom, there is a relation with Telecom, I am saying to Telecom, you should offer lower; so, what he wanted was the best price. I wasn't going to go along to Doherty and say,

"listen stitch Telecom up here, they want this site", because that is a conscience matter. That is something you handle in conscience, so, hence, I was agreeing to 9.4 and then buying it back".

(Prior to his giving this evidence to me, Mr. Desmond had stated that he received no benefit whatsoever out of the sale of the site.)

10.12.5 Mr. Desmond says that he then spoke to Mr. Doherty and to Mr. Smyth suggesting the figure of £9.4 million. He stated that as they were both in agreement about developing the residential part of the site, they saw the value in buying it back pro rata. Mr. Desmond stated to me that his argument to them in relation to the sale price to Telecom, was that the higher they went, the more it was going to cost them to buy back the residential pro rata. However, it would appear that at this point in time, there had, in fact, been no discussions with Telecom, as to the price Telecom would have been prepared to accept for the residential buy back option. Indeed when the deal was concluded, Mr. McGovern expressed particular satisfaction that the residential portion would be bought back at the same rate as that attributable to the commercial part of the site, even though he would have understood that the commercial part of the site would be more valuable.

10.12.6 Mr. Smyth, in his evidence, has said that he did not take part in any discussion, either directly or indirectly, in relation to a specific sale price for the site. When Mr. Smyth attended before me on the 21st February 1992, he had told me that the first information that he had about a sale to Telecom was on his return to his office in January 1990 following Christmas holidays. He said that in early December he had had a general conversation with Mr. Desmond about the then state of the property market and what sort of value this site would have, if fully developed. I subsequently discovered that in late November 1989, Mr. Smyth had advised representatives of the Bank of Ireland that there was a possibility of a sale to Telecom. Mr. Smyth has explained to me

that he had not recollected that he had told Bank of Ireland about a possible sale and that as far as he was concerned, it was a general possibility only and that he was not aware of a specific offer. He added that the information given to Bank of Ireland by him, was on the specific instructions of Mr. Desmond and Mr. Smyth has also stated that he received no information in relation to the transaction, except from Mr. Desmond.

10.12.7 Mr. Desmond's agreed evidence to the Telecom Inquiry in relation to events following upon the telephone discussion with Mr. McGovern of the 20th December was

"he then contacted Mr. Smyth. He did not recall precisely if he told Mr. Smyth who was actually interested. He thinks that in order to establish the comfort factor he would have inferred that a sizable company with a base here was involved. He could not recall how he actually approached and played the matter. Mr. Desmond continued that it was a question of establishing his credibility with Mr. Smyth. Mr. McDonagh countered that surely Mr. Desmond's credibility if he says that he had a major concern interested would not be doubted, given his deal making reputation. Mr. McDonagh asked Mr. Desmond how many conversations he had with Mr. Smyth. Mr. Desmond responded that he had two or three as he was anxious to respond to Telecom quickly. Mr. McDonagh asked if there had been any discussion on the alternatives and Mr. Desmond explained that he thought that what Mr. McGovern wanted was the whole site, though naturally Mr. McGovern wanted to see all the options".

In his evidence to me in relation to this, Mr. Desmond did not elaborate further.

10.12.8 On the same day as the discussion with Mr. McGovern, i.e. the 9th January 1990, Mr. Desmond wrote in the following terms:-

"Dear Fergus,

Further to our conversation of this morning, I have spoken to the principals and the best offer I have obtained from them, is that they would be prepared to sell the entire site for £9.4m. However, there is one condition that they be granted an option to purchase the residential element, pro rata to the sale price. If you decide not to develop the residential units on the site, the option would lapse." (See Appendix 18)

(Mr. Desmond's evidence to the Telecom Inquiry was "Mr. Desmond responded that at some time he may have seen plans or have been told of plans but that the reference to a previous conversation in that letter (i.e. the 9th January) confused him at this late stage. He added that the Chief Executive charged him with finding out what the proposed site would cost. He reverted to Mr. Smyth and explained that his clients were now interested and did a little trading on the price which eventually culminated in Mr. Desmond obtaining a price in the region of £9.4m.

Mr. McDonagh, in summation, said the import of the correspondence was that Mr. Desmond had in fact negotiated the deal. Mr. Desmond said that he viewed himself more as a "minder" to Telecom Eireann. He was in the business of enhancing his reputation with a view to a further stream of income, as he put it, and he did not view himself as a negotiator in this case at all.

Mr. Desmond in response to a request to relate £9.4m to the £10m mentioned in the previous letter, stated "that it was a question of doing some pro rata adjustments and he already had a base figure of £7m - £8m for 4.5 acres of the site".)

As stated in Paragraph 10.12.6, Mr. Smyth's evidence is that he did not discuss any specific price with Mr. Desmond.

10.13 January 1990 Board Meeting

- 10.13.1 The offer was then put to the full board meeting on the 10th January 1990, and at that meeting a detailed report was given to the board by Mr. McGovern and Mr. O'Halloran. The advice in relation to planning permission was that Mr. McCarron of the Dublin City Planning Department was favourably disposed to the Telecom proposal due to the very low density of development, but added that there would have to be some residential content (even though he, Mr. McCarron, accepted that **"a large scale residential content would conflict with and indeed destroy the low density/high environment concept of the design"**). Mr. McCarron indicated that the proposal was **"possible"** but that great care would have to be taken with the application.
- 10.13.2 The discussions with Mr. McCarron appear to have been based on similar drawings to that set out in a report from O'Halloran & Associates dated the 8th January 1990 (and the report states that the conclusions drawn from those discussions were incorporated in the report). These drawings showed a very minimal residential content. Mr. O'Halloran's written memorandum of his meeting with Mr. McCarron, specifically noted that the planners wanted the residential content at the Ballsbridge Terrace end of the site, and that a large scale residential development at the south end would threaten the concept.
- 10.13.3 On the morning of the board meeting of the 10th January, Mr. O'Halloran spoke to Mr. O'Neill, and reported to him on a meeting which he had had with Dr. Smurfit on the previous evening. He told Mr. O'Neill that Dr. Smurfit had been enquiring as to Mr. O'Halloran's proposals for the site and that he had outlined these to him. He added to Mr. O'Neill that Dr. Smurfit's response was that the proposals were not what he wanted and that Telecom could not afford them at

present. Mr. O'Neill stated to me that Mr. O'Halloran informed him that Dr. Smurfit's ideas were that the Telecom building should front onto the Ballsbridge village end as this was the high value commercial end of the site; that he did not like the idea of a bridge (required by the planners to avoid excess congestion at the Ballsbridge Terrace end); that while the building should be smaller than 60,000 square feet it should have capacity for expansion; and finally that Telecom could not afford the entire site and it would have to forego the south end for a substantial residential content.

According to Mr. O'Neill's note of the telephone conversation, Mr. O'Halloran pointed out to Dr. Smurfit the realities of the planning permission and the outcome of his discussion with the planners, and Dr. Smurfit then agreed that a bridge would be acceptable which would serve both the needs of Telecom and the residential part of the development. It would appear that Mr. O'Halloran then prepared an alternative site layout incorporating Dr. Smurfit's other views and that Mr. O'Halloran showed both the original and the revised schemes to the chairman at a meeting prior to the board meeting. Both site drawings were presented to the board meeting. It would seem that in altering the development, the risk in not obtaining planning permission would have increased considerably in the light of the very clear reservations made by Mr. McCarron, but this does not appear to have been explicitly explained to the board. Neither Dr. Smurfit nor Mr. McGovern recollected any suggestion, particularly from Mr. O'Halloran, that the planning application would be an extremely sensitive one, even though appended to Mr. O'Halloran's notes of his meeting with Mr. McGovern, there is a handwritten note to the effect that the application would be the most sensitive application in ten years.

The appropriateness of the JMOB site was considered primarily by reference to an aerial photograph which was presented at the meeting. While the Crampton site and the Sweepstake site were considered, this was only in passing, as according to Mr. McGovern, it was clear

that the JMOB site was vastly superior. No other sites were proposed.

The minute of the meeting recited:-

"(ii) Company Headquarters

The Board noted a report presented by Messrs McGovern and O'Halloran. Following discussion, the Board decided that management should enter negotiations with the relevant party to acquire the former Johnston Mooney & O'Brien site at Ballsbridge on best terms".

(Dr. Smurfit in his written statement to the Telecom Inquiry says that after that meeting "I had no further hand in the acquisition of the site as all further matters were dealt with by management. I was advised of progress from time to time".)

10.13.4 Although it does not appear in the minutes of the meeting, the board had mandated management to acquire the site for a price of up to £10,000,000. According to the evidence of Mr. Johnson to the Telecom Inquiry, he was not under the impression that a price had been agreed prior to that meeting, **"there was no allusion to a definite price"**. He recalled the chairman saying that **"price depends on the need"**. His recollection is that the board was advised that the unofficial view from the corporation was that planning would not be a problem. Dr. Smurfit has also said that that was his perception of the planning permission and he continued to hold the view when interviewed by me on the 25th October 1991.

10.13.5 Although I do not have specific evidence to that effect, it is likely that the board were informed by Mr. McGovern of the letter received by him from Mr. Desmond at the end of December 1989 and that the reference to £10m emanated from that. I have been informed by Mr. McGovern that the letter from Mr. Desmond of 9th January 1990 was received by him before the board meeting of the 10th January, and that it's contents were advised to the board during the meeting on 10th

January 1990. On 11th January, Mr. McGovern endorsed his acceptance of the terms stated without any further negotiation. It is arguable whether this acceptance was in compliance with the mandate from the board that the management should "Enter negotiations with the relevant party to acquire the site at on best terms". On the 11th January 1990, Mr. McGovern telephoned Mr. Desmond and confirmed that Telecom accepted the terms set out in Mr. Desmond's letter of the 9th January 1990 and he then notified Mr. O'Neill of that.

On the same day, 11th January 1990, Mr. O'Neill contacted Mr. Smyth to initiate the process of legal acquisition.

10.14 Involvement of Property Department and Legal Department

- 10.14.1 According to a handwritten note of Mr. O'Neill, he and Mr. McGovern discussed the JMOB site at a meeting on 8th January 1990 and considered, inter alia, whether Telecom should acquire the entire site and if they did, how they would deal with the residential part; the estimated cost of the entire development; and whether it would be seen as commercial i.e. that Telecom could sell it on to a bank, to which doubt was expressed.
- 10.14.2 However the price for the entire site, and for the buy back option by the vendors (in respect of that part of the site for which planning permission for residential development would be applied) having been agreed on the 11th January 1990, the matter was passed to the legal department of Telecom to complete the sale. This did not proceed smoothly over the next few months, as there were a number of different proposals of a structural nature proposed by both Mr. Smyth and by Telecom.
- 10.14.3 At the time of the commencement of the legal procedures, i.e. 11th January 1990, the agreement between UPH and Chestvale had not been completed, as there remained outstanding, the sale of the shares in Chestvale by UPH. The final methodology of this sale was itself still under active consideration at this time, and the sale was only finally closed on the 19th April 1990. This resulted in additional complications, as it had not finally been agreed what company would purchase the Chestvale shares, and the vendors introduced a number of additional steps in an attempt to mitigate their tax liabilities, as indeed did Telecom at a later stage.
- 10.14.4 It would appear from Mr. O'Neill's notes of a further meeting on 11th January 1990 between Mr. McGovern and himself

- (i) that Mr. O'Neill was instructed by Mr. McGovern to endeavour to negotiate agreement on the purchase being made subject to planning permission;
- (ii) that Mr. O'Neill told him that he did not consider that there was any hope of this being achieved;
- (iii) that Mr. McGovern also asked Mr. O'Neill to try to build in a provision for inflation to the value of the residential site, the subject of the option back to the vendors, as planning permission could take 18 months or longer, and Mr. O'Neill noted that this was "a must";
- (iv) that Mr. McGovern wanted Telecom to occupy the premises from the date of legal transfer in such a manner as **"may be visible to the public"**.

Mr. O'Neill arranged a meeting with Mr. Smyth on the 12th January, and at that meeting a closing date of Wednesday, the 11th April, was agreed. Mr. O'Neill says that he raised the possibility of the purchase being made subject to planning permission, but he says that Mr. Smyth simply smiled in response and the matter was not pursued. Mr. Smyth in evidence to me stated that he had no firm instructions to refuse such a request, and simply formed the view from his discussion with Mr. O'Neill, that there was no serious interest on Telecom's part in pursuing the matter. The appointment of architects was considered and Mr. Smyth advised that the vendors had retained Mitchell O'Muire & Smyth architects to advise them.

10.14.4 Mr. O'Neill has noted in a contemporaneous note and confirmed in evidence, that on the 15th January 1990, he received a telephone call from Mr. Desmond to the effect that he, Mr. Desmond wished to establish contact and to ensure that the process was kept moving **"as Dr. Smurfit had indicated to him that he wanted forceful action in progressing this project"**. Mr. Desmond, in evidence both to the Telecom Inquiry and to me, said he has no recollection of this

conversation. Dr. Smurfit said in evidence that he had no recollection of ever giving Mr. Desmond such an instruction. Mr. O'Neill in his note of the conversation with Mr. Desmond records quite a lengthy conversation with Mr. Desmond as he discussed the interpretation of the pro rata clause in Mr. Desmond's letter of the 9th January 1990 and the concept of minimising overheads. It was noted by Mr. O'Neill that Mr. Desmond said that his involvement in the project was

"mainly on the tax aspects and as a go between to Dr. Smurfit, and Noel Smyth was primarily the man to deal with".

I am satisfied that Mr. O'Neill's recollection is accurate and is corroborated by his attendance note.

Somewhat after the event, when the Telecom executive committee again met on the 16th January 1990, authority was given to proceed with the acquisition of the site at the best possible terms. It is not clear what the function of the executive committee was in relation to this transaction.

In a memo of the 22nd January 1990, Mr. Smyth noted that he was to tell Mr. Desmond to talk to Telecom as to how they would acquire the property i.e. by buying the property or by buying the company which owned the property.

- 10.14.5 It was only on the 12th February 1990 that draft contract documentation furnished by Mr. Smyth was received by Telecom. This was after concern being expressed by Mr. McGovern to Mr. O'Neill at the delay. His concern primarily stemmed from his understanding that there were other purchasers interested in the property. In fact, while this is something that may have been suggested to Mr. McGovern, there is no evidence that there were any other serious purchasers interested at that time. Mr. Smyth has stated that he did not try to give that impression. Mr. McGovern confirmed in evidence to me that he was very concerned to ensure that having been mandated by the board, he should not then lose the site. At that

time, Telecom felt that they did not have a binding contract in place, and were anxious to secure the position by offering to pay a deposit.

10.14.6 The documentation furnished by Noel Smyth & Partners (comprising a share purchase agreement between the vendors, Mr. Hannigan and Ms. Hewitt, being the shareholders of Hoddle, and Telecom) reflected a proposal whereby Telecom would acquire the shares in Hoddle for £6.9 million but subject to the mortgage in favour of Ansbacher in the sum of £2.5 million. Mr. O'Neill, on receipt of the documents, sought advice from Mr. Hall, the Telecom solicitor, who advised that the proposed transaction would result in stamp duty chargeable on a transfer of shares, at 1% of the consideration of £9.4 million as distinct from stamp duty at the rate of 6%, on the transfer of the property. He added that it would require the approval of the Minister for Communications, and the consent of the Minister for Finance under the Postal and Telecommunications Services Act 1983, in addition to the consent of the Minister for Industry and Commerce under the Mergers Monopolies and Takeovers (Control) Act 1978. Mr. Hall advised that Telecom could execute the agreements submitted, subject to obtaining the necessary consents and any amendments that Telecom may wish to make. Telecom executives felt that this would take too long. There was also concern that such a procedure would initiate enquiries from, in particular, the Department of Finance about the transaction and that it might become difficult for Telecom to proceed.

10.14.7 An option agreement, again to be between Hoddle and Telecom, was also furnished. Mr. O'Neill in a memorandum dated the 13th February 1990 to Mr. McGovern and the executive directors for Corporate Affairs and Finance commented

"the contractual situation covered by the Option Agreement is stacked in favour of Hoddle Investments. We are obliged to grant

them an option, in accordance with the terms negotiated by Mr. Desmond, to purchase the portion of the property in respect of which T.E. has obtained planning permission for residential development. However, Hoddle may or may not exercise this option (Second Schedule). The implication being, that if the permission is not considered to lead to a commercially attractive development, they will leave T.E. stuck with it. It should be noted that we are also obliged by paragraph 2.02 of the agreement to consult fully with the Vendors Architects before applying for Planning Permission and incorporate their input, if any. This consideration is one of the many tending to rule out the idea of having a design competition - the project has enough complexities without adding this layer! A decision on the appointment of an architect is required as soon as possible ... This is the most complex property transaction which the Company has been involved in".

10.14.8 On the 15th February 1990, Mr. Joyce (who was one of the trustees of the pension fund) wrote to Mr. McGovern indicating that he had spoken to Ms. Meehan, and that the trustees of the pension fund were not interested in the purchase and development of the site, but that **"what they might be more likely to consider would be the financing of a lease-back of the proposed Telecom building but this was of course some time away"**. Ms. Meehan does not recollect the conversation, but is satisfied that it did reflect her view of the situation.

10.14.9 On the 16th day of February 1990, the Irish Independent published an article by Clíodhna O'Donoghue in its property section claiming that Mr. Desmond and Dr. Smurfit had an interest in the consortium which purchased the JMOB site from UPH and which was then being purchased by Telecom. During the course of that afternoon James O'Dwyer, solicitor of Arthur Cox, received a telephone call from Dr.

Smurfit who was then abroad. Mr. O'Dwyer informed me that Dr. Smurfit was outraged, as the article was totally untrue, and that he was instructed to demand an apology from the Independent and to look for damages. The matter was referred by Mr. O'Dwyer to one of his litigation partners, Mr. McLoughlin, who drafted a letter which was faxed directly that afternoon to the Independent. The text of the letter had not been previously approved with Dr. Smurfit and the level of required damages referred to in the letter had not been discussed. After the letter had been sent, Mr. O'Dwyer received a telephone call from Mr. Desmond, who enquired as to what steps were being taken on behalf of Dr. Smurfit. According to Mr. O'Dwyer, Mr. Desmond told him that he had been speaking to Mr. Doyle, the editor of the Irish Independent, and had agreed with him a form of wording clarifying his position. He read to Mr. O'Dwyer the form of words agreed upon. Mr. O'Dwyer pointed out that that statement did not rectify Dr. Smurfit's position and that his firm were dealing with the matter separately.

10.14.10 Arthur Cox did not receive a reply from the Independent on Friday 15th to their letter, but on the following day, Saturday the 17th February, the Irish Independent published an apology which stated inter alia

"Mr. Dermot Desmond has asked us to clarify the situation and he has informed us that he does not have a share either directly or indirectly in the site since United Property Holdings sold out. We unreservedly apologise for any inference to the contrary".

In relation to Dr. Smurfit, the apology stated that

"the statement in the same article (concerning the Johnston Mooney site) that the present owners and vendors to Telecom Eireann include Dr. Michael Smurfit, is totally false".

The reason why the apology also referred to Dr. Smurfit, without further reference to his solicitors, was simply due to the fact that having taken legal advice on the afternoon of Friday the 16th February, the Independent were of the view, that if they did not apologise to Dr.

Smurfit at the same time as publishing an apology to Mr. Desmond, the implication would be that the article was correct in respect of Dr. Smurfit. Mr. O'Mahony of McCann Fitzgerald, solicitors for the newspaper had drafted the text of the apology himself. The text of the complete apology was then apparently agreed by Mr. Doyle with Mr. Desmond on Friday evening in the course of a telephone conversation and Mr. Desmond apparently agreed that the apology in respect of Dr. Smurfit, should be published in conjunction with the agreed apology to him. The position of the apology on page three of the Saturday's edition of the paper was also agreed with Mr. Desmond. As it was late on the Friday evening, the Independent's solicitors were unable to make telephone contact with Arthur Cox to agree the text.

10.14.11 On the 16th February, Mr. Desmond had also written directly to Mr. John Meagher, the deputy chairman of Independent Newspapers and had stated

"I wish to state categorically that I do not directly or indirectly hold a stake in the Johnston Mooney & O'Brien site and that I am not in any way the beneficiary of any proposed sale of the site".

10.14.12 Dr. Smurfit spoke by telephone to Mr. O'Dwyer at his home on Sunday 18th February. Mr. O'Dwyer read out the apology that had been printed on the 17th and Dr. Smurfit expressed his lack of satisfaction with it and instructed Mr. O'Dwyer that he wanted a more prominent apology and that he also wanted damages, because the libel was a serious one, as far as he was concerned. Before Arthur Cox had an opportunity to take the matter further with the Independent, they apparently received a message from Dr. Smurfit to do nothing further and they had no further involvement until September 1991.

10.14.13 On the afternoon of Monday the 19th February 1990, Dr. Smurfit contacted Mr. Meagher directly, complaining that the apology in the

previous Saturday's edition was not sufficient and that a significant sum of money would have to be paid to a charity of his choice. The text of a further apology was prepared by Mr. O'Mahony at the request of the Independent and this was apparently agreed by telephone between Mr. Meagher and Dr. Smurfit on the 21st February 1990. Mr. Meagher wrote to Dr. Smurfit that day confirming the agreement and enclosing a copy of the proposed text, as follows:-

- "1. Mr. Desmond does not have a share directly or indirectly, in the site since United Property Holdings sold it some six months ago to a European property company;**
- 2. Dr. Smurfit does not have and never had an interest directly or indirectly in the site."**

The proposed apology further confirmed that a significant sum had been paid to a charity nominated by Dr. Smurfit. The significant sum agreed was £1,500. The apology, having been agreed, was published in the Irish Independent on Friday 23rd February 1990.

10.14.14 In deciding originally to publish the apology, the Irish Independent had felt, having taken legal advice, that they had no alternative, as Ms. O'Donoghue's source for the original story had refused to "go public".

10.14.15 Mr. Desmond says that he was not aware of the second apology until September 1991.

10.14.16 In September 1991 when it became publicly known that Dr. Smurfit was a shareholder in UPH, a firm of public relations consultants, Messrs. Wilson Hartnell issued a statement on the night of Friday the 20th September on behalf of Dr. Smurfit which stated:-

"On the instructions of Dr. Michael Smurfit, Arthur Cox, Solicitors wrote on his behalf to the Irish Independent on February the 16th, 1990 requesting an apology and retraction for misleading information contained in a story in the Irish Independent on that

date. The apology was published on the following day February the 17th, 1990. Neither Dr. Smurfit nor his solicitors had any input into the second apology which was published on Friday, February 23rd 1990 nor were they aware that it was being published."

The issue that had arisen, was whether there was any significance in the different wording of the apologies, in that the first apology of the 17th February denied that Dr. Smurfit was one of the present owners and vendors to Telecom, whereas the apology published on the 23rd February stated that Dr. Smurfit "does not have and never had an interest directly or indirectly in the site". The actual complaint made by Arthur Cox at the outset in their letter of the 16th February 1990 was

"the statement in your article that the purchasers of this property (the vendors to Telecom Eireann) "include industrialist Michael Smurfit" is totally false. Furthermore, there is a clear innuendo in this article that Dr. Smurfit is deriving a substantial personal benefit from the transaction to which you refer notwithstanding his position as Chairman of Telecom Eireann. This is a most grievous libel on Dr. Smurfit".

As is stated above, the initial apology was in fact drafted by Mr. O'Mahony of McCann Fitzgerald but due to the exigencies of time, without reference to Mr. McLoughlin in Arthur Cox. Similarly the second apology was drafted and published without reference to Arthur Cox although Mr. Doyle told me that he had in fact thought that it was cleared with them, because it had come from the papers own solicitors. Mr. Doyle has given evidence to me that he was not conscious of any significance in the different wording.

Following the statement by Wilson Hartnell, the Irish Independent published an article on Saturday the 21st September pointing out that the text of the second apology had in fact been agreed with Dr. Smurfit and, as is noted above, that a copy of the text, together with a covering letter had been sent to him by the newspaper. That

correction was accepted by Dr. Smurfit during the following days.

10.14.17 According to the evidence of Mr. McGovern, the publication of the Irish Independent article on the 16th February 1990, caused some concern to him but this was quickly dissipated when the apologies appeared on the following day and on 23rd February. The extracts from the minutes of the executive committee meeting of 19th February 1990 and 26th February reflect that and the minute of the 19th February 1990 indicates that Mr. McGovern referred to the report as being "quite untrue". Mr. Johnson in his evidence to me stated that he was very concerned, but that Mr. Joyce, the company secretary, quickly circulated to the board members the retraction published by the paper, and that and the fact that the apology stated that substantial damages had been paid "put beyond any doubt whatsoever his bona fides". Mr. Johnson said that he accordingly never gave that issue a further thought.

10.14.18 On the 20th February 1990 Mr. Desmond wrote to Mr. McGovern in the following terms:-

"Dear Fergus,

The recent inaccurate publicity concerning the above site prompts me to suggest that there are ways in which Telecom can protect itself against any accusation that the transaction is anything less than a good commercial deal for it. I am not sure how far negotiations have gone, but, if there is still room for manoeuvre, I would suggest, that by incorporating the following conditions, Telecom would eliminate all commercial risks to themselves:-

- (a) That Telecom be granted the option to purchase the site or lease the proposed buildings, the option to be exercised on receipt of planning permission.
- (b) If satisfactory planning permission is not received Telecom should be entitled to walk away without liability.

(c) Where planning permission is granted,

- If Telecom decides to take the purchase option, the purchase price, would be the recent asking price of £9.4 million plus interest accruing from say 28th February.
- If it takes the lease option, the lease rental would be determined by your property advisers in consultation with the vendor's advisers. In the event of disagreement an independent firm would be appointed to arbitrate.

(d) Telecom would submit the planning application and in the event of either purchase or lease they would project manage the development.

As I see it, this gives Telecom all the options by ensuring that you need not proceed unless you are completely satisfied with the financial viability of the transaction.

I hope that these suggestions are helpful both in commercial terms and in ensuring that Telecom is protected against unwarranted media treatment in relation to the site.

Yours sincerely

"

I have been informed that this letter was not shown to the Telecom board members until September 1991.

10.14.19 Mr. Smyth has stated in evidence that he reported fully on the negotiations in which he was involved with Telecom, to Mr. Desmond, and that he did not report to anybody else. Mr. Smyth has also told me that he had also received instructions at this time from Mr. Desmond to entertain further proposals that might effectively ease Telecom's difficulties as they then perceived them.

Mr. Desmond's evidence to the Telecom Inquiry was recorded as follows:-

"The objective of this letter he (Mr. Desmond) said was to protect

both Telecom and himself as, if the deal fell through and Telecom were hurt it would inevitably impact on Mr. Desmond and NCB, given his role in the whole matter. His advice to Telecom was to make the deal subject to planning permission. If they got poor planning permission, they could walk away from the deal. If they got good planning permission then the benefits were for Telecom to reap. The letter he said covered both himself and Telecom. It was an un-solicited letter. There was no follow up discussion on the various options outlined in this letter He said this letter was essentially to limit exposure and that he was glad in hindsight that he had written it. "

10.14.20 On Mr. Desmond's second attendance before the Telecom Inquiry on the 1st October 1991, his agreed evidence is recorded as follows:-

"Mr. Desmond, referring to his letter of 20th February 1990 wanted to make it absolutely clear that this was his last interaction with Telecom Eireann in regard to the Johnson Mooney & O'Brien site. Mr. Desmond said that this was final and overriding advice to Telecom (only buy the site if the purchase is subject to the requisite planning permission). In view of this, Mr. Desmond said that he could in no way be blamed for Telecom making the decision to purchase. As far as he was concerned that advice superceded all other actions or involvement with Telecom."

10.14.21 Prior to the letter of the 20th February 1990, a meeting had already been arranged for the 21st February with Mitchell O'Muire Smyth, Architects, who had been retained by Mr. Smyth to develop the residential portion of the site. This meeting took place and dealt essentially with the details of the terms of purchase which were then being proposed. Telecom indicated that the share transfer proposal would probably not proceed as it would involve agreement from three government departments and that could involve delay, and consent,

in the end, might not be forthcoming. At that meeting, a further meeting was arranged for the 26th February to include Ms. Kenny from Noel Smyth & Partners.

10.14.22 As a result of Mr. Desmond's letter, Mr. O'Neill was instructed to raise the question of making the purchase subject to planning permission. At the meeting of the 26th February, Mr. O'Neill stated the preferred choice of Telecom and asked whether the vendors would consider Telecom buying approximately 3 acres, i.e. sufficient to site the office block, but with an adjustment as necessary, to fit in with the subsequent planning permission requirements. John Smyth, Architect, stated that a unified approach to the planning was necessary. He also agreed that if the site was divided, the valuation of each portion would be on a pro rata basis, irrespective of the type of planning permission. Mr. O'Neill also asked whether the purchase could be made subject to planning permission. In the absence of Mr. Smyth from the meeting, it was agreed to defer that issue. A copy of a memorandum of the meeting prepared by Mr. O'Donoghue of the property department of Telecom is attached as Appendix 19. Although stated to refer to a meeting of 21st February, I understand and accept that this is a typographical error and should in fact refer to 26th February.

10.14.23 On the 2nd March, Mr. Desmond sent Mr. Smyth a copy of his letter to Mr. McGovern of the 20th February, and on the same date Mr. Smyth, pursuant to his instructions, wrote to Mr. Desmond outlining the content of the meeting of the 26th February and putting forward various proposals that would make economic sense from the vendors point of view and would achieve Telecom's requirements of not being entirely exposed should the planning permission not succeed. On taking instructions from Mr. Desmond (to whom he had sent a draft of the proposed letter), Mr. Smyth wrote to Mr. O'Neill on the 5th March setting out a list of conditions, subject to which the vendors

would agree to make the sale subject to planning permission. This letter however was not received until after the next meeting, which took place between Mr. O'Neill and Mr. Smyth on the 7th March. A copy of the said letter of 5th March 1990, together with a copy memorandum or note of the meeting of 7th March 1990, are contained in Appendix 20. The memorandum noted that the next meeting was scheduled for 15th March 1990.

10.14.24 Following the meeting of 7th March, Mr. Smyth again wrote to Mr. O'Neill on the 9th March, setting out the proposals discussed (having first furnished a draft of the letter to Mr. Desmond for his approval). The letter of the 9th March (a copy of which is contained in Appendix 21) set out the following proposals:-

1. The existing proposal i.e. Telecom would acquire the entire site for £9.4m and Chestvale would buy back the residential element on a pro rata basis.
2. Telecom would enter into a contract to purchase the entire site for £9.4 million subject to obtaining planning permission for approximately 50,000 square feet of office and to paying interest at 1% over DIBOR from a date to be agreed until closing. Telecom would then be entitled to call on Chestvale to grant to it a 35 year lease of the office area at an agreed rent. If it exercised that option, it would be repaid its deposit and would be granted an option to acquire the freehold of the leasehold premises at an agreed price. It added that planning permission would be sought for a development that would suit Telecom's requirements, but would also seek to maximise the value of the site, and in the event of an increase in the office content, the price of the freehold to Telecom would be discounted.
3. Chestvale would apply for planning permission and on receipt thereof, Telecom would purchase the office portion

at a price to be arrived at by valuing the remainder of the site with whatever permission had been obtained for it. Instead of "Chestvale's take" being valued pro rata, Chestvale would get a discount on the added value to compensate it for the risk.

4. Telecom would buy 2 to 3 acres, which would not be subject to planning permission. Planning permission would be applied for in consultation with Chestvale and when permission was granted Chestvale and Telecom would enter into an "equalisation agreement" to value Chestvale's take. This could result in a further reduction in the cost to Telecom if a more favourable planning permission was obtained on the remaining 2.5 to 3 acres based on a current value of the site at £9.4 million.

10.15 Consideration by Telecom of Noel Smyth letter of 9th March 1990

10.15.1 Consideration was then given by Mr. O'Neill to the alternative proposals outlined above. Mr. O'Neill in notes prepared by him at the time stated that option 1 involved carrying "Exposure" on planning and under the heading "Comment" stated:

"Not favoured because of capital outlay, exposure on planning and to criticism from "shareholders", customers, media and property experts"

In relation to option 2, he noted that the vendors would take on the role of developing a property to the requirements of Telecom, Telecom would lease it at the open market rent, with recourse to an arbitrator to resolve any disagreement and he noted that this was Mr. Desmond's second option and that the vendor would have exposure on planning.

In relation to option 3, he stated that as proposed by Mr. Desmond, the purchase of the site required for the Telecom development would be contingent on Telecom getting planning permission and paying interest charges on the capital tied up from the 28th February, 1990 to the date of purchase.

In relation to option 4, he noted that it involved Telecom purchasing three acres then and accepting the "exposure" on the planning permission. When the planning permission was through, there would be an adjustment in relation to the amount of property required by Telecom, up or down in the light of the permission granted. This was to be on a basis to be agreed. He noted in a summary as follows:-

"if we want minimum or no exposure, we go for option 3. If we want the lowest cost with the small risk involved in getting permission, we go for option 4. In effect 4 is the same as 1 but with less capital tied up".

10.15.2 The next matter that appeared on Mr. O'Neill's files, were notes of two

meetings on the 12th March 1990 and one telephone conversation on the same date. The telephone conversation was with Mr. Hanna of Brian O'Halloran & Associates, Architects; the first meeting, which was with Mr. McGovern, followed that and was held according to Mr. O'Neill at c.11.30 a.m.; and the third meeting which was with Mr. McGovern and Dr. Smurfit was in the afternoon and immediately before the Telecom board meeting on that day.

10.15.3 Mr. O'Neill's note of his conversation on the morning of 12th March with Mr. Hanna reads as follows:-

"His (Mr. Hannas) assessment is that there is a significant risk on obtaining planning permission. While the attitude of the planning officials was positive, it was in the context of "spectacular under utilization" of the site and because it was a corporate HQ for TE, the under utilization is spectacular by comparison with the Sweepstake site, in his view. They applied for 300,000 square feet of offices but got only 150,000 square feet even though the site is zoned for offices.

I told him that we had now firmed up, as far as we can at this stage, on a building of 60,000 square foot gross I asked him to give me an estimate of what site area would be required on an under utilisation basis, to accommodate that building. He came back to me on the phone with a figure of".

Although the note is actually blank in relation to the figure, Mr. O'Neill subsequently informed me in evidence on the 13th February 1992 that the figure Mr. Hanna gave him was in the order of 3.5 acres.

Mr. O'Neill then had the meeting with Mr. McGovern and his notes of that meeting indicated that he pointed out to Mr. McGovern that option 1, the original proposal, was the most favourable from Telecom's point of view although it did expose Telecom to risk on planning permission. If Telecom did not wish to carry that risk, they would according to Mr. O'Neill "have to pay dearly under options 2 and 3 for letting the

vendors carry it". He added that option 4 still involved risk on planning but a reduced amount and involved several "tricky aspects of an equalisation agreement". He noted that

"we felt that option 2 represented the least desirable approach - it involved paying interest, an agreement on rent, presumably at open market considerations and an agreement on purchase of freehold".

He added:

"Option 3 appeared to be a possibility since it was the least complex. Mr. McGowan asked me to estimate what would be the added value of the "residential portion" if the vendors could, as an extreme case, get planning permission for a second block of 60,000 square feet on it".

Mr. O'Neill's note then contained a complicated calculation based on Mr. O'Halloran's figures and Dr. Smurfit's cost estimate of 30th November 1989 and based on this, calculated that the enhancement in value would range between £1,500,000 and £5,000,000, depending on the size of the additional building which one might put on that site, ranging from 30,000 square feet to 60,000 square feet. If these figures are correct, and I have not tried to check them, then in exercising option 3 of the letter of 9th March, the cost of the site required by Telecom would be substantially reduced, although the vendors would, based on the premise in Mr. Smyth's letter, get a higher proportionate benefit from the enhanced value.

- 10.15.4 There then followed, early that afternoon, the meeting with Dr. Smurfit pursuant to which Dr. Smurfit and Mr. McGovern attended a Telecom board meeting. This meeting, according to the evidence, seemed to have lasted somewhere between 5 and 15 minutes and according to Dr. Smurfit it would have been "a few minutes". Mr. O'Neill's memorandum of the meeting is attached as Appendix 22. It notes that there was full agreement to proceed, as per option 1 of Mr. Smyth's letter of the 9th March, i.e. the original proposal whereby Telecom

took the risk on planning and indeed a risk that the residential element of the overall development would be left on their hands.

Mr. O'Neill in his evidence to me, stated that he and Mr. McGovern outlined their reservations about accepting any other options that would not give them control of the planning permission, and that the other alternatives involved them being drawn into a partnership or joint venture type of arrangement with an unknown partner. They felt that the cost of sheltering the planning risk was very high and they expressed concern as to the problems that might arise out of Telecom venturing into what was for them, unfamiliar territory, and the possibility of conflicts in relation to the planning permission being sought in conjunction with the vendors to maximise the value of the site. Mr. O'Neill stated in evidence that he reported to Dr. Smurfit and Mr. McGovern the advices of Mr. Hanna received earlier that morning.

10.15.5 As I considered this meeting of 12th March 1990, the meetings and correspondence leading up to it and the decision making process within Telecom to be of considerable importance, I examined each of Mr. O'Neill, Mr. McGovern and Dr. Smurfit in detail in relation to them. The essence of Mr. McGovern's evidence was that he assumed that Mr. O'Neill had taken whatever advice he required and he, Mr. McGovern, was relying on Mr. O'Neill's "**prudent judgment**". He accepted that he was informed by Mr. O'Neill of the telephone conversation with Mr. Hanna but maintained that this did not indicate that the planning situation had deteriorated since the initial report in January 1990.

10.15.6 Dr. Smurfit in his evidence indicated that he could not recall the contents of Mr. Smyths letter of the 9th March being mentioned to him, nor even a summary of them. He added that he would be "**relying on the Chief Executives ability in the sense that he would have done all of the homework and would have done all of the**

details and I would have asked him "again is this a recommendation?", and I would have said "yes, fine" - I wouldn't want to go into the background, the detailed negotiations that took place".

I informed Dr. Smurfit that Mr. McGovern and Mr. O'Neill indicated to me that they had told Dr. Smurfit of the four options that were available and what their recommendation was. Dr. Smurfit said that he did not recollect that, nor could he remember Mr. Hanna's name ever coming up at any meeting with the chief executive and Mr. O'Neill. He added that he could not remember the circumstances that led up to them wanting to meet him. He added that Mr. McGovern had not sent to him a copy of the letter from Mr. Desmond of the 20th February 1990, in which Mr. Desmond had suggested to Telecom a way in which they could protect themselves from media criticism and get a better commercial deal.

Extracts from my interviews with each of Mr. McGovern, Mr. O'Neill and Dr. Smurfit dealing with these aspects are contained in Appendix 23.

- 10.15.7 I am concerned at the apparent change in opinion of Mr. O'Neill between 9th March 1990 and 12th March 1990. I am also concerned at the fact that recommendations appear to have been made based on assumptions which were not checked with his counter party, Mr. Smyth, and the apparent lack of what one would normally experience in a negotiation process. What is also surprising is the apparent failure of the chairman and the chief executive to seek further information and if necessary advice when it would appear from the evidence, that Mr. O'Neill was coming to a conclusion, based at least partly, on the fact that another, more beneficial, option was "**unfamiliar territory**" for him, that one of the options was "**too complicated**", that one contained several "**tricky aspects**" and that it involved a joint venture with "**unknown persons**". There is no evidence that Mr. O'Neill,

Mr. McGovern, nor Dr. Smurfit considered asking who the unknown persons were or that the complications be explained to them. For instance in considering option 3, Mr. O'Neill thought it was too complicated and did not on its face promise sufficient benefit to Telecom. As explained by Mr. Smyth to me, what he intended was that, if, for example, planning permission was given for another office block on the remainder of the site, then instead of Chestvale buying back the lands pro rata, they would do so based on the enhanced value that the property then had, but with a discount to allow for the effect that Chestvale had carried the risk in relation to planning permission. In fact, the sort of discount, or method whereby a discount figure would be arrived at, was never raised by Mr. O'Neill, so that effectively in dismissing this option, the actual practical details and the effect of it, were not known by him. It may be that Mr. O'Neill was put under considerable time pressure to make up his mind because of the impending board meeting on the 12th March and it should be noted that the notes of his previous meeting with Mr. Smyth of the 7th March 1990 indicated that the next meeting to consider the options would be on the 15th March. There is no evidence on his file prior to the 12th March 1990, that he was aware that a decision had to be made for the board meeting on the 12th March.

10.15.8 After the board meeting, Mr. O'Neill advised Mr. Smyth that Telecom intended to proceed with option 1 i.e. the purchase of the complete site with a buy back option but not subject to planning permission and Mr. Smyth notified the Telecom position in writing to Mr. Desmond. This obviously took Mr. Smyth by surprise, because on 15th March 1990, Mr. Smyth's firm furnished revised draft documentation to Telecom based on an assumption that the sale would be subject to planning permission being obtained for an office block.

10.15.9 As stated above, a board meeting of Telecom took place on 12th

March and Mr. McGovern reported to the meeting that agreement had been reached on the purchase of the JMOB site at a cost of £9.4 million. In evidence to me, Ms. Meehan confirmed that none of the issues discussed earlier that day between Mr. McGovern and Mr. O'Neill and subsequently between Mr. McGovern, Mr. O'Neill and Dr. Smurfit were raised at the meeting. No other record of that meeting is available, but it would appear that all that happened was the noting of the brief report by Mr. McGovern. Ms. Meehan informed me that when the board carried out a review of the purchase following upon the Telecom Inquiry in September 1991, the management reported to the board that

"the cost of the site subject to planning permission being available would have been astronomical, even if it was possible to get it on that basis".

Having examined the files produced to me by Telecom, I can find no basis for that assertion.

10.16 Post Board Meeting Decision of 12th March 1990

10.16.1 At a meeting on the 15th March between Mr. O'Neill, Mr. Smyth, Ms. Kenny and Toal O'Muire (architect), it was agreed that a deposit of 10% of the purchase price would be paid by Telecom on the 28th March 1990 and while the formal closing date was deferred until the 30th May 1990, Telecom agreed to place the balance of the purchase money on deposit from the 11th April 1990. This reflected Telecom's understanding that they had been responsible for the delays that had, by that stage, resulted in it becoming very difficult for all parties to complete the sale on the scheduled closing date. In fact, this was a misapprehension on their part, and even if Telecom were ready to close, the vendors would not have been ready. Accordingly the concession of interest from 11th April 1990 does not appear to have been necessary. The interest that was finally paid by Telecom was IR£221,034.

10.16.2 It is true that subsequent to 15th March, Telecom required further changes, because having taken advice from Craig Gardner, their tax advisers, they realised that there could be a significant capital gains tax problem, arising from the exercise of the option agreement in relation to the residential portion of the site. As a result of these advices, it was decided that they would buy the office and the residential portions by two separate contracts. The potential saving for Telecom by using this method in respect of capital gains tax and stamp duty liabilities, was estimated to be in the region of £1,000,000.

10.16.3 On the 6th April 1990, Mr. Smyth wrote to Mr. O'Neill confirming agreement to postpone the closing date of the sale until the last week in April, on the basis that Telecom would pay the vendors interest on the outstanding purchase money, at DIBOR plus 1% until the actual completion.

By memo dated 12th April 1990, Mr. McGovern wrote to Dr. Smurfit updating him on the then position, in the following terms:-

"Further to our conversation yesterday, the negotiations and the legal documentation in regard to our purchase of the Ballsbridge site have been effectively concluded. Relevant agreements were due to be signed on the 30th March when the Vendors asked for a short postponement to seek advice on some capital gains tax aspects. Subsequent consultation and discussions on the latter (which also effects Telecom) led to mutual agreement that some changes in the legal documentation would be desirable and the respective legal people are currently attending to this. However, the transaction is effectively committed and we are "on interest" with effect from 11th April. The revised legal documentation is expected to be ready for signature around the end of the month."

As stated in Paragraph 10.16.1, it is not clear why Telecom agreed to pay interest on the outstanding purchase money, given that the delay was to enable both sides obtain further tax advice, as was set out in the letter from Noel Smyth & Partners of April 6th which stated:-

"I appreciate the best efforts of both sides to try and complete on the 11th April, but given the complexity involved in the case, the necessity to ensure the objectives of both of our clients are met, the serious tax consequences that could arise unless proper steps are taken to mitigate the liability, especially in the event of a buy back, the most sensible thing, as we have agreed, is to postpone the closing, but to preserve the agreement between the parties."

No formal contracts had been signed at this point. In fact, the agreements for sale between Chestvale and Delion, and between Delion and Hoddle, had not been executed nor indeed at that time had the sale of shares in Chestvale from UPH to Delion been completed, so that Chestvale remained a subsidiary of UPH.

10.17 Further Legal Discussions on Title up to Closing

10.17.1 Further discussions and meetings ensued between Telecom's solicitors and Noel Smyth & Partners with a view to signing contracts. They were to be signed on 3rd May, but at the last minute Noel Smyth & Partners announced that Delion and Hoddle would not now appear on the contract documentation. In a memo from the Telecom legal department to Mr. O'Neill, it was pointed out:-

"As you know these companies were being used for tax reasons - which in itself is quite legitimate. The vendor has changed its mind on a number of times on whether or not to use these companies".

As a result of this, it was advised that the relevant conveyancing precautions be taken to ensure that any outstanding interests of those companies be gathered into the conveyance. There also appears to have been some concern on the part of Mr. Smyth, to ensure that he executed the contracts on behalf of Chestvale and, as Mr. Smyth was going to be away on the day scheduled for executing the contracts, it was arranged that he would sign execution pages of the contracts in blank.

10.17.2 The contracts were then finally executed on the 7th May 1990 by Hoddle and Telecom. The price for the residential portion of the site was £3,506,000 and the balance of the £9.4 million i.e. £5,894,000 was attributed to the office portion of the site. The contracts provided for the application for planning permission to be completely under the control of Telecom. Telecom was obliged to lodge a planning application in relation to the corporate headquarters. Telecom would then, at its absolute discretion, seek permission for any further development on the Office Site and the Residential Site. The proposals in relation to the Residential Site were to be submitted by the vendors architects, Mitchell O'Muire Smyth. Telecom was to be the final arbitrator as to all matters in relation to the planning

application. As a result of these conditions, the vendor, Hoddle, which subsequently obtained an option over the Residential Site, retained no control whatsoever over the application for planning permission for the Residential Site and accordingly had no guarantee that the permission that would be granted would enable a cost effective development to be carried out. It is to be presumed that the vendors were as aware of the planning difficulties as Telecom were and the risk, in particular, that there might only be very low density development allowed. In fact, a dispute did arise for this very reason, between the respective architects during the course of the negotiations with the planning authority during 1991, when it became apparent that the planning department of Dublin Corporation were going to insist on a reduction/variation in the amount of development on the Residential Site as a pre-condition to granting permission for the office development.

The contract in respect of the Residential Site was not made subject to the granting of an option agreement in favour of the vendor, although this appears to have been agreed, as an option agreement was in fact executed on the 29th June 1990, the date on which the sale was closed. The option provided that Hoddle would have the right to purchase the Residential Site in the event that final grants of planning permission for a residential development on the Residential Site and certain other developments on the Office Site were obtained by the grantor. One of the provisions of the option agreement, condition 6.3, was to the effect that if planning permission, when granted, stipulated that the development of the offices would be permissible on an area different from what was defined in the agreements as the Office Site, so that in fact it would have to encroach on part of the Residential Site, that there would be adjustment between the Office Site and the Residential Site to ensure compliance with the requirements of the planning permission. Any such adjustment in area would result in a pro rata adjustment by way of increase or decrease in the purchase

price. This is, in effect, very similar to the equalisation agreement required for option 4 save that as originally proposed, the equalisation agreement did not necessarily involve pro rata adjustment. However this, as stated earlier, was not explored by Mr. O'Neill with Mr. Smyth.

10.17.3 Pursuant to the execution of the agreements, requisitions on title were raised and the usual conveyancing procedures were complied with. In addition, extensive redrafting of the various legal documents was required to effect the sale. In particular, difficulties arose out of a deed of indemnity/warranty required by Telecom. The purpose of this was to give comfort to Telecom as to the proper state of corporate affairs of Chestvale, Hoddle and Delion and also to secure certain assurances from those companies in favour of Telecom in order to protect the legal, financial, taxation and commercial position of Telecom as purchaser. In a memorandum dated 12th June 1990 from Patrick McGovern, Solicitor in Telecom to Mr. Hall and Mr. Russell (also of Telecom), Mr. McGovern pointed out that

"these warranties or indemnities by a worthless company are themselves almost worthless. However, there is no natural or corporate person of substance other than the vendors themselves overtly involved on the vendors side. We have requested that the deed of indemnity and warranty be supported by a performance bond. We do not expect this request to be met by the vendor. If, as expected, the request is refused, this office feels that you must proceed with accepting the vendors as they are. It would not be the first time that TE would have had to purchase from vendors of straw. The only real risk is inability to recover and/or costs for any breach of obligation. You might confirm that this is in order. "

After negotiations, an indenture of warranty and indemnity was agreed for execution by Mr. Smyth, together with a letter of covenant, the purpose of which was to reinforce the effect of the deed of warranty and indemnity. The letter was to be given by way of covenant and not

by way of guarantee.

Before executing the deed and giving the covenant, Mr. Smyth took the precaution of obtaining a written deed of indemnity from Mr. Desmond. This is dated the 28th June 1990 and recited inter alia, the following:-

"2 Chestvale and Delion are non-resident companies and the shares in Chestvale, Delion and Hoddle are held by nominees in trust for the beneficial owners.

4 Mr. Desmond is aware of the identity of the beneficial owners but is unable to procure a warranty from them and Mr. Smyth at the request of Mr. Desmond on behalf of the beneficial owners has agreed to enter into the warranty".

The deed of indemnity by Mr. Desmond effectively indemnified Mr. Smyth against any claim that might be made against him by Telecom arising from the covenant and warranties that he gave to them.

10.17.4 Eventually, all matters were finalised and the sale was closed on the afternoon of the 29th June 1990, when a cheque in the amount of £8,460,000 (made payable to Ansbacher) was handed over. There were a number of undertakings in relation to outstanding matters to be complied with, one of which was an undertaking by the vendors

"to procure that the asbestos which is still on the site will be cleared within seven days hereof, at the risk and expense of the vendor".

There was another undertaking by the vendors that they would execute a deed of conveyance of the residential site to Telecom when requested to do so. The reason for this undertaking was that Telecom had decided, on tax advice and on the basis that there was an option to buy back the Residential Site, that they would not take a deed of conveyance of the site (which would be stampable), in the expectation that planning permission would soon be obtained, the option would be exercised and the property would end up with the vendors anyway.

Accordingly, even though Telecom had paid the full consideration, of £9.4m, they merely had a contractual interest in the Residential Site and did not have the legal title vested in them. This was still the case at the time of my appointment in October 1991, although I understand that this position may have been rectified since and, although I have not checked the position, I presume that Telecom have had the legal estate in the Residential Site vested in them since.

- 10.17.5 Since the closing of the sale in June 1990, Telecom together with their architects have engaged in endeavouring to get planning permission for the development of the site. It is not necessary for me to go into the details of the negotiations and application for planning permission, which, in fact, has not yet been obtained and I understand is the subject matter of an appeal to An Bord Pleanala. However I have noted that on 11th June 1991, Mr. O'Halloran, architect had a meeting with certain people in the Planning Department of Dublin Corporation. Among other things, the planning officials indicated that their basic policy difficulty was that they wanted the type of development proposed by Telecom to take place in the city centre, rather than in Ballsbridge. (This was not now and in fact had been stated to Mr. O'Halloran in January 1990 and is referred to in the report to the Telecom board for the board meeting of 10th January 1990 - see Paragraph 10.13.) In response to the report of this meeting by Mr. O'Halloran, Mr. O'Neill spoke by telephone to a Mr. Quinlan of Dublin Corporation on the 19th June 1991, to the effect that he had just one clear message to pass on behalf of Telecom. He said that if their application for planning permission at Ballsbridge for a corporate HQ was not successful, the proposal would be dropped and there would be no question of it being relocated to a designated area or the city centre. Mr. O'Neill noted that Mr. Quinlan said that the information would be carefully considered in their deliberations on the matter. It is arguable that if this reflected the policy of Telecom (and Mr.

O'Neill in his note of the conversation specifically stated that he gave the message on behalf of Telecom), then it calls into question the reality of Telecom's need for a corporate headquarters and therefore their entire rationale in pursuing the acquisition of the JMOB site at all, irrespective of the various anomalies that appear in the history of their involvement with the site between June 1989 (if not earlier) and September 1991. In this regard, it is perhaps pertinent to point out that the only references to the corporate headquarters discussed at executive committee meetings of Telecom, as reported by extracts from records of their meetings, are attached in Appendix 24 and it should be noted in particular that the only references between 12th February 1990 and 2nd July 1990 (after they had completed the purchase) were references to the article appearing in the property supplement of the Irish Independent on the 16th February and the subsequent retractions.

10.18 Cablelink

10.18.1 There is one further issue that has come to light in the course of my investigations into the purchase by Telecom of the JMOB site, and which may or may not have a relevance, and this is the purchase by Telecom in July 1990 of the Cablelink building adjoining the JMOB site. One interesting aspect of this, is that Mr. Desmond in his submissions to banks in July 1989, referred to the possibility of Telecom/Cablelink being interested in the JMOB site. In fact, Mr. Walsh in his evidence to me, stated that it was pointed out to Mr. Finnegan in January 1989 that the Cablelink building adjoined the JMOB site and that they could be developed jointly. Further, when writing to Mr. McGovern on 5th December 1989, Dr. Smurfit referred to the JMOB site being the most suitable **"from a security point of view"** and referred to the Cablelink building. During all of this time, Telecom were negotiating for the acquisition of Cablelink, but it would not appear that the acquisition, which ultimately involved the purchase of a controlling stake in Cablelink, was completed until 27th June 1990. The reference to the **"security point of view"** is curious as I could not find any other reference to security in the numerous Telecom files inspected by me.

10.18.2 Preliminary inquiries by me, indicate that Telecom bought the Cablelink building from Mount Merrion Estates Limited. Mount Merrion Estates Limited is owned by a company registered in Jersey and it would appear that some time after October 1989, the ultimate ownership of the Jersey company changed. I understand that Mount Merrion Estates Limited was owned by the Pembroke Estate. It may be that the transactions referred to were part of a tax planning or corporate restructuring exercise by the beneficiaries of the Pembroke Estate. I have been assured by Mr. Finnegan, who acted for Mount Merrion Estates in the sale to Telecom, that the true vendors were the

Pembroke Estate. However he would not necessarily be aware of any changes that took place in the chain of ownership of companies in Jersey. I believe that this acquisition by Telecom requires further examination to satisfy the board of Telecom that it was a bona fide arms length transaction.

This is particularly so, as at the time of its purchase, which was "prior to auction", planning permission had not yet been obtained for the JMOB site and it was not clear, where on the JMOB site, the planning authorities would want the office block, even if they were disposed to permitting it somewhere on the site. Accordingly, there was no guarantee that the possible "security" or other benefits that might result from having adjoining sites, could be achieved.

11.0 Report on the Membership of Chestvale and Hoddle

11.01 As provided in my warrant, I am required not only to determine the true persons who are or were financially interested in the success or failure (real or apparent) of Chestvale and Hoddle or able to control or materially to influence their policy but also to report on the membership of the Companies.

Section 31, Companies Act 1963 defines "membership" and provides

"(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and, on its registration, shall be entered as members in its register of members.

(2) Every other person who agreed to become a member of a company, and whose name is entered in its register of members, shall be a member of the company."

Accordingly, I report as follows on the membership of Chestvale and Hoddle.

11.02 The members of Chestvale at the 9th October 1991 according to the Companies Registration Office in Dublin are Sean Kavanagh and Marc O'Connor, the original subscribers.

Although I have requested it, I have not had returned to me from Cyprus, the share register of the Company to ascertain if it reflects the share transfers described by me in Paragraph 2.1.4 above.

11.03 The members of Hoddle at the 9th October 1991, according to the share register of the company, as inspected by me on the 15th October 1991 were:

Catherine Daniel holder of 1 Ordinary Share;

Jacqueline Berns holder of 1 Ordinary Share.

The transfers referred to at Paragraph 2.3.6 were not registered in the share register at the said date.

12.0 Conclusion

12.01 I do not consider it appropriate for me at this stage to summarise any further the evidence adduced to me. I intend to continue further with my investigation into the money trail, and in particular to seek further information regarding the two payments from Union Bank of Switzerland in Geneva, the payments into and out of the account at AIB (CI) Limited in Jersey and the disposal by Mr. Desmond of the £500,000 in cash withdrawn by him from the Freezone account at TSB, Grafton Street, between 23rd July 1990 and 31st July 1990. I also intend, where I consider it necessary, to attempt to verify or have corroborated certain aspects of the evidence already adduced to me. I hope to be in a position in early course to issue a final report, to include the determinations required by my warrant.

12.02 As I have not received cooperation from Joe Lewis, the apparent beneficial owner of the shares in UPH, and accordingly have difficulty in finding out relevant facts about the shares, I recommend to the Minister for Industry and Commerce that he issue a notice directing that the shares listed below and which are registered in the name of Aurum Nominees (333013) be, until further notice, subject to the restrictions imposed by Section 16, Companies Act, 1990.

25,000 Ordinary Shares

60,000 "A" Fixed Rate Redeemable Preference Shares

40,000 "B" Fixed Rate Redeemable Preference Shares

CHESTVALE PROPERTIES LIMITED

HODDLE INVESTMENTS LIMITED

Appendices attached to

INTERIM REPORT

APPENDIX 1

PARAGRAPH 1.1

Houses of the Oireachtas

Warrant of Appointment of Inspector

The Minister for Industry and Commerce, Mr Desmond J O'Malley, TD, in exercise of the powers conferred on him by section 14 of the Companies Act, 1990, being of the opinion that there are circumstances suggesting that it is necessary in the public interest, hereby appoints Mr John A. Glackin as Inspector under the said section to investigate and report on the membership of Chestvale Properties Ltd and Hoddle Investment Ltd and otherwise with respect to these companies for the purposes of determining the true persons who are or have been financially interested in the success or failure (real or apparent) of these companies or able to control or materially to influence the policy of these companies. Without prejudice to the generality of the foregoing, the investigation shall extend to the investigation of any circumstances suggesting the existence of an arrangement or understanding which, though not legally binding, is or was observed or likely to be observed in practice and which is relevant to the purposes of the investigation.

Given under the Official Seal of the Minister for Industry and Commerce this 9th day of October 1991

Sean Dorgan

Sean Dorgan

A person authorised by the Minister for Industry and Commerce to authenticate the Official Seal of the Minister.

APPENDIX 2

PARAGRAPH 1.6

Houses of the Daireachtas

LIST OF WITNESSES

<u>Name of Witness</u>	<u>Date of Attendance</u>
James Aylmer and Ronan King	4th February 1992
Kevin Barry	23rd October 1991
	1st November 1991
	8th November 1991
	1st July 1992
Liam Booth	10th July 1992
John Bourke	27th November 1991
	18th March 1992
	11th June 1992
Diarmuid Bradley	5th May 1992
Eric Brunker and James Osborne	22nd October 1991
Michael Buckley	20th May 1992
James J. Burke	14th November 1991
Tom Cavanagh	7th April 1992
Roger Conan	29th April 1992
Terry Cooney	18th October 1991
	26th February 1992
Donal Cotter	14th January 1992
Dermot Desmond	11th November 1991
	12th November 1991
	5th December 1991
	6th December 1991
	5th April 1992
Patrick Doherty	19th November 1991
Vincent Doyle	12th December 1991
Colm Duignan	20th March 1992
John Finnegan	24th October 1991
	31st January 1992
	6th February 1992
	12th June 1992

LIST OF WITNESSES

<u>Name of Witness</u>	<u>Date of Attendance</u>
Liam Fitzgerald	24th April 1992
Ian French	22nd October 1991
Michael Gilmartin	13th March 1992
Laurence J. Goodman	22nd May 1992
Tom Grace	18th October 1991
Padraic Hassett	31st January 1992
Conor Haughey	27th April 1992
Michael Johnson	27th January 1992
Kevin Kenny	13th November 1991
	6th May 1992
Laurence McCabe	13th January 1992
Fergus McGovern	22nd November 1991
	11th June 1992
Sidney McInerney	27th March 1992
J.P. McManus	14th February 1992
John Magnier	10th February 1992
Robert Matthews	26th March 1992
	27th March 1992
Olaf Maxwell	24th January 1992
Ita Meehan	3rd June 1992
Gay Moloney	23rd March 1992
	12th May 1992
	19th May 1992
Michael Moriarty and Harry McIntyre	10th March 1992
	19th March 1992
Tom Mulcahy	7th April 1992
Maura O'Connor	13th December 1991
Mark Odlum	4th December 1991
Clíodhna O'Donoghue	10th December 1991
James O'Dwyer and Paul McLoughlin	28th November 1991

LIST OF WITNESSES

<u>Name of Witness</u>	<u>Date of Attendance</u>
James O'Higgins	27th November 1991
Aidan O'Hogan	18th October 1991
Dan O'Neill	13th February 1992
	19th March 1992
Ivan O'Neill	23rd October 1991
Rory O'Nuallain	26th June 1992
Seamus Pairceir	13th January 1992
Lochlann Quinn	30th March 1992
Richard Robinson and Fergus Smith	2nd March 1992
Eamonn Rothwell	5th May 1992
John Russell	11th June 1991
Dr. Michael Smurfit	25th October 1991
	14th June 1992
Noel Smyth, Ronan Hannigan and Catherine Daniels	16th October 1991
Noel Smyth	20th February 1992
	21st February 1992
	18th March 1992
	3rd April 1992
	10th June 1992
Gerard Walsh	7th April 1992
	23rd April 1992
	2nd July 1992

APPENDIX 3
PARAGRAPH 2.3.11

Houses of the Oireachtas

REGISTERED OWNERS	DATE OF SUBSCRIPTION	DATE OF ALLOTMENT	APPARENT BENEFICIAL OWNERS
accharates Limited (100,000 Ordinary Shares)	17.1.89	31.5.89	Dr. Michael Smurfit
ulzano Limited (25,000 Ordinary Shares)	24.5.89	31.5.89	John Magnier Family Trusts
onvoy Trust Limited (150,000 Ordinary Shares)	12.5.89	31.5.89	Tom Cavanagh
urum Nominees Limited (25,000 Ordinary Shares)	21.6.89	31.5.89	Joseph Lewis
Aurum Nominees Limited (100,000 Ordinary Shares)	23.5.89	31.5.89	Lochlann Quinn and Martin Naughton
AIIM Nominees Limited (100,000 Ordinary Shares).	1.6.89	31.5.89	Allied Irish Property Fund for Tax Exempt Pension Schemes and Charities
AIIM Nominees Limited (600,000 Ordinary Shares)	1.6.89	31.5.89	Allied Irish Property Fund for Tax Exempt Pension Schemes and Charities
Glen Investments Limited (1,500,000 Preference Shares)	15.5.89	31.5.89	Martin Naughton and Lochlann Quinn
Smurfit Paribas (400,000 Preference Shares)	20.1.89	31.5.89	Smurfit Group Pension Fund
Sulzano Limited (60,000 Preference Shares)	24.5.89	31.5.89	John Magnier Family Trusts
Convoy Trust Limited (360,000 Preference Shares)	12.5.89	31.5.89	Tom Cavanagh
Aurum Nominees Limited (60,000 Preference Shares)	21.6.89	31.5.89	Joseph Lewis
Sulzano Limited (40,000 Preference Shares)	24.5.89	31.5.89	John Magnier Family Trusts.

REGISTERED OWNERS	DATE OF SUBSCRIPTION	DATE OF ALLOTMENT	APPARENT BENEFICIAL OWNERS
Convoy Trust Limited (240,000 Preference Shares)	12.5.89	31.5.89	Tom Cavanagh
Aurum Nominees Limited (40,000 Preference Shares)	21.6.89	31.5.89	Joseph Lewis
Padraic E. Hassett (50,000 Ordinary Shares)	9.3.90	6.3.90	Padraic E. Hassett
Pepper Canister Nominees (254,070 Ordinary Shares)	6.3.90	6.3.90	Dermot Desmond
NCB Group Limited (195,910 Ordinary Shares)	6.3.90	6.3.90	NCB Group Senior Executives

Houses of the Oireachtas

APPENDIX

PROPOSED ZONING AND DEVELOPMENT PLAN, 1972

Location

The location of the site is shown on page 11. It will be convenient to refer to the land containing the site throughout this plan in Dublin 4 when it is necessary to re-emphasize its location. As far as the boundaries of the site are concerned, it is defined by its location but because of the existing buildings its position and its planning possibilities and its planning history is shown on the attached site plan.

Planning Regulations

The site appears to be zoned under the 1964 Development Plan as light industrial (see current development plan) and a change of use from light industrial to residential is allowed, provided that the change will require a planning permission of the plan which is not prohibited as shown on a legal map.

APPENDIX 4

PARAGRAPH 5.2.9

Even the granting of such a permission would still require the site to be used in accordance with the terms of the zoning.

In terms of line 100 it is a residential area, in the view of 100 meters as per planning permission for the site and the actual applied use has in fact been changed. This will be a breach of the zoning.

- (1) The original zoning scheme is still valid.
- (2) Because of the zoning, in Dublin 4 or that there will be those who will be built from those who will be granted planning permission in the area and those who will not be granted planning permission for everything that is built in the Dublin 4 area, except houses etc.
- (3) The alleged or pre-announced use of the site is not in fact a residential use but a commercial use.
- (4) Because the site is zoned as residential it is not a residential use in the view of the Dublin 4 zoning and the Dublin 4 zoning is still valid.

Use of property

It has been stated in a number of questions that the site would be used as a residential area. The zoning of the site is light industrial and the construction of residential buildings on a high density residential use is not allowed. The fact that the site is zoned as light industrial does not mean that it is a residential use. The fact that the site is zoned as light industrial does not mean that it is a residential use. The fact that the site is zoned as light industrial does not mean that it is a residential use.

Houses of the Oireachtas

A HISTORY
BY
S. J. O'NEILL

MEMORANDUM

RE: JOHNSTON MOONEY AND O'BRIEN SITE, BALLSBRIDGE, DUBLIN 4

Location

The location of the site is second to none. It must be considered as one of the last remaining sizeable properties left in Dublin 4 which is likely to be re-developed in the next decade. On par with the Sweepstakes site in terms of its location but because of the existing buildings, its zoning vis a vis planning permission and its previous history is probably more difficult to develop.

Planning Permission

The site appears to be zoned under the 1980 Development Plan as light industrial (see current development plan). The change of use from light industrial to offices, commercial or residential will require a material contravention of the plan which is a political manoeuvre as opposed to a legal one.

Even the politics of such a manoeuvre is outside normal Dail politics and into the realm of the Corporation.

In terms of time scale it will take a minimum, in my view, of 18 months to get planning permission from the time that the actual application has in fact been lodged. This will take account of two positions:-

- (a) The material contravention process itself; and
- (b) Because of its sensitivity in Dublin 4 no doubt there will be third party objectors both from those endeavouring to preserve "light industrial" in the area and those who will just normally object to everything that is built in the Dublin 4 area, either because of:-
 - (a) its alleged or pre-supposed over intensification of the site, no matter what is put on it; and
 - (b) because they will be perceived to be required to object because of the demise of the Johnston Mooney & O'Brien even though the Johnston Mooney & O'Brien position was considered undesirable in its then location.

Use of property

It has been noted on a number of occasions that the site would be ideally suited as a location for a new Hotel. Given the cutbacks on the BES Scheme, the construction of several hundred bedrooms of a high quality in Dublin over the last number of years, the planned construction of further Grade A rooms over the next number of years, a Hotel of itself would in my view not be a feasible or realistic return in respect of the actual site.

It may well be that in the course of the development an offer for a small well located Hotel concentrating on a function type business might well be located on some portion of the site, however it would be the least attractive proposal in my view.

The location of the site makes it unique in terms of its desirability both in terms of:-

(a) residential; and

(b) offices,

and it is a combination of both of these areas that I think should be considered.

Residential

At the present time in Dublin there is no identifiable high security top class individualistic site which can combine both the private residence and the corporate image.

I would perceive that this particular location has the ability to deliver on both.

The location of the site close to Lansdowne Road and to the R.D.S. which at certain times of the year become the focal points of corporate entertainment and corporate conference centres.

If the high spec security conscious, one off properties limited to 20 or so numbers on a site of circa two acres in Ballsbridge can be sold as corporate packages then it must be possible at this stage to raise approximately ,000.00 in respect of each unit involved.

owner occupiers of between 3,000

Proposal

1. Residential

I would divide a portion at the rere end of the site into approximately 2 acres which would have views on to Herbert Park and to the Dodder (when cleaned up).

I would make the site a totally secure area with access available only to the 20 or so residences who would be entitled to occupy same.

I would recommend that the 20 or so residences would be the effective town house of the Chief Executive of each of the top 20 or so companies in Ireland, and could also be the focal point in respect of any corporate entertaining that that Chief Executive through his Company may wish to pursue.

I would envisage that at least 3 to 5 of the properties would be acquired by some of the top companies who continuously use the Ballsbridge area to entertain their corporate clients; e.g. Guinness, Aer Lingus, A.I.B., B. of I.

The secure location in a prestige area of a property to be used by

these companies for location and entertainment privately of visiting guests, or persons from other like-size corporations, must be of interest rather than the use of Hotel accommodation in the immediate vicinity.

Equally the fact that the location is central and secure and has a limited number of selected individualistic units all individually and architecturally designed to suit the needs of the individual would in my view command substantial monies but more importantly would fund the entire site from the outset as shown in the enclosed figures.

In addition, it gives the opportunity for the corporation in question to take a participation in the overall property and thereby afford an opportunity to reduce considerably the cost of acquiring such an important property in the first instance.

Assume that 20 corporations could be attracted to taking up the proposal, what they would effectively get would be as follows. Assuming a cost of £500,000.00 for each of the 20 units each of the people involved would be given say a 1.5% overall share in the Company and in addition, would be given a house not more than 2,000 square feet up to a certain specification including a certain level of fit out which would cost probably in the region of IR£200,000.00 or £100.00 per foot to complete.

The specification for £100.00 per foot would be extremely high, and it may well be that if the specification was reduced to £75.00 per foot the square footage of the actual unit could increase to 3,000 square feet, a matter of detail to be considered with each individual occupier.

The 1.5% of the overall profit in the scheme could work out quite handsomely depending on the planning permission that was achieved in respect of the 81 units themselves.

The effect is to try and bring about a cost efficient proposal to ensure that the initial capital to purchase the site is available and that a substantial amount of profit is available to the developers for obtaining and building out the proposed development.

2. Office development

At present there is approximately 280,000 square feet of covered space on the site.

The planners would not allow any such reintensification of the site as heretofore, however it would not be unreasonable to assume that circa in the region of 150,000 square feet of offices would be available on the site. On the basis of that number and because of their size assume the following figures were realistic:-

- (a) Because of the height of the existing buildings, the RDS and the buildings immediately next door it is unlikely that buildings higher than three or four storeys at the maximum would probably be allowed on site.

Obviously in some circumstances five storeys may be allowed, but I would believe this is unlikely.

Working on the premise that most of the offices involved were B1 type office units then the specification for those offices/showrooms would be on the basis that they were sold and possibly even "pre-sold" to individual end users.

The market that one is endeavouring to sell to are the smaller end of the market which is not really serviced at this time, i.e. the professionals, the accountants, solicitors, computer and small service industries who require somewhere in the region of between 2,000 and 5,000 square feet.

The proposal would be to either pre-sell to the end user or to funds the space in question.

Assuming 150,000 square feet together with a 50,000 square foot multi storey car park to service the 150,000 square feet of offices, yielded of say £15.00 per foot commencing in three years time, the total rent receivable would be £2.25 million \times 12.5 (8% yield) throws up a total value of £28,125,000.00. Add 20 residential sales at £500,000.00 each = £10 million. Total: £38,125,000.00. Less cost of residential construction $20 \times 2,000 \times £100.00 = £4$ million. Cost of construction of 150,000 square feet of offices to include tenant specification at £70.00 per foot = £10.5 million. Add 50,000 square feet of car parking at £25.00 per foot = £1.25 million. Add stamp duty marketing and legal, 10% of gross receipts = £3,812,500.00. Add financing costs on a cash flow that will peak at say £15 million for nine months at 12% = £1.35 million.

Total receipts:	£38,125,000.00.
Total costs:	£20,912,500.00

Balance	£17,212,500.00

Net cost divisible as to:-

- (a) 70% for the developer;
- (b) 30% for the individual investors.

Investors return would be:-

- (a) House plus 1.5% of overall profit =

Obviously the figures that are set out here can be argued as to:-

- (a) the planning permission that one is likely to receive;
- (b) the likelihood of getting investors to invest in a project of this nature;
- (c) whether the return is sufficiently attractive and secure for them at this time.

Dealing with the insecurity aspect of it I would suggest that rather than any of the investors parting with cash that if they are of sufficient strength that each of the 20 investors be required at this

stage to issue a promissory note for 50% of the agreed price, i.e. £250,000.00 each.

The £250,000.00 advanced by them would be underwritten by say NCB to be returned to them in the event of planning permission not being obtained and the transaction not being proceeded with as proposed. If on the other hand the transaction is proceeded with then on receipt of planning permission the further £250,000.00 is payable.

The first £250,000.00 can be by way of promissory note which the developer could discount so that the actual holding of the site is not covered by a Bank loan and therefore the costs of holding same in the hands of the developer is kept to a minimum. Equally it may well be possible to enter into such equally agreeable arrangements with sharing the profits with any number of funds who wish to become involved, or indeed any number of individuals who wish to become involved by pre-selling to them by way of agree promissory notes payable into the future and using the land as security for the finance, keeping the cost of the finance in the hands of the developer to a minimum.

In most large developments the holding of the land bank at a large cost is what eventually forces the developer to take decisions which he might normally not have taken had his finance been institutionally backed or available to him on attractive rates.

Obviously the above requires considerable refinement both in terms of proposals for the property, a proper marketing package to be constructed, a detailed site survey, an architectural report on the planning that will be available and a view from a town planner as to what is likely to be granted with the greatest of ease and with the least amount of fuss.

May 17, 1989

Houses of the Oireachtas

APPENDIX 5

PARAGRAPH 5.3.16

Freezone Investments Ltd.

7th Floor Victory House
Prospect Hill
Douglas
Isle of Man

STRICTLY CONFIDENTIAL

Mr Patrick Doherty,
96 Palace Garden Terrace,
Kensington,
LONDON.

9th August 1989.

Dear Pat,

Further to our discussions on your plans for developing the Johnston Mooney & O'Brien site, I am prepared to make a loan available of IR£2 million to Chestvale for the purchase of the site, on the following terms and conditions:-

- BORROWER:** Chestvale Limited/Patrick Doherty
- TERM:** Repayable by 31st August 1992
- SECURITY:** Promissory note signed by Patrick Doherty for IR£3 million, due 31st August 1992, being the IR£2 million advanced here and IR£1 million guaranteed profit.
- PROFIT SHARE:** The first IR£2.5 million of profit after all costs and after repayment of the funds, i.e. IR£2 million, is to be transferred for the account of Freezone. The promissory note will be returned on full payment of the IR£4.5 million.

contd...../2

Freezone Investments Ltd.

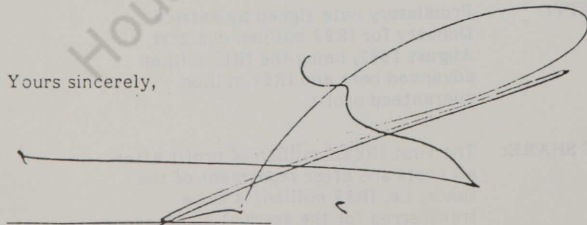
-2-

7th Floor Victory House
Prospect Hill
Douglas
Isle of Man

- CONDITIONS:**
1. I, Colin Probets or Freezone will have no further rights on any profits received from the development.
 2. My funds will be held in separate deposit accounts and all interest on those accounts will be for my benefit and will not be included in the calculation of the profit share or guaranteed profit under the promissory note.
 3. The development of the site will be the sole responsibility of yourself and all decisions relating to the purchase, design, development and disposal will be your sole responsibility.
 4. All financial aspects relating to this development should be advised to Mr Dermot Desmond, who is authorised to act on my behalf in relation to giving an opinion on the financial structure and approving the profit share calculation.

This loan agreement is confidential to the parties herein. If you agree with the foregoing, please sign the attached copy of this letter together with the promissory note, as confirmation of your acceptance to the above terms and conditions.

Yours sincerely,



R.C.G. PROBETS
for and on behalf of R.C.G. PROBETS
and FREEZONE

Various header information including names and titles, partially obscured and mirrored.

Noel Smyth & Partners

August 11, 1988

Eric Smeeth, Esq.
2 A.I. Building
Deloitte
Embassy Gardens
Waterloo Street
Dublin 2

Your Client - United Property Holdings
Low Level Development Licence

Dear Sirs,

We refer to the above matter and the fact that your client has been granted a licence to develop the site in question. We are pleased to advise that the licence is valid and that the development is in accordance with the conditions of the licence.

APPENDIX 6


PARAGRAPH 5.4.11

The licence is valid and the development is in accordance with the conditions of the licence. We are pleased to advise that the licence is valid and that the development is in accordance with the conditions of the licence.

In view of the above, we advise that the licence is valid and that the development is in accordance with the conditions of the licence. We are pleased to advise that the licence is valid and that the development is in accordance with the conditions of the licence.

We advise that the licence is valid and that the development is in accordance with the conditions of the licence. We are pleased to advise that the licence is valid and that the development is in accordance with the conditions of the licence.

We advise that the licence is valid and that the development is in accordance with the conditions of the licence. We are pleased to advise that the licence is valid and that the development is in accordance with the conditions of the licence.

Yours sincerely,

Noel Smyth & Partners

Commissioners for Oaths

Incorporating
Louis J. Noonan & Co.

Our Ref. NS/ph
Your Ref.

Date. August 11, 1989

Dublin 2.
Tel: (01) 615525.
Telex: 30677. D.D.E. 34.
FAX No. 613979.
VAT No. F4645234J.

Hills Solicitors,
Great Queen Street,
London.
Telephone 01-242 8431
Telex 669774

Tenzer, Greenblatt, Fallon & Kaplan
Chrysler Building,
405 Lexington Avenue,
New York 10174.
Telephone (212) 573 4300
Telex 968711 TGFK NYK

Assumpta Kenny
Hugh O'Neill
Cathal O'Sullivan
Ronan Hannigan
T. Colman Bermingham

Noel Smyth & Partners

RE: Your Clients - United Property Holdings,
Our Client - Chestvale Properties Limited.

Dear Sirs,

We act, as you are aware, for Chestvale Properties Limited, who have agreed to purchase from your Clients, their interest in the site known as the Johnston Mooney and O'Brien Site at Ballsbridge, Dublin, 4, containing 5.5. acres statute measure, or thereabouts.

We confirm that we are today assuming your responsibility for the closing of the sale in relation to this matter with the Liquidator thereof, Mr. Tom Grace and we will be paying over to him the sum of IR£4 million.

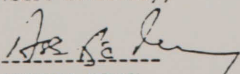
The balance of the consideration amounting in total to IR£2.3 million to be satisfied by Loan Paper, guaranteed by a Bank will be put in place within fourteen days from the date hereof.

We confirm that our Clients have accepted facilities from Trinity Bank to guarantee the said paper in accordance with the terms previously agreed and in consideration of your closing the sale today, WE NOW UNDERTAKE with you as follows:-

- (a) To hold the deeds and other documents of title relating to the property known as the Johnston Mooney and O'Brien Site, containing 5.5 acres, statute measure or thereabouts, in trust for United Property Holdings, subject to a First Charge being placed on the property by the Bankers who are providing facilities to the Purchasers in this matter, which Charge shall not in any event exceed IR£4 million.
- (b) In addition we shall use our best endeavours to procure that Chestvale Properties Limited will put in place on or before the 25th of August 1989, the necessary guaranteed Loan Paper as final portion of the consideration herein.

We confirm that we hold the irrevocable instructions from Chestvale Properties Limited to give the necessary Undertakings as herein.

Yours sincerely,


ASSUMTA KENNY
NOEL SMYTH & PARTNERS.

APPENDIX 7

PARAGRAPH 6.1.3

Houses of the Oireachtas

PROPOSAL

July 26, 1989.

Fitzwilliam Trust, 22, Fitzwilliam Square, Dublin, 2, ("The Borrower") has agreed to purchase through itself or through a subsidiary nominee Company the property as set forth in appendix 1 of the details attached hereto, for the price or sum of IR£6.3 m.

PURCHASE PRICE

The purchase price is to be satisfied as follows:-

- a. On completion of the payment of IR£4 m.
- b. Four years on the anniversary of the completion IR£2.3 m.

The IR£2.3 m payment is to be satisfied by the issue of this stage of Guaranteed Loan paper which will carry an interest coupon of 1 point below debar.

PROPERTY

The Property is as described a prime development site at Ballsbridge, Dublin, 4, previously occupied by Johnston Mooney and O'Brien.

PLANNING POSITION

The site as described in appendix 1 is owned objective D 1 - to provide for mixed uses.

On the square footage of 5.5 acres available Planning Permission would in theory be allowed for 80% of the gross site which amounts to 193,600 square feet.

There are four and five storey buildings on the site at the present time and given the height of the adjacent buildings taken a mean of 4.5, total site coverage on this criteria could be as high as 484,000 square feet.

There is on the site at the present time a covered space of 240,000 square feet approximately, the details of which are also contained in appendix 1.

These buildings would be more expensive to refurbish than to demolish and as none of the buildings on site are preserved buildings that would be the intention of the Borrower.

Under the Zoning objective for the area, office permission on a 2/1 ratio of the site available would be allowed and the maximum allowability would therefore be:-

- | | |
|-------------------------------|---------------------|
| a. Office space | 160,000 square feet |
| b. Mixed uses and Residential | 324,000 square feet |

The Borrower recognises that the site falls into three main categories detailed proposals of which are set out below.

PROPOSALS

1. The front portion of the property on which an application would be sought for 120,000 square feet gross offices, leaving a net square footage of approximately 100,000.

This would be located on circa 1 acre - see appendix 2 for stack up.

2. The residential site at the rear and side over-looking Herbert Park and the Dodder River. Application would be sought here for 45 exclusive Townhouses. Security, privacy, and location being the main selling features. The area occupied by this portion of development would amount to 3.25 acres - see appendix 3 for stack up.
3. The middle portion of the site on which application would be sought for a Hotel or a Private Club, Restaurant, Bar, Function Rooms, Shops, Commercial Development, and multi-storey Car Park. Area occupied 1.25 acres - see appendix 4 - no stack up.

BORROWING REQUIREMENT

The Borrower would require to borrow IR£4.1 m against the total consideration of IR£6.3 m.

The IR£6.3 m is to be satisfied as stated above as to:-

- a. IR£4 m in cash;
- b. IR£2.3 m in guarantees.

The IR£4 m required in cash would be satisfied as to:-

- a. IR£1.2 m of Borrowers own equity in cash;
- b. Bank Borrowing of IR£2.8 m.

In respect of the IR£2.3 m Guarantee, IR£1 m would be provided by way of direct Guarantee to the Vendors by the Borrower (and a separate Bank Guarantee on other assets of the Borrower) and the remaining IR£1.3 m would be required by way of a Bank Guarantee, agreeing this security.

The total Borrowing requirement in cash is IR£2.8 m. The total exposure to the Bank however assuming the Guarantee being available would be IR£4.1 m.

TERMS

The Borrower would offer a first Fixed and Floating Charge over the Company holding the property and would subordinate the IR£1.2 m cash introduced to the Company to the Banks loan.

The Borrower would require a moratorium on the interest for 12 months on the IR£2.8 m but on the proposal as set out hereunder would be in a position to substantially reduce the Banks commitment including the Bank Guarantee at the end of that period of time.

It is submitted that the Banks exposure at the end of 12 months to the Borrower would then be as follows:-

a. Original loan	£2,800,000
Add interest at say 12%	336,000
Loan note	£1,300,000
Add interest at 1% below debir say 9%	117,000
TOTAL:	£4,553,000

SITE VALUES

Of the three site values listed above the following is the submission by the Borrower as to their value. Appendix 2 shows the net value of the site at IRE8 m. In appendix the rent per square foot at £18 and the yield at 8% are certainly achievable.

The gross building costs of £100 per square foot are certainly for a very high specification. On the other hand fees and interest during the construction are taken at their maximum and the area to be occupied for the offices would be 1 acre.

Appendix 3 shows the residential site being offered for sale at the end of 12 months at say IRE4 m leaving in those figures, a gross margin for the builder of 40% based on a house price of £250,000 per unit.

This is also eminently achievable given the value of house prices in such area's as:-

- Richview in Clonskea.
- Shrewsbury Lawn.
- The prices that have been paid recently for residential sites in Grand Canal Basin (IRE1.2 m for an acre and IRE2 m refused by Rehills for their site which is less than 1.8 acres)

Appendix 4 which is the balance of the site which is valuable but has no value attributed to it although it is an area of 1.25 areas.

It would be eminently suitable as a Hotel site for further residential, for a Commercial Restaurant, Pub or Shops but again taking the conservative view of the site no value has been attributed to same. In addition the site may be used for portion of a multi-storey Car Park. Depending on the water table applicable, it would be the intention to build an underground Car Park to service the 100,000 square feet of offices which would be approximately 200 car spaces. We are satisfied that if a multi-storey or underground Car Park were built then the income from the sale of such would be sufficient to "wash its face" and would not impinge further on the value or profitability of the site.

REPAYMENT

The repayment of the loan would take to phases.

Phase 1

Application will be lodged immediately on completion for at least 45 Townhouse units on 3.25 acres.

It is anticipated that Planning Permission will be available for the residential development within 12 months and that will then confirm that value on that portion of the site which would then be disposed of for not less than

1924 m. On receipt of that monies they would be lodged in the Bank to the following purposes.

- a. Discharge the interest.
- b. Discharge the capital.
- c. Balance retained in the Bank under lien and hypothecation to cover the Banks exposure in respect of the proposed Guarantee.

Phase 2

Planning Permission will be sought for the office content at the same time that the residential content is being pursued. At this time also an application will be lodged for the middle site either for Commercial, Hotel or indeed further residential development. At that point in time we will know whether or not a multi-storey Car Park is appropriate or whether the Car Parking requirements can be handled by means of an Underground Car Park. It is largely dependent on:-

- a. The water table on the site.
- b. The costings which we estimate at the present time look very favourable to an underground Car Park.

A detailed underground survey has yet to be completed which would indicate to us the viability of underground Car Parking. For this reason the middle site is not taken into any of the figures or calculations.

It is anticipated that it will take in the region of 18 months to obtain the necessary Planning Permission required for the office contents.

The application for Permission on the offices which covered by the zoning of "mixed uses" will take a longer period to negotiate. However, given the huge area being set aside for residential development and given the removal of the existing structure with its replacement by a more attractive and modern building should lend handsome weight to the overall Application and Planning and Development of the site.

It would not be possible to plan and develop the site piecemeal and therefore within a short period of time after acquisition it will be necessary to draw very finite lines around the site and the proposals for same.

STAMP DUTY AND EXPENSES

We have negotiations opened with the Liquidator at the present time on the mitigation of the Stamp Duty involved and we are satisfied that we shall be in a position to save the entire Stamp Duty.

Legal and other expenses will be discharged by the Borrowers from their own resources.

NOEL SMYTH & PARTNERS

Approved & Signed: Robert J. ...
Secretary: ...
Date: ...

August 11, 1958

Members, ...
...
...

Attention of the ...

Dear ...

We ...
...

APPENDIX 8

PARAGRAPH 6.6.7

...

...

...

...

...

...

...

...

Noel Smyth & Partners, Solicitors
Commissioners for Oaths

Incorporating
Louis J. Noonan & Co.

Our Ref. NS/ph

Your Ref.

Date. August 11, 1989

22 Fitzwilliam Square,
Dublin 2.
Tel: (01) 615525.
Telex: 30677. D.D.E. 34.
FAX No. 613979.
VAT No. F4645234J.

Hills Solicitors,
Great Queen Street,
London.
Telephone 01-242 8431
Telex 669774

Associate Offices

Tenzer, Greenblatt, Fallon & Kaplan
Chrysler Building,
405 Lexington Avenue,
New York 10174.
Telephone (212) 573 4300
Telex 968711 TGFK NYK

Noel M. Smyth
Assumpta Kenny
Hugh O'Neill

Cathal O'Sullivan
Ronan Hannigan
T. Colman Birmingham

Noel Smyth & Partners

Messrs. Ansbacher and Company Limited,
Bankers,
52 Lower Leeson Street,
Dublin, 2.

Attention of Ms. Pauline O'Toole.

Dear Pauline,

We confirm that we act for Chestvale Properties Limited who have agreed to purchase the Johnston Mooney & O'Brien Site in the sum of IR£6.3 million, to be satisfied as to

- (a) IR£4 million on completion of the sale today and
- (b) IR£2.3 million to be paid over by way of loan paper guaranteed over a four year period.

I refer to the copy documentation which I have enclosed with my letter of even date from Lombard & Ulster Bank and also from Trinity Bank.

I am informed by Mr. Dermot Desmond, Chief Executive of National City Brokers that the facilities for Lombard & Ulster has now been approved and the conditions in relation thereto as between himself and Lombard & Ulster so that there should be no impediment for the draw down of the loan.

I confirm separately that I have had negotiations with Irish Intercontinental, whom I believe may be in a position to offer the same facilities to Chestvale next week.

In the meantime I confirm that we are hopeful of closing the sale today and therefore require bridging facilities in the sum of IR£3 million.

In consideration of the Bank advancing to our Client, Chestvale Properties Limited, the sum not exceeding IR£3 million, WE HEREBY UNDERTAKE to hold the Deeds and other documents of title in relation to the property known as the Johnston Mooney & O'Brien site, containing circa 5.5 acres or thereabouts, statute measure, Ballsbridge, in the County of Dublin, TO HOLD the same in trust for the Bank pending the draw down and completion of a loan facility with Lombard & Ulster Bank, or in the alternative such other Financial Institution as Chestvale Properties Limited might agree and to ensure that the said facilities are drawn down within 30 days from the date hereof.

We also UNDERTAKE to remit the proceeds of such draw down as received in discharge of the following:-

- (a) The principal sum as advanced by the Bank in the sum of IR£3 million;
- (b) Interest accrued thereon;
- (c) The Bank's fee in respect of the facility in this regard.

As requested I am enclosing herewith a copy of the form of tender as executed on the 22nd of November 1988, wherein the property was purchased for IR£4,400,700 by United Property Holdings. That contract was revised because it

included a period to allow the Company into possession for a term of 2 years. The revision of the Contract has meant that Chestvale Properties has now agreed to purchase the interest for IR£4 million and to pay IR£2.3 million to United Property Holdings over a four year period by Guaranteed Loan Notes. I confirm that the amount that will be paid on completion today will be IR£4 million satisfied as to IR£1 million which was lodged yesterday by National City Brokers to the account of Noel Smyth & Partners in the Bank, which we now wish to draw down and the balance of IR£3 million bridging finance from your Bank.

If there is anything further you require in relation to the above mentioned matter, please let me hear.

I confirm that we are closing the sale this morning at 11 a.m. and therefore I will contact you as soon as I get to the office with a view to having the necessary documentation signed up and the draw down take place.

Yours sincerely,

Noel Smyth
NOEL SMYTH
NOEL SMYTH & PARTNERS.

Houses of the Oireachtas

REVENUE DEPARTMENT

DATE: 12th September 1982

1. The following information is being provided to you in relation to the proposed development of the site at 12, 14 & 16, St. James's Street, Dublin 1.

2. The proposed development consists of the construction of a new building to be used as a residential development. The proposed building is to be a three storey building with a total floor area of approximately 1,000 sq. m.

APPENDIX 9
PARAGRAPH 6.6.9

The proposed development is to be a three storey building with a total floor area of approximately 1,000 sq. m. The proposed building is to be used as a residential development. The proposed building is to be a three storey building with a total floor area of approximately 1,000 sq. m.

CREDIT APPLICATION 908/21

DATE : 22nd August, 1989 REVIEW : 11th September, 1989

A. LOAN DETAILS

Name : Chestvale Properties Limited.
Address : c/o 22 Fitzwilliam Square, Dublin 2.
Shareholders : Dermot Desmond, John Magnier and J.P. McManus.

B. SANCTION DETAILS

Loan Required : Amount IRE 3,000,000
Client Business : Property developer.
Purpose of Loan : Bridging finance to enable the company to complete the purchase of the Johnston Mooney & O'Brien site at Ballsbridge, Dublin 4 as follows: -
Cost IRE 6,300,000
Own Funds IRE1,000,000
Bank Guarantee (Trinity Bank) IRE2,300,000 IRE 3,300,000
Bridging Required IRE 3,000,000
=====

Period and Source of Repayment : To 11th September 1989 repayable from refinancing from Lombard & Ulster Bank.
Interest Rate : DIBOR 1 month plus 2 1/2% p.a.
Payment of Interest : Interest will be charged and payable in full on maturity.
Bank Charge : IRE15,000 payable on acceptance.

Security

1. Solicitor's personal Undertaking from Noel Smyth, Messrs. Noel Smyth & Partners undertaking as follows: -
 - A. To hold the deeds and other documents of title in relation to the property known as the Johnston Mooney & O'Brien site, containing approximately 5.5 acres or thereabouts, statute measure, Ballsbridge, in the County of Dublin in trust for the Bank pending the drawdown and completion of a loan facility with Lombard & Ulster Bank, or in the alternative such other financial institution as the Borrower might agree and to ensure that the said facilities are drawn down within 30 days from the date hereof;

B. To remit the proceeds of such drawdown as received in discharge of the following: -

- (i) The principal sum as advanced by the Bank in the sum of IRE3 million,
- (ii) Interest accrued thereon,
- (iii) The Bank's fee in respect of the facility in this regard.

2. Promissory Note executed.

C. TOTAL CREDIT EXPOSURE

Banking	IRE 3,000,000
Leasing	<u>Nil</u>
	IRE 3,000,000

D. CONTINGENT LIABILITIES

None.

E. FUNDS WITH US

None.

F. GENERAL COMMENTS AND RECOMMENDATIONS

This application for bridging finance on behalf of Chestvale Properties Limited is made to us by Noel Smyth.

The company have contracted to purchase the Johnston Mooney & O'Brien site in Ballsbridge for the sum of IRE6.3 million satisfied as to IRE4.0 million on completion and IRE2.3 million by way of Guarantee over a 4 year period. The company have been approved by Lombard & Ulster Bank for a facility of IRE3.75 million. They require Ansbacher to bridge this facility for a period of 30 days. The remainder of the purchase will be satisfied by a Bank Guarantee from Trinity Bank which has been approved for IRE2.3 million (we have sight of both the Trinity Bank and Lombard & Ulster terms).

The Bank will be secured by a solicitor's personal Undertaking from Noel Smyth to hold the Deeds and other Documents of Title in relation to the Johnston Mooney & O'Brien site, Ballsbridge pending the drawdown and completion of the loan facility with Lombard & Ulster Bank within 30 days. Sanction is recommended.

RISK EVALUATED AND FACILITIES APPROVED/RECOMMENDED

ASSOCIATE
DIRECTOR

MANAGING
DIRECTOR

CHAIRMAN

DATE

DATE

25th August 1989

11/10/89 253

1. Title of Report
2. Author(s)
3. Date
4. Classification
5. Number of Pages
6. Storage (if any)

APPENDIX 10

PARAGRAPH 6.7.3

Houses of the Oireachtas

Following the
approval of
the
the
the
the
the

JC O'BOURKE A.C.A.

Coolmore Stud,
Fethard,
Co. Tipperary.

Tel: 052-31298
Telex: 80254
FAX: 052-31264

FAX TRANSMISSION

To: ASSUMPTA KENNY Date: 5th September 1989
Of: Noel Smyth & Partners

To: Fax No: 01-613979

Copies to:

Number of Pages (including this Page) : 4

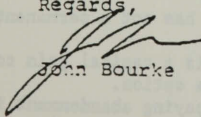
Message (if any):

Re: Land Purchase

Following the meeting with Noel and yourself, I have prepared some cryptic notes of the game plan. I am contacting the owner to clear it, but would you confirm with Terry Cooney that he is happy with the scenario outlined in the page entitled Structura.

The page entitled Additional Information summarises what I need on the other areas.

Additional points confirm other matters.

Regards,

John Bourke

Structure

1. Chestvale Properties Limited

An Irish Registered and Resident Company.

Acquires Sita

Seeks planning permission

Gives an option for sale to Company II at cost plus 5% and receives a payment for the option.

On receiving planning permission, pays Company II to abandon option.

Gets a Capital Gains tax clearance certificate on sale, so it receives full disposal proceeds without either 15% or 32% withholding.

Has the following income and expenditure as a dealing Company.

Income.	Sale of Sita Option Fee	
Expense	Interest Planning Costs Cost of Sita Abandonment Fee Admin. Costs.	(Borrows as much as possible) (Will get a tax deduction - not capital)

2. Structure & Banking

The Irish Company will be owned by Offshore Ltd which is owned by L.

The Irish Company will borrow 3.M. on a back-to-back arrangement with the bankers of Offshore Ltd and an Irish bank (IIC or BOI). Renegotiate with United Properties to give them a second charge on property instead of a guarantee.

3. Company II

Incorporated in Cyprus, owned by a Trust or guarantee Company (LIC only).

Ireland has a tax treaty with Cyprus, as it has not a permanent establishment not taxable in Ireland.

Probably also a dealing company, but if it is a capital gain company, no exposure to tax on the abandonment of the option.

Chestvale has no exposure to deduct tax on paying abandonment fee.

While there was an initial suggestion that Company II would be cleared by the Revenue, there does not appear to be any need to do this if it is not liable to tax or withholding and neither is Chestvale.

Will pay tax at 4.24% in Cyprus.

4. Additional Points

- (a) Terry Cooney will do accounts and tax.
- (b) Back-to-back borrowing will give a better utilisation of funds. High Irish rate offset by favourable back-to-back.
- (c) Site will realise miscellaneous, market trading, parking and other income.
- (d) Present financing £3.M. with Ansbacher will have to be taken ^{out} ~~over~~.
- (e) Fergal McCabe and Mitchell Murray Smith do planning with John Finegan.

Houses of the Oireachtas

Additional Information Requested

1. Copy of purchase agreement.
2. Date money paid to United.
3. Date money received, amounts, where transferred to and where transferred from. Currency received.
4. Directors of Irish Company.

Stamp: Sale of Stock
Stamp Fee

Expenses: Interest (Interest as much as possible)
Stamping Charge
Cost of Sale
Amendment Fee
Admin. Costs

2. Structure & Timing

The Irish Company will be owned by Offshore Ltd which is owned by L.

The Irish Company will borrow £100, as a bank overdraft arrangement with the bank. Offshore Ltd and an Irish bank (RIB or BCI).

Interest will be paid to Offshore Ltd and an interest charge on the loan of a percentage.

3. Company II

Incorporated in Cyprus, owned by a trust or guaranteed company (LHM only)

Ireland has a tax treaty with Cyprus, so it has not a permanent establishment nor taxable in Ireland.

Probably also a holding company, but if it is a capital gains company, no expense to tax on the amendment of the articles.

Shareholder has no expense to deduct tax on paying amendment fee.

While there was an initial suggestion that Company II would be owned by the Bankers, there does not appear to be any need to do this if it is not liable to tax on withholding and neither is Shareholder. Will pay tax at 4.25% in Cyprus.



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The Commission on the Environment and Planning
has published its report on the
state of the environment in Ireland
in 1987. The report is a comprehensive
survey of the state of the environment
in Ireland and is a valuable
reference for all concerned with
the environment. The report is
available in both English and
Irish. The report is available
from the Stationery Office,
Dublin, at a price of 10.00.

APPENDIX 11

PARAGRAPH 6.10.3

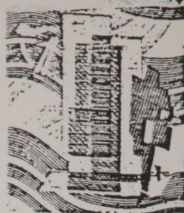
Houses of the Oireachtas

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reference for all concerned with
the environment. The report is
available in both English and
Irish. The report is available
from the Stationery Office,
Dublin, at a price of 10.00.

1988
1988
1988

Noel Smyth & Partners,
Solicitors,
22 Fitzwilliam Square,
DUBLIN 2.

17th January, 1990.



FROM DERMOT F. DESMOND
EXECUTIVE CHAIRMAN

Dear Noel,

Re: Undertaking to Ansbacher & Company Limited, Bankers.

This will confirm my irrevocable instructions to you and to give the Letter of Undertaking as attached hereto to Messrs. Ansbacher & Co., Bankers.

I confirm my irrevocable instructions to you to undertake to pay out of the monies which are received from the net proceeds of sale, on the sale of the Johnston Mooney & O'Brien Site to Telecom Eireann, either through:-

- (i) the sale of the property directly from Chestvale Properties Limited; or
- (ii) the sale of the shares in Chestvale Properties Limited by Delion Investment Dealings Limited or any associated Company.

I also confirm that your undertaking extends to repay the said IR£500,000 facility out of the IR£2 million which are liened and hypothecated in the Bank in support of and guaranteeing the Chestvale facilities at this time, so that in the event of there being insufficient proceeds from the sale of the Johnston Mooney & O'Brien site, that you are authorised to utilise part of the monies liened and hypothecated, when released, to discharge your undertaking to Ansbacher in this matter.

I also confirm that it is in order for you, and I now hereby irrevocably authorise you, to make a copy of this authority available to the Bank.

I understand that the Bank may be prepared to waive their right to register the undertaking given in relation to this matter, in consideration of the undertaking as issued by you herein.

Yours sincerely,

DERMOT F. DESMOND

NS/ph

January 17, 1990

Gay Moloney, Esq.,
Messrs. Ansbacher and Company Limited,
Bankers,
52 Lower Leeson Street,
Dublin, 2.

RE: Chestvale Properties Limited & Johnston Mooney & O'Brien.

Dear Gay,

We act for Mr. Dermot Desmond of Ferry House, 48/53 Upper Mount Street, Dublin, 2, whom I understand has been approved by the Bank for a loan in the sum of IR£500,000.

I confirm that we hold Mr. Desmond's irrevocable instructions that on the completion of the sale of the Johnston Mooney & O'Brien site at Ballsbridge, Dublin, 4, that we are to pay to the Bank the sum of IR£500,000 together with accrued interest in relation to same, out of the net proceeds of sale.

I confirm that we hold instructions at the present time to sell the said property to Telecom Eireann in the sum of IR£9.4 million and I am enclosing herewith photocopy of a letter in that respect to Telecom Eireann with a note thereon confirming that the transaction is to proceed.

In consideration therefore of the Bank advancing to our Client, Mr. Dermot Desmond, the sum of IR£500,000 WE HEREBY UNDERTAKE that on the completion of the sale of the property to An Bord Telecom that after the discharge of the Mortgage in favour of the Bank, in the sum of IR£4,750,000, to pay out of the net proceeds of sale, the sum of IR£500,000, plus interest accrued thereon.

The sale with Telecom is due to complete in April of this year, and as soon as a contract has been executed and exchanged, I will confirm to you what the exact date of completion.

Yours sincerely,

NOEL SMYTH
NOEL SMYTH & PARTNERS.

APPENDIX 12

PARAGRAPH 7.2.23

Houses of the Oireachtas

UNITED PROPERTIES

This memorandum covers a meeting held at the office of Noel Smyth on 18th September 1989 at 5.00 p.m.

The purpose of the meeting was to have Dermot Desmond and his tax advisors meet with myself, Terry Cooney and Noel Smyth to discuss the transaction with respect to the purchase of the JMSO'B site, the financing and also the tax planning.

Dermot Desmond did not attend the meeting but indicated that he was at the end of a telephone. After waiting for some time, it became evident that Kevin Kenny, who is his tax advisor and in the NCB offices, was not coming to the meeting and he was telephoned. He arrived approximately thirty minutes after the meeting had started.

Background

It would appear that Kevin Kenny gave tax advice to United Properties to the effect that it could mitigate its tax liability if it dropped down the JMSO'B site into a subsidiary company and sold shares in the subsidiary company for a consideration which included a guaranteed loan note. However, for this scheme to have worked, there were a number of considerations:

1. United Properties would have to have bought the property in its own name, which it never did.
2. It would have to have established a subsidiary company and effected a contractual transfer and the question of who and when stamp duty would be paid would become an issue.
3. It would have to have found a purchaser willing to buy the shares in the subsidiary company. This would be difficult, because the purchaser would be buying shares in a company and the company's asset base in the property, would be £4.M. instead of £6.3 M. The only type of purchaser which this would suit would be one who would be certain that they would, in turn, be able to sell on shares in the company on the same basis as they had bought them and/or a purchaser who wished to hold the property for investment purposes whereby a sale and a loss of a tax deduction on the sale would not be a relevant issue.
4. Even if a purchaser to buy the shares were obtained, a discount factor would have to be introduced to compensate the purchaser for the inherent loss of the tax deduction and/or the inherent restriction of marketability of the property.
5. Even under the scheme proposed, United Properties would eventually have to pay Capital Gains Tax @ 35% when the loan note would mature.

Present Position

Since none of the above had happened or been agreed to by any of the parties involved in the purchasing company, it was clear that such a transaction could not now take place and a renegotiated transaction would have to be completed. The tax position of UPH on the present transaction would appear to be as follows :

1. It will have to pay Capital Gains Tax @ 60% on the £2.3 M. and this tax will be payable irrespective of the fact that it does not receive any money for three years.
2. It will also have to pay full tax on the interest income it receives on the bond and, as it is not a trading company, it will not have any losses to set against this tax.
3. If it borrows money to fund the payment of the tax, it should also fail to get a tax deduction on the interest on the borrowing, although it may be able to manoeuvre itself into a position to get this.

Possible Solutions

It would appear therefore that all parties would have to accept that a new deal will have to be restructured, as the present deal leaves all parties to the transaction extremely unhappy. As far as Chestvale is concerned, the existence of the guaranteed note will make it extremely difficult to finance the balance of the transaction and extreme confusion now surrounds the entire deal. In addition to that, an amount of money has been subscribed as capital into Chestvale for the purposes of financing the transaction and a bank has lent a substantial amount of money on a facility which has expired. It is therefore in the interests of all parties to conclude this transaction satisfactorily, as quickly as possible, before it explodes into becoming a major problem. A number of scenarios were discussed with a view to achieving a result :

Option No. 1

If all parties to the transaction were to accept that the transaction should be structured as originally intended, it might still be possible to do that. However, the purchaser of the property would have to get a substantial discount on the £2.3 M. to take into account (a) the restriction of marketability of the property and the fact that the purchaser does not intend to hold it as an investment long term, and (b) the tax liability on the £2.3 M. which would crystallise in the purchaser's hands as soon as the property has been sold.

Because of the difficulty of agreeing terms and the fact that neither side will ever be happy with the conclusion, this option does not seem to be at all feasible.

Option No. 2

This involves a further variation of the existing scheme, but instead of interest payable on the note, the note would be issued on a deep discount basis, which would avoid interest which is currently taxable. However, the discount would also have to take into account the inherent tax liability which the purchaser is taking over and this is only a slightly better variation of Option No. 1.

Both of these options with the guaranteed note make the financing of the balance of the property very difficult and leave the purchaser with a very sick tax situation.

Option No. 3

This entailed United Properties retaining an interest in the property, valued at £2.3 M. and a restructuring so that the new purchaser's interest would be adjusted. This could all be achieved by United Properties' acquiring an interest in Chestvale which would be valued at £2.3 M. and it was agreed that Kevin Kenny would go back and discuss this proposal with Dermot Desmond and, if Dermot agreed to it, Kevin Kenny and Terry Cooney would work out the mechanism by which it would be achieved and report back to both sides for their approval on an agreed route. The advantages of this route are :

1. it will reduce the financing requirements.
2. It will avoid United Properties having to pay any tax currently.
3. It will enable more stable and long term tax planning to be put into place.
4. It will avoid the purchaser taking over a structure which is very tax inefficient.
5. It will avoid the possibility that, while United Properties may end up with a tax liability, the purchaser may end up with a loss and neither will be offsetable against the other.
6. It will make the entire proposal bankable.
7. It will immediately clear up a degree of confusion which cannot otherwise be solved and which it is not in the interests of any parties to leave hanging around.

SUMMARY

It is important for all parties to realise that, whatever the original intentions with respect to United Properties, the beneficial owners of Chestvale have not agreed to any transaction involving a purchase of shares and have not been adequately involved in the transaction at an early stage with respect to its structuring and agreement. The legal position is that Chestvale has not signed any documentation and a Deed of Conveyance has been completed between Chestvale and the original owner of the JM&O'B sita and this Deed is being currently held by the United Properties lawyers.

I cannot therefore sufficiently emphasise for all concerned how much of a mess this transaction is in and what the financial consequences for all concerned would be if the whole matter is not concluded satisfactorily before something happens which will put a solution out of the reach of everybody involved.

Houses of the Oireachtas

In Reply, Please Refer to File No.

September 17, 1957

The First National Bank
Boston, Boston & Co.
Boston, Mass.
Charleston, S.C.
Dallas, Tex.

Mr. Charles F. Brantley, Jr.
111 Liberty Building, S.W. Corner
Washington, D.C.

Dear Sirs:

I refer to our recent discussion of the
Construction Finance

APPENDIX 13

PARAGRAPH 7.2.26

Houses of the Oireachtas

Stage 1 - Proposed Form

The following is a summary of the proposed form of the
Construction Finance Bill, 1957, as amended, which will be
presented to the Houses of the Oireachtas on 17th September 1957.
The Bill is intended to provide for the establishment of a
Construction Finance Corporation, which will be a body
incorporated under the Companies Act, 1947, and will be
controlled and managed by a Board of Directors, of whom
one-third shall be appointed by the Government and the
remainder by the members of the Corporation.

Stage 2 - Proposed Form

The proposed form of the Bill is intended to provide for
the establishment of a Construction Finance Corporation,
which will be a body incorporated under the Companies Act,
1947, and will be controlled and managed by a Board of
Directors, of whom one-third shall be appointed by the
Government and the remainder by the members of the
Corporation. The Bill is intended to provide for the
establishment of a Construction Finance Corporation, which
will be a body incorporated under the Companies Act, 1947,
and will be controlled and managed by a Board of Directors,
of whom one-third shall be appointed by the Government
and the remainder by the members of the Corporation.



0

Arthur Young & Company

By Fax Also

Stapleton House,
89 South Mall,
Cork, Ireland.
Telephone: (021) 277116
Telefax: (021) 272465
Telex: 75883 Avl

September 28, 1989

Mr. Terry Cooney
Bastow Charleton & Co.
Marine House
Clanwilliam Court
Dublin 2

Re: Chestvale Properties Ltd.
United Property Holding Company

Dear Terry,

I refer to our recent discussion at Noel Smyth's office and our long telephone conversation on Monday.

The serious tax consequences of a direct sale of the site by UPH have been discussed at length. However a share-for-share sale would substantially mitigate UPH's tax exposure. A share-for-share transaction has the disadvantage that the purchaser does not get the benefit of the uplifted value of the site in a subsequent corporation tax computation. In our discussions we looked at various alternatives for reducing the overall tax exposure and the following was the one that seemed to have the most favourable chance of success.

Stage 1 - Relevant Facts

The site currently either has been or is about to be conveyed into Chestvale Properties Ltd. The vendor is the liquidator of JMOB. Chestvale will be capitalised at say 1,000 £1 ordinary shares, all of which are held by UPH. A non-resident person (or persons) is interested in acquiring the site for £6.3m.

Stage 2 - Paper-for-Paper Sale

Incorporate a Cyprus holding company ('Cypro'). It will make a paper-for-paper bid for the shares in Chestvale and will offer a loan note, on terms to be agreed, to UPH in consideration of the transfer by UPH of its shares in Chestvale. Schedule 2 of the Capital Gains Tax Act 1975 grants a tax deferral on paper-for-paper transactions, the capital gains tax only crystallising when the paper is cashed in. This should have the effect of reducing UPH's capital gains tax cost from an immediate 60%, to a deferred 35%.

Section 63 Finance Act 1982 restricted the benefits of Schedule 2 to transactions '*effective for bona fide commercial reasons not forming part of any arrangement or scheme of which the main purpose or one of the main purposes is the avoidance of liability to tax*'. We considered that Section 63 cannot be invoked by the Revenue as the purpose of the sale of the shares in Chestvale is unquestionably a bona fide commercial sale. The method of the transaction is unquestionably structured to be tax efficient. That however is not the point - the purpose of the transaction is commercial.

The Finance Act 1982 also introduced the ring fence in relation to gains on the disposal of development land. Whether or not the JMOB premises is development land as defined in the Act is of course a moot point. Even if it were, I do not consider that the relief under Schedule 2 would be jeopardised. The reason is that there is no specific reference to Schedule 2 in Sections 36-40 of the Finance Act 1982. "Development land" is defined as extending to shares that derive the greater part of their value from development land. The shares in Chestvale could very clearly therefore come within the ambit of the Finance Act 1982 rules. However that Act does not exclude the operation of Schedule 2 and consequently in my opinion relief should be available on the share-for-share transaction.

Stage 3 - Transfer of Residence of Chestvale

With stage 3 the residence of Chestvale is moved from Ireland to Cyprus. This is to be accomplished by appointing Cypriot directors to Chestvale and arranging for all directors' meetings and major decisions to be made in Cyprus. Chestvale will accordingly be managed and controlled in Cyprus for the purposes of Cyprus taxation and Irish taxation. Chestvale will apply for planning permissions etc. on the site and at the appropriate time dispose of the site for its new market value. That market value presumably will be higher than the uplifted value of £6.3m.

Ireland/Cyprus Double Taxation Agreement

On the sale of the property Chestvale will contend that it has no liability to Irish taxation for the following reasons:

1. It is a trader in property, having purchased the site as a speculation with the intention of turning it over at a quick profit.
2. It has no permanent establishment in Ireland.

3. It is resident in Cyprus for the purposes of the Ireland/Cyprus Tax Treaty [in this connection see Article 3, 1 (f), (i) a resident of Cyprus is defined by the Treaty as "any company whose business is managed and controlled in Cyprus"].

The Treaty exempts from Irish taxation the business profits of a Cyprus company which does not have a permanent establishment in Ireland. To come within this definition it is vital that Chestvale be a dealer in property and secondly that it does not have a permanent establishment in Ireland. The definition of 'permanent establishment' in Article 4 of the Treaty follows along the normal lines and includes 'a place of management', 'a branch' and "a building site or construction or assembly project". The 'building site' aspect of this definition is unusual in that most treaties apply the permanent establishment test only to building sites extending beyond a specified duration (usually one or two years). It is essential that Chestvale should have no presence whatever in Ireland and all applications for planning permissions etc. should originate from Cyprus. Also the site must be sold before any construction takes place.

Article 12 of the Treaty states that 'gains' from immovable property may be taxed in the country in which such property is located. The heading to Article 12 reads 'capital gains' and this would seem to be somewhat different from 'business profits' as referred to in Article 6 (however para 7 of Article 6 states that the other provisions of the Treaty are to operate in priority to Article 6). The heading 'capital gains' and the word 'gains' in the Article seem to indicate that Article 12 is confined to gains which would be treated as capital gains by the laws of the country in which the property is situated. This view is reinforced by Article 13 of the OECD Model Treaty. Article 12 (Treaty) is a word-for-word reproduction of Article 13 (OECD). The following extract from 'Principles of International Double Taxation Relief' (Davies) puts Article 13 in context:

"The OECD commentary observes that there is a considerable variation in the tax treatment of capital gains in different countries. As a consequence Article 13 is drafted in fairly wide terms so as to include all forms of taxes levied on capital gains. The Article does not give a definition of what is meant by a capital gain, and the method of computing the gain is left to domestic laws."

So, it seems that Article 12 only refers to profits from immovable property which would be treated as capital gains and not as profits liable to income taxation.

Capital Gains Tax Clearance Certificate

Capital gains tax withholding of 15% applies to property transactions in excess of £100,000 (para 11 Schedule 4 CGT Act 1975). In practice it would be extremely difficult to obtain a clearance certificate from the Revenue, irrespective of the merits of any technical arguments founded upon the Ireland/Cyprus Treaty. It would therefore we considered be important to attempt to avoid the withholding.

The simplest manner of accomplishing this is to ensure that the method of payment is other than cash. We discussed payment to be made in redeemable preference shares or gilts, etc. Under Schedule 4 para 11 (7) the person acquiring the asset must notify the Revenue of the transaction within three months. That is merely a procedural matter whereby information is provided to the Revenue.

Interest

As a further insurance for the scheme we considered structuring a loan between Cypro and Chestvale whereby Chestvale will pay interest on the loan related to the profitability of the transaction. There is no rule of income tax law that I am aware of whereby such interest would not be deductible (assuming of course that it can be justified to be computed on an arm's length basis). For corporation tax purposes the interest would not be deductible in view of Section 84 CTA 1976. Under Section 84 as originally enacted interest on a participating loan is non tax deductible. However by virtue of the amendment introduced by the Finance Act 1984 interest is deductible so long as it is paid to another company which is within the charge to corporation tax. Cypro would not be within such a charge and consequently for corporation tax purposes the participating loan interest would be regarded as a distribution. Cypro however will be liable to income tax, and not corporation tax (assuming that it does not have a trading branch in Ireland). Applying income tax principles therefore I do not see why the interest should not be deductible. This adds a layer of insurance to the scheme in that the profit on the transaction is extracted via the participating interest. Should Chestvale for any reason be taxable, then the quantum of the taxable profits should be substantially reduced. Crucial to this approach is the requirement that Chestvale does not have a 'branch' in Ireland.

Transfer of Residency

There is no rule of law whereby an Irish company cannot transfer its management and control out of Ireland. I mention this specifically as such a transaction is prohibited in the U.K.

Deep Discount Bond

It would be preferable, from the tax standpoint, to structure the loan note as a discounted bond. In effect no interest will be paid on the note, and the imputed interest will be rolled up and the entire amount payable at maturity of the loan note. The advantage to UPH is the avoidance of corporation tax (and surcharge) on the interest.

Action

We agreed that this letter would be written and issued to the parties involved so they can decide in principle whether the plan is to go ahead. If the decision is 'yes' then it will be necessary to review the tax strategy both from the Irish and Cyprus standpoints. At this stage the strategy outlined in this letter should be considered as preliminary rather than definitive.

Yours sincerely,



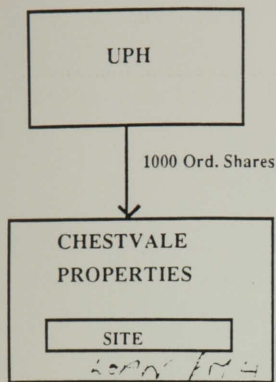
Kevin Kenny

cc

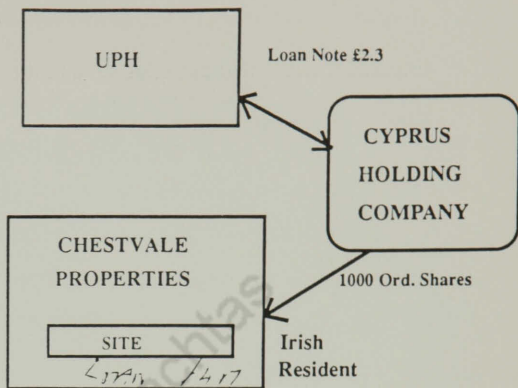
C.C.: Dermot Desmond, NCB
 Kevin Barry, NCB
 Noel Smyth, Noel Smyth & Partners
 John Bourke

UNITED PROPERTY HOLDING COMPANY

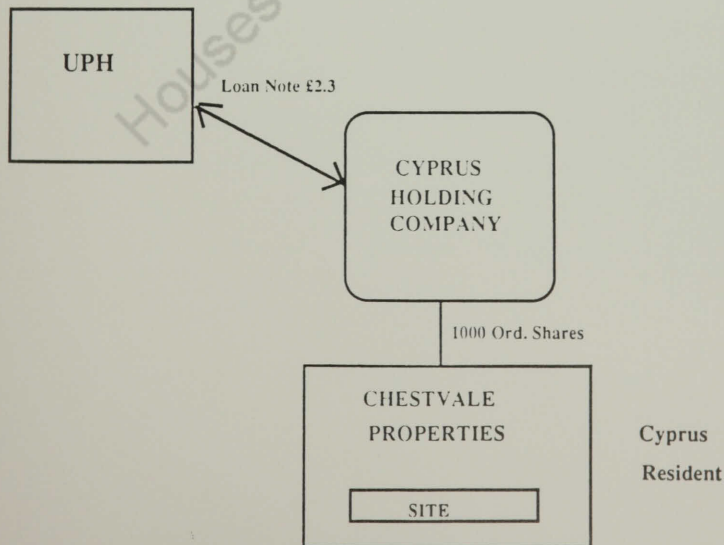
STAGE 1



STAGE 2



STAGE 3



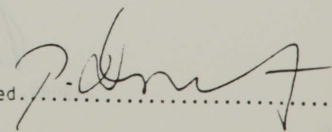
Houses of the Oireachtas

APPENDIX 14

PARAGRAPH 8.6.4

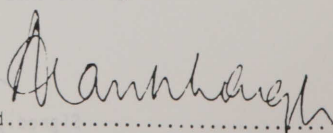
I, Paul Joseph Valentine Dougherty of 7th Floor, Victory House Prospect Hill, Douglas, Isle of Man ACKNOWLEDGE AND DECLARE that I hold One Share of One Pound each fully paid in Freezone Investments Limited registered in my name as Nominee and Trustee for Mr Colin Proberts, PO Box 365, St Peter Port, Guernsey (hereinafter called "the Owner") AND I UNDERTAKE AND AGREE not to transfer deal with or dispose of the said Share save as the Owner may from time to time direct AND I HEREBY DEPOSIT with the Owner the certificate for the said Share together with a transfer thereof executed by me in blank AND I EXPRESSLY AUTHORISE AND EMPOWER the Owner at any time to complete such transfer by inserting therein the name or names of any transferee and the date of the transfer and to complete the same in any other necessary particular AND I EXPRESSLY DECLARE that this authority is irrevocable by me AND I FURTHER UNDERTAKE AND AGREE to account to the Owner for all dividends and profits which may be paid to me from time to time upon the said share and for all other monies or profit which may be payable to or receivable by me (whether in cash or other benefits or rights) in respect thereof AND I FURTHER UNDERTAKE to exercise my voting power as Holder in the said Share at the direction of the Owner PROVIDED that the Owner shall indemnify me at all times and in all respects against any costs of any nature whatsoever arising from the allotment of, my continued registration as a holder of, or the transfer of the said Share

Given under my hand this day of 1988.

Signed 

I, Alan Lloyd Gough of 7th Floor, Victory House, Prospect Hill, Douglas, Isle of Man ACKNOWLEDGE AND DECLARE that I hold One Share of One Pound each fully paid in Freezone Investments Limited registered in my name as Nominee and Trustee for Mr Colin Probets, PO Box 365, St Peter Port, Guernsey (hereinafter called "the Owner") AND I UNDERTAKE AND AGREE not to transfer deal with or dispose of the said Share save as the Owner may from time to time direct AND FURTHER to give full effect to the trust hereby declared I HEPEBY DEPOSIT with the Owner the certificate for the said Share together with a transfer thereof executed by me in blank AND I EXPRESSLY AUTHORISE AND EMPOWER the Owner at any time to complete such transfer by inserting therein the name or names of any transferee and the date of the transfer and to complete the same in any other necessary particular AND I EXPRESSLY DECLARE that this authority is irrevocable by me AND I FURTHER UNDERTAKE AND AGREE to account to the Owner for all dividends and profits which may be paid to me from time to time upon the said share and for all other monies or profit which may be payable to or receivable by me (whether in cash or other benefits or rights) in respect thereof AND I FURTHER UNDERTAKE to exercise my voting power as Holder in the said Share at the direction of the Owner PROVIDED that the Owner shall indemnify me at all times and in all respects against any costs of any nature whatsoever arising from the allotment of, my continued registration as a holder of, or the transfer of the said Share

Given under my hand this day of 1988.


Signed.....

THIS AGREEMENT made the

15th day of

June 1988

BETWEEN:-

COLIN PROBETS
of South Grange de Beauvoir,
Ivy Gates, Rohais, St. Peter Port,
Guernsey, Channel Islands.
(hereinafter called "the Grantor" which
expression shall include his
heirs and legal personal representatives)

of the One Part

AND

DERMOT DESMOND
of Ferry House, 48/53 Lower
Mount Street, Dublin 2
(hereinafter called "Mr Desmond"
which expression shall include
his heirs, legal personal
representatives and assigns)

of the Other Part

WHEREAS:

(A) The Grantor is legally and/or beneficially entitled through nominees or otherwise to 100% of the entire issued and allotted share capital for the time being of FREEZONE INVESTMENT LIMITED (hereinafter referred to as "the Company").

(B) The Grantor is desirous of granting an option to Mr Desmond for the purchase of the Option Shares (as hereinafter defined) and in the manner hereinafter appearing.

NOW THIS INDENTURE WITNESSETH as follows:-

SECTION 1.00 - DEFINITIONS.

1.01 The following words where used in this Agreement shall have the following meanings:-

the Option Price has the meaning ascribed to it in Clause 2.02 hereof;

the Option Shares means all shares for the time being and from time to time held either legally or beneficially through nominees or otherwise by the Grantor in the capital of the Company, being the entire issued and allotted share capital of the Company;

IRE and Irish Pounds means the lawful currency for the time being of the Republic of Ireland.

1.02. Further Definitions.

(a) Any reference to any provision of any legislation shall include any modification re-enactment or extension thereof. Any reference to any provision of any legislation unless the context clearly indicates to the contrary shall be a reference to legislation of the Republic of Ireland.

(b) Words such as "hereunder", "hereto", "hereof", and "herein" and other words commencing with "here" shall unless the context clearly indicates to the contrary refer to the whole of this Agreement and not to any particular Section or Clause thereof.

(c) Save as otherwise provided herein any reference to a Section, Clause, paragraph or sub-paragraph shall be a reference to a Section, Clause paragraph or sub-paragraph (as the case may be) of this Agreement and any reference in a Clause to a paragraph or sub-paragraph shall be a reference to a paragraph or sub-paragraph of the Clause or paragraph in which the reference is contained unless it appears from the context that a reference to some other provision is intended.

1.03 Headings and Captions. The Section headings and captions to the Clauses in this Agreement are inserted for convenience of reference only and shall not be considered a part of or affect the construction or interpretation of this Agreement.

1.04 Governing Law. This Agreement shall in all respects (including the formation hereof and performance hereunder) be governed by and construed and interpreted in accordance with the laws of the Republic of Ireland.

SECTION 2.00 - GRANT OF OPTION

2.01. Option. In consideration of the sum of IRE£1.00 hereby paid by Mr Desmond to the Grantor (the receipt of which is hereby acknowledged) the Grantor hereby grants to Mr Desmond or his nominee an option to purchase the Option Shares.

2.02. Option Price. The price payable by Mr Desmond (or his nominee) to the Grantor upon exercise of the option hereby granted shall be the sum of IRE£1.00.

2.03. Specified Events. The option hereby granted to Mr Desmond (or his nominee) shall be exercisable at any time within ten years from the date hereof.

SECTION 3.00 - EXERCISE OF OPTION

3.01 Exercise of Option. The exercise of the option granted to Mr Desmond (or his nominee) shall be by irrevocable notice in writing served by Mr Desmond on the Grantor and shall be governed by the following provisions:-

(a) upon the exercise of the option hereby created the parties hereto shall each be bound to complete the sale and purchase of the Option Shares;

(b) completion shall take place at 3 p.m. on the fourteenth day after the exercise of the option at the registered office of the Company or at such other place as may be agreed between the parties hereto; and

(c) upon completion the Grantors shall deliver to Mr Desmond (or his nominee):-

(i) duly completed and signed transfers of the Option Shares accompanied by the share certificates therefor and such other deeds and documents as may be necessary to transfer to Mr Desmond (or his nominee) the unencumbered legal and beneficial ownership of the said shares; and

(ii) The resignation as Director of the Company of any person specified by Mr Desmond each such resignation to include an acknowledgement under seal to the effect that such resigning party has no claim whatsoever against the Company;

(d) upon completion a board meeting of the Company shall be held at which the transfers hereinbefore referred to shall (subject to stamping) be approved and, if appropriate, there shall be submitted and accepted the resignations hereinbefore referred to; and

(e) Mr Desmond (or his nominee) shall make payment to the Grantor upon completion of the amount of the Option Price.

SECTION 4.00 - POWER OF ATTORNEY

4.01. Appointment of Attorney. If the Grantor shall fail to deliver to Mr Desmond or his nominee such forms of transfer as are hereinbefore referred to at such time and in such manner as is hereinbefore required the Grantor hereby irrevocably appoints Mr Desmond as his attorney with full power to execute complete and deliver in his name such form or forms of transfer so that upon the execution and registration of such transfers in respect of the Option Shares Mr Desmond (or his nominee) shall make payment of the Option Price provided for herein to the Grantor.

SECTION 5.00 - GRANTOR'S COVENANTS AND WARRANTIES

5.01. Warranties. The Grantor hereby warrants to Mr Desmond as follows:-

(a) the Option Shares are and at all times shall remain fully paid and free from any lien, pledge, mortgage or other encumbrance whatsoever; and

(b) the Option Shares are and at all times shall be either legally transferred to and in the legal ownership of the Grantor or in the beneficial ownership of the Grantor through nominees.


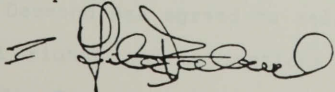
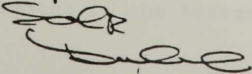
5.02. Covenants. The Grantor hereby covenants with Mr Desmond that the nominal capital of the Company will not be increased, nor will further shares in the capital of the Company be issued or allotted, without the prior written consent of Mr Desmond.

SECTION 6.00 - ASSIGNMENT

6.01. Assignment. It is hereby agreed and confirmed by the parties hereto that this Agreement together with all rights and obligations attaching thereto may be assigned by Mr Desmond without the necessity of serving any notice on the Grantor.

IN WITNESS whereof these presents have been entered into the day and year first herein WRITTEN.

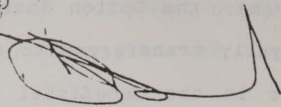
SIGNED SEALED and DELIVERED
by the said COLIN PROBETS
in the presence of:-

SIGNED SEALED and DELIVERED

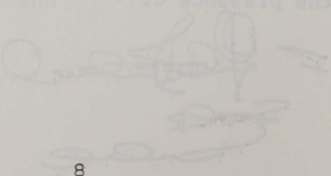
by the said DERMOT DESMOND

in the presence of:-



Robert Conan
Ferry House
W1 Mount St
Dublin 2

Houses of the Oireachtas



THIS AGREEMENT made the _____ day of _____ 1989

BETWEEN:-

DERMOT DESMOND
of Ferry House, 48/53 Lower
Mount Street, Dublin 2
(hereinafter called "Mr
Desmond" which expression
shall include his successors and
assigns)

of the One Part

-and-

of

(hereinafter called "the Assignee"
which expression shall include its
successors and assigns)

of the Other Part

WHEREAS:-

A. Pursuant to an option agreement (hereinafter referred "the Option Agreement") made the 15th day of June 1988 Colin Probets did grant to Mr Desmond an Option to purchase the Option Shares (as therein and hereinafter defined) for the Option Price (as therein and hereinafter defined) during a period of ten years from 15th June 1988.

B. Mr Desmond has agreed to sell and the Assignee has agreed to buy all rights and obligations of Mr Desmond pursuant to the Option Agreement to the Assignee for the sum of IR£1.00.

NOW THIS INDENTURE WITNESSETH:-

SECTION 1.00 - DEFINITIONS.

1.01 The following words where used in this Agreement shall have the following meanings:-

the Company means Freezone Investment Limited, a limited liability company incorporated in the Isle of Man;

the Option Price means IRE1.00;

the Option Shares means all shares for the time being and from time to time held either legally or beneficially through nominees or otherwise by the Grantor in the capital of the Company, being the entire issued and allotted share capital of the Company;

IRE and Irish Pounds means the lawful currency for the time being of the Republic of Ireland.

1.02. Further Definitions.

(a) Any reference to any provision of any legislation shall include any modification re-enactment or extension thereof. Any reference to any provision of any legislation unless the context clearly indicates to the contrary shall be a reference to legislation of the Republic of Ireland.

(b) Words such as "hereunder", "hereto", "hereof", and "herein" and other words commencing with "here" shall unless the context clearly indicates to the contrary refer to the whole of this Agreement and not to any particular Section or Clause thereof.

(c) Save as otherwise provided herein any reference to a Section, Clause, paragraph or sub-paragraph shall be a reference to a Section, Clause paragraph or sub-paragraph (as the case may be) of this Agreement and any reference in a Clause to a paragraph or sub-paragraph shall be a reference to a paragraph or sub-paragraph of the Clause or paragraph in which the reference is contained unless it appears from the context that a reference to some other provision is intended.

1.03 Headings and Captions. The Section headings and captions to the Clauses in this Agreement are inserted for convenience of reference only and shall not be considered a part

of or affect the construction or interpretation of this Agreement.

1.04 Governing Law. This Agreement shall in all respects (including the formation hereof and performance hereunder) be governed by and construed and interpreted in accordance with the laws of the Republic of Ireland.

SECTION 2.00 - ASSIGNMENT

2.01. In consideration of the sum of IRE1.00 hereby paid by the Assignee to Mr Desmond (the receipt of which Mr Desmond doth hereby acknowledge) Mr Desmond as beneficial owner hereby assigns unto the Assignee all that and those the rights and obligations of Mr Desmond pursuant to the Option Agreement, absolutely.

2.02. The Assignee doth hereby covenant with Mr Desmond that it, the Assignee, its successors and assigns will henceforth honour all obligations of Mr Desmond arising from the Option Agreement and keep indemnified Mr Desmond against all actions, proceedings, damages, costs, claims and demands whatsoever by reason or on account of the non performance of such obligations or any of them.

IN WITNESS whereof the parties hereto have set their hands and
affixed their seals the day and year first herein WRITTEN.

SIGNED SEALED and DELIVERED
by the said DERMOT DESMOND
in the presence of:-



PRESENT when the Common Seal
of the ASSIGNEE
was affixed hereto:-

Houses of the Oireachtas

1. THE STATE SHALL ensure that the...
2. THE STATE SHALL ensure that the...
3. THE STATE SHALL ensure that the...

4. THE STATE SHALL ensure that the...
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APPENDIX 15

PARAGRAPH 9.1.6

Houses of the Oireachtas

1. THE STATE SHALL ensure that the...
2. THE STATE SHALL ensure that the...
3. THE STATE SHALL ensure that the...
4. THE STATE SHALL ensure that the...
5. THE STATE SHALL ensure that the...

STATUTORY DECLARATION OF COLIN PROBETS

I, COLIN PROBETS, of Val D'Or, Les Landelles, Guernsey, Channel Islands, Company Director, aged 21 years and upwards, do solemnly and sincerely declare that:

1. I am now a retired Company Director. Prior to my retirement I was a substantial Shareholder in and Director of Tullett & Tokyo, London who are one of the largest money brokers in the world. I have known Dermot F. Desmond for a period of approximately ten years and during this time Mr. Desmond has become a close friend of mine and a trusted advisor. Over the past five years Mr. Desmond has been advising me on financial matters and enjoys my full confidence. During this period Mr. Desmond has recommended a number of investments and business opportunities to me.
2. In or about the month of July 1989 on the recommendation of Mr. Desmond I agreed to provide mezzanine finance of IRE2m ("the mezzanine finance") for the funding of the purchase of property in Dublin known as the Johnston Mooney & O'Brien site at Ballsbridge, Dublin 4 ("the property") from United Property Holdings Limited. The Purchaser of the property was Mr. Patrick Doherty of 96 Palace Garden Terrace, Kensington, London and/or a company within his control and I reached agreement with Mr. Doherty to provide him and/or a company within his control with the mezzanine finance.
3. On or about the 10th day of August 1989 I arranged for the sum of IRE1m to be transferred to Ansbacher Bank, Dublin. These funds were paid to Ansbacher Bank at my direction. This sum of IRE1m represented the first tranche of the mezzanine finance and I understand was utilised

by Mr. Doherty to pay the deposit on the purchase of the property.

4. On or about the 7th day of December 1989 I arranged for a further sum of US\$1.5m (which equated to approximately IRE1m) to be transferred via Banker's Trust, New York to Ansbacher Bank in Dublin.
5. The sum of IRE956,118 (which equated to approximately US\$1.5m) was transferred on or about the 30th day of July 1990 by Ansbacher Bank, Dublin to Bankers Trust, New York.
6. The original deposit of IRE1m together with interest thereon making a total of IRE1.131m was transferred on or about the 30th day of July 1990 by Ansbacher Bank, Dublin to the Trustee Savings Bank, Dublin for credit of an account in the name of Freezezone Investments Limited. Freezezone Investments Limited is a Company incorporated in the Isle of Man of which I am the sole and absolute beneficial owner.
7. A further sum of IRE1.3m was transferred by Ansbacher Bank, Dublin on or about the 30th July 1990 to the Trustee Savings Bank, Dublin for credit of the same account in the name of Freezezone Investments Limited. This sum of IRE1.3m was, apart from interest, the agreed return to me from Patrick Doherty on my arrangement with him for the provision of the mezzanine finance. Apart from the foregoing, there is or was no contract, arrangement, involvement or understanding whatever by me or any Company which I control in respect of the sale of the property.
8. Either personally directly or indirectly through Freezezone Investments Limited (of which I am and was at all times the sole and absolute beneficial owner) I and/or Freezezone Investments Limited was

the only and absolute beneficial owner of the monies invested by way of mezzanine finance in the purchase of the property and accordingly the owner of the profit earned on the provision of the mezzanine finance and no-one other than myself and/or Freezone Investments Limited had at any time any interest therein. I further say that no person other than myself and/or Freezone Investments Limited had any ownership interest within the meaning attributed to the phrase by Section 14 (1) of the Companies Act 1990 in the mezzanine finance monies or the profits earned thereon that is to say that insofar as the mezzanine finance and the profits earned thereon are concerned that no persons other than myself and/or Freezone Investments Limited are or have been financially interested in the success or failure (real or apparent) of Chestvale Properties Limited and/or Hoddle Investments Limited ("The Companies"). I further say that as regards the mezzanine finance and the profits earned thereon there is not and there never has been in existence an arrangement or understanding which, whether legally binding or not legally binding, is or was observed or likely to be observed in practice and which is relevant to the purposes of the Inspector's investigation into The Companies.

9. I declare that I am in no way whatever connected with Telecom Eireann its servants or agents.
10. Neither I nor any person, entity or company on my behalf has made any payment by way of fees or otherwise to Mr. Dermot Desmond, United Property Holdings Limited, National and City Brokers Limited or any associated person in relation to the mezzanine finance or the profits earned thereon, or in relation to the sale of the property by Mr. Doherty and/or a company within his control.

11. I refer to the report on my medical condition supplied to the Inspector, and I say that it is true and accurate. I supply the information in this Declaration voluntarily and without acknowledgement of an obligation on my part in the hope that it will assist the Inspector and allow him to clarify the limited matters he has been appointed to ascertain. To allow for verification I have given financial and other details going beyond his remit. These details are confidential to me and others. I do so to facilitate the Inspector and in the trust and on the express wish that it will not be necessary to reveal them publicly.

I make this solemn Declaration from facts within my own knowledge save where otherwise appears under and by virtue of the Statutory Declarations Act, 1938.

~~PROBETS~~

COLIN PROBETS

DECLARED by the said COLIN

Probets

at 39 Mesril Road

in the City of Dublin this 23rd
day of *October* 1991 before
me a Commissioner for Oaths and
I know the Deponent.

John L. Douglas
COMMISSIONER FOR OATHS

STATUTORY DECLARATION OF COLIN PROBETS

I, Colin Probets of Val D'Or Les Landelles, Guernsey, Channel Islands, Company Director aged twenty one years and upwards do solemnly and sincerely declare as follows:-

1. I make this Affidavit supplemental to an Affidavit sworn by me on 23.10.1991 at the request and for the benefit of Mr. John Glackin being an Inspector appointed pursuant to the Companies Act 1990 by the Minister for Industry and Commerce in Ireland.

2. I say that I commenced acquiring shares in the Company Freezone Investments Limited (hereinafter referred to as "Freezone") in the following manner:-

(Set out :- number of shares, class of shares, price per share and the date acquired)

3. I further swear that at no time has Freezone, or any party on its behalf, entered into any arrangement, whether written or otherwise, whereby any other person or persons were, or would be, entitled to share in the profits of Freezone whether directly or indirectly. (IF THIS IS NOT CORRECT KINDLY FURNISH DETAILS OF THE ARRANGEMENT OR ARRANGEMENTS AND FURNISH COPIES OF ALL DOCUMENTATION IN RELATION TO THE ARRANGEMENT(S))

4. I further swear that at no time has Freezone granted a power of attorney to any person or persons. (IF ANY POWER(S) OF ATTORNEY HAS

BEEN GRANTED KINDLY FURNISH DETAILS OF SAME AND EXHIBIT CERTIFIED COPIES OF THE POWER(S) OF ATTORNEY).

5. I further swear that neither I nor Freezone have ever entered into any arrangement or understanding of any nature whatsoever, whether legally binding or not with United Property Holdings Limited, ("UPH") a company incorporated in the Republic of Ireland and having its registered office at 48/53, Lower Mount Street, Dublin 2 and/or with any of the shareholders of "UPH", which shareholders are the persons whose names are set out in a schedule hereto and who I understand to be the beneficial owners of the shares of UPH at some or all of the relevant times between the date of incorporation of that Company and the date hereof. (IF THIS IS NOT CORRECT KINDLY FURNISH DETAILS OF THE ARRANGEMENT OR ARRANGEMENTS AND FURNISH COPIES OF ALL DOCUMENTATION IN RELATION TO THE ARRANGEMENT(S))
6. I further swear that neither I nor Freezone have at any time granted an option, or entered into an agreement to grant an option, over all or part of the shares in Freezone, or all or any part of its assets. (IF THIS IS NOT CORRECT KINDLY FURNISH DETAILS OF THE OPTION(S) AND EXHIBIT COPIES OF ALL DOCUMENTATION IN RELATION TO THE OPTION(S)).
7. I further swear that at no time have I or Freezone borrowed monies from Dermot F. Desmond, Dedair (a company registered in the Republic of Ireland having its registered office at 48/53, Lower Mount Street, Dublin 2), Courtland Enterprises Limited (a company incorporated under the laws of the Isle of Man and having its registered office at Victory House, Prospect Hill, Douglas, Isle of Man), nor has any guarantee, nor any agreement to give a guarantee, ever been given on behalf of Freezone by any of the said parties aforementioned. (IF THIS IS NOT CORRECT KINDLY FURNISH DETAILS AND EXHIBIT ALL DOCUMENTATION).

8. In relation to the arrangement reached with Mr. Patrick Doherty affecting the Johnston, Mooney and O'Brien site at Ballsbridge ("the Site")

- A. SET OUT THE AGREEMENT REACHED WITH MR. DOHERTY IN RELATION TO THE PROVISION OF THE "MEZZANINE" FINANCE OF Ir£2m.
- B. STATE WHETHER THE NEGOTIATIONS LEADING UP TO THE AGREEMENT OR THE COMPLETION OF THE AGREEMENT WERE DONE PERSONALLY BY MR. PROBETS OR THROUGH MR. DESMOND. IF ANY OTHER PARTY WAS INVOLVED ON BEHALF OF MR. PROBETS OR FREEZONE KINDLY IDENTIFY SAME.
- C. STATE WHETHER ALL NEGOTIATIONS WERE CARRIED OUT BY MR. PATRICK DOHERTY PERSONALLY OR BY MR. DESMOND ON HIS BEHALF. IF ANY OTHER PARTY WAS INVOLVED ON BEHALF OF MR. DOHERTY PLEASE IDENTIFY SAME.
- D. EXHIBIT A COPY OF THE LOAN AGREEMENT EVIDENCING THE ARRANGEMENTS REACHED BETWEEN MR. PROBETS/FREEZONE AND MR. DOHERTY/A COMPANY WITHIN HIS CONTROL.

9. A. FURNISH DETAILS OF ALL SECURITY GIVEN BY MR. DOHERTY.

B. EXHIBIT COPIES OF ANY GUARANTEES OR PROMISSORY NOTES EXECUTED BY MR. DOHERTY.

10. EXHIBIT ALL CORRESPONDENCE AND DOCUMENTATION OF ANY NATURE WHATSOEVER IN MR. PROBETS POSSESSION POWER OR CONTROL IN RELATION TO THE PROVISION OF THE MEZZANINE FINANCE AND IN RELATION TO ITS REPAYMENT.

11. IN RELATION TO THE PAYMENT OF IR£1m TO ANSBACHER BANKERS ON 10.08.1989 FURNISH A COPY OF THE MANDATE/INSTRUCTION GIVEN TO ANSBACHER BANKERS. IDENTIFY THE ACCOUNT INTO WHICH THE MONEY WAS LODGED. IDENTIFY THE ACCOUNT FROM WHICH THE MONIES WERE PAID AND WHO WAS THE TRUE OWNER OF THAT ACCOUNT. EXHIBIT BANK RECORDS CORROBORATING THE SAID TRANSFER.

12. IF THE MONIES WERE TRANSFERRED INTO AN ACCOUNT IN A NAME OTHER THAN THAT OF MR. DOHERTY STATE WHAT EVIDENCE WAS FURNISHED BY MR. DOHERTY TO SATISFY MR. PROBETS/FREEZONE THAT THE ACCOUNT WAS WITHIN THE CONTROL OF MR. DOHERTY AND/OR A COMPANY WITHIN HIS CONTROL. IF THE ACCOUNT WAS NOT IN THE CONTROL OF THE PARTY WHOSE NAME WAS ON THE ACCOUNT KINDLY IDENTIFY THE PARTY WHO WAS IN CONTROL OF THE ACCOUNT.

13. IN RELATION TO THE PAYMENT OF US\$1.5m MADE ON 07.12.1989 KINDLY IDENTIFY THE ACCOUNT INTO WHICH THE SAID MONIES WERE PAID IN ANSBACHER BANK IN DUBLIN. PLEASE FURNISH THE SAME INFORMATION IN RELATION TO THIS PAYMENT AS IS SOUGHT IN THE IMMEDIATE PRECEDING PARAGRAPHS IN RELATION TO THE FIRST PAYMENT. FURNISH BANK RECORDS TO CORROBORATE THE SAID PAYMENTS.

14. IN RELATION TO THE PAYMENT OF US\$956,118.00 TRANSFERRED BY ANSBACHER BANKERS on 30.07.1990 FURNISH CORROBORATIVE BANK RECORDS SHOWING THE SAID TRANSFER. IDENTIFY THE ACCOUNT IN ANSBACHER BANK FROM WHICH THE MONEY WAS PAID.
15. A. IN RELATION TO THE TRANSFER OF £1.131m ON 30.07.1990 FROM ANSBACHER BANKERS TO TRUSTEE SAVINGS BANK FURNISH CORROBORATIVE BANK RECORDS SHOWING THE SAID PAYMENT.
- B. STATE HOW THE AMOUNT OF £.131m INTEREST WAS COMPUTED.
- C. FURNISH COPY BANK RECORDS FOR THE PARTICULAR ACCOUNT IN TRUSTEE SAVINGS BANK FROM 30.07.1990 TO DATE.
- D. FURNISH COPIES OF ALL MANDATES WHICH HAVE APPLIED TO THE SAID ACCOUNTS AT ANY TIME.
16. FURNISH CORROBORATIVE BANK STATEMENTS SHOWING THE TRANSFER OF £1.3m FROM ANSBACHER BANKERS DUBLIN TO TRUSTEE SAVINGS BANK DUBLIN ON 30.07.1990. STATE FROM WHAT ACCOUNT IN ANSBACHER BANKERS THE SAID MONIES WERE TRANSFERRED.
17. I say that neither I nor any person, entity or Company, either on my behalf or at my direction, has made any payment or conferred any benefit or discharged any liability of any nature whatsoever to, on or for Mr. Dermot F. Desmond, Dedeir, Courtland Enterprises, United Property Holdings Limited, NCB Group, Fitzwilliam Trust Company, Bacchantes Limited, Mr. Michael Smurfit, Telecom Eireann, or any of its executives or employees, or any other person in relation to any of the transactions pertaining to or affecting the site from August, 1988 to date.
18. I make this solemn declaration from facts within my own knowledge save where otherwise appears under and by virtue of the Statutory Declarations Act 1938.

DECLARED by the said COLIN PROBETS

AT

IN

ON THE DAY OF 1991

BEFORE ME A COMMISSIONER FOR OATHS

AND I KNOW THE DEPONENT.

COMMISSIONER FOR OATHS

SCHEDULE

BENEFICIAL OWNERS OF UPH SHARES UNDERSTOOD TO BE

AIIM (Nominees) Limited

PADRAIC HASSETT

TOM CAVANAGH

LOCHLAINN QUINN

MARTIN NAUGHTON

JOHN MAGNIER FAMILY

JOSEPH LEWIS

NCB GROUP LIMITED EXECUTIVES

MICHAEL SMURFIT

DERMOT DESMOND

MCDONAGH BOLAND BEECHILL PENSION TRUSTEES

Houses of the Oireachtas

Dated this 23rd day of October 1991

STATUTORY DECLARATION

of

COLIN PROBETS

LENNON HEATHER AND COMPANY
Solicitors
39 Mespil Road
Dublin 4

APPENDIX 16

PARAGRAPH 9.3.12

Houses of the Oireachtas

Glencar,

Kilteragh Drive,

Dublin. 18.

12th April, 1988.

Hill Samuel & Co. Ltd.,
100, Wood Street,
EC2P 2AJ,
ENGLAND.

Dear Sirs,

In consideration of your agreeing to make a facility in the sum of IR£5m. available to Freezone Investments Limited and me, I hereby covenant and undertake with you that I shall not effect any expansion, development or evolution of my business interests in relation to the drinks, food, beverages industry and related areas except through the medium of R. & J. Emmet plc, or a wholly owned subsidiary of such Company.

In the event that I do not make any such investments through the medium of R. & J. Emmet, plc, I confirm that I shall make such investment through another Company whose Shares are or are about to be quoted or dealt with on any Stock Exchange of Ireland or England and I shall grant you an option to acquire 20% of the Shares in such Company on similar lines to the option granted to you in R. & J. Emmet plc or a subsidiary thereof.

Yours faithfully,



DERMOT F. DESMOND.

DATE : 22nd March, 1990 REVIEW : December, 1990

A. LOAN DETAILS

Name : Freezone Investments Limited.
 Address : Victory House, Prospect Hill, Douglas, Isle of Man.
 Beneficial Owner : Dermot Desmond.

B. SANCTION DETAILS

Loan Required : Amount DM Equivalent of IRE 814,000
 =====

Purpose of Loan : To enable the Borrower to refinance borrowings with Hill Samuel which were for the purpose of purchasing R. & J. Emmet plc shares.

Period and Repayment of Loan : To 31st December 1990 and repayable as follows: -

From the sale of the shares as Dermot Desmond will enter into an option to buy back the R. & J. Emmet plc shares at the end of the term of the loan at a price to include interest for the term from his own resources i.e. from estimated surplus of £10 million from Custom House Dock project and estimated surplus of £5.0 million from the Johnston Mooney & O'Brien site.

Interest Rate : DIBOR 3 months plus 2 1/2% p.a. plus RAC.

Payment of Interest : Interest will be payable after six months and on maturity.

Bank Charge : 1/2% of amount sanctioned i.e. £4,070.

Security

1. Formal lien over 814,000 R. & J. Emmet plc shares.

The shares to be registered in the name of the Bank's nominee company and certificates lodged with the Bank as collateral. Valued at cost IRE 814,000

2. Form of Guarantee completed by Mr. Dermot Desmond supported by a Put Option in favour of the Bank for Dermot Desmond to purchase the shares by 31st December, 1990.
3. Letter signed by Dermot Desmond confirming in the event of the Guarantee in favour of UPH being lifted, the cash deposit may be utilised against this borrowing.

IRE 814,000
=====

C. TOTAL CREDIT EXPOSURE

Banking - DM Equivalent of	IRE 814,000
Leasing	<u>Nil</u>
	IRE 814,000
	=====

D. CONTINGENT LIABILITIES

None.

E. FUNDS WITH US

None.

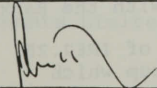
F. GENERAL COMMENTS AND RECOMMENDATIONS

This application is made to us by Dermot Desmond. Freezone Investment Limited wish to refinance their borrowings currently with Hill Samuel which was for the purpose of purchasing R. & J. Emmet plc shares.

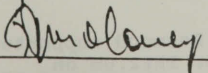
The shares will be held by Ansbacher as security. Dermot Desmond will undertake to purchase these shares on the maturity of the loan at a price to repay the Bank plus interest in full. We will hold a letter from Dermot Desmond confirming in the event of the cash deposit relating to the Guarantee in favour of UPH Ltd being lifted these funds will be held by Ansbacher to secure this Freezone loan. The Bank will also be secured by the personal Guarantee of Dermot Desmond. We hold a Net Worth Statement signed by Dermot Desmond in April, 1988 for IRE23 million. We understand this value would now have substantially increased. Sanction is recommended.

RISK EVALUATED AND FACILITIES APPROVED/RECOMMENDED

ASSOCIATE
DIRECTOR



MANAGING
DIRECTOR



DATE

22nd March 1990

CHAIRMAN

DATE

A. LOAN DETAILS

Name : Freezone Investments Limited
 Address : Victor House, Prospect Hill, Douglas, Isle of Man.

B. SANCTION DETAILS

Loan Required : Amount IRE5,100,000
 =====

Purpose of Loan : To repay loans of the Borrower to Hill Samuel Bank Limited to enable the release of R & J Emmet Plc Shares and to have these held by Ansbacher.

Period : To 30th September 1991.

Source of Repayment : From the proceeds of the offer for Freezone's 50.7% shareholding in R. & J. Emmet plc by Gilbey of Ireland Group a subsidiary of Grand Metropolitan Plc who are making an agreed bid at IRE2.25 per share-value in total to Freezone IRE15.3 million.

Interest Rate : DIBOR plus 3% + RAC.

Payment of Interest : On maturity i.e. end of September 1991 when the cash offer, which has been accepted by Freezone Investments Ltd is paid over.

Bank Charge : Substantial fees are being negotiated and will be payable on maturity when the proceeds are received.

Security

1. First fixed charge over 6,818,750 R. & J. Emmet plc shares. The shares to be registered in the name of the Bank's nominee company, Pegasus Nominees Ltd and the share certificate deposited with the Bank.

Valued on the basis of offered price of IRE2.25 per share from Gilbeys of Ireland Group which has been accepted. IRE15,300,000

2. Personal Guarantee of Mr. Dermot Desmond supported, an assignment of life policies for IRE2.0m on his life and the procuring by him that the shareholders of the Borrower grant a lien over ~~their shares to the Bank and lodge their share~~ certificates with the Bank.
3. Promissory Note executed by the Borrower.

Banking - new loan	IRE5,100,000
- existing facilities DM equivalent	IRE 874,613
(fully secured by shares valued at IRE1.8 m)	
Leasing	<u>IRE Nil</u>
	IRE5,974,613
	=====

D. CONTINGENT LIABILITIES

None.

E. FUNDS WITH US

None.

F. GENERAL COMMENTS AND RECOMMENDATIONS

This application is made on behalf of Freezone Investments Limited by Mr. Dermot Desmond on behalf of Mr Colin Probets, the owner of Freezone Investments Ltd. The company presently have borrowings from Hill Samuel Bank Limited which have been in place secured by shares in R. & J. Emmet plc for some years.

An agreed bid is being made by Gilbeys of Ireland Group a subsidiary of Grand Metropolitan Plc for all of the shares of R. & J. Emmet plc at a price of IRE2.25 per share.

Freezone Investments Limited require to have the Emmet shares currently held by Hill Samuel released and taken under the control of Ansbacher so that the terms of the offer may be completed immediately the offer is received by the company. Mr Gabriel Moloney will hold Power of Attorney from Freezone Investments Ltd.

The loan of IRE5.1m will be for a period of about two months as the offer will be made by 14th August 1991.

The Managing Director and Financial Director of Gilbeys of Ireland Group have confirmed at negotiation meetings with Mr Dermot Desmond and Mr Gabriel Moloney the agreed offer which will be put formally by 14th August.

Freezone Investments Limited and Kiril Limited who own in total between them 66.2% of R & J Emmett Plc will sign "irrevocables" as and when the formal offer is made and will formally accept the offer by 22nd August. The cash offer will be payable at the end of September.

The following shares are held: -

Freezone Investments Limited	6,818,754	50.7%
Kiril Limited	<u>2,083,360</u>	15.5%
	8,902,114	66.2%
	=====	=====

It has also been confirmed that Mr. Joe G. Lynch, the Chief Executive of R & J Emmett Plc who owns 738,336 shares (5.5%) and others holding stock equating to about a total of 17% of stock will accept the offer which will bring the Gilbeys of Ireland Group holding well over the 80% thereby putting them in control.

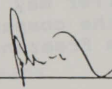
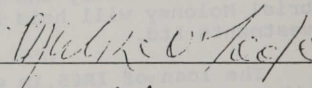
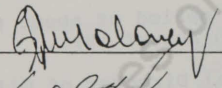
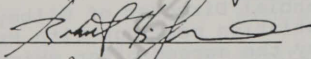
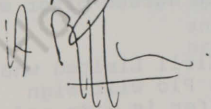
A copy of the Gilbeys of Ireland Group letter to Freezone Investments Limited and Kiril Limited is attached. It should be noted that the letters from Gilbeys of Ireland Group are drafted in a fashion which allows them to be considered, not as an offer at this moment in time, but at the same time putting on record the terms agreed between Dermot Desmond and Gabriel Moloney acting for Freezone Investments Limited and Kiril Limited and David Dand, Managing Director and Gary McGann, Financial Controller of Gilbeys of Ireland Group, subsidiary of Grand Metropolitan.

At the same time that he accepts the offer on behalf of Freezone Investments Limited and Kiril Limited, G.J. Moloney acting under Power of Attorney has arranged with the Managing Director of Gilbeys of Ireland Group and the Financial Director to exchange all of the shares owned by Freezone Investments Limited and Kiril Limited against cash which at IR£2.25 per share will be a total of IR£20,029,756 from which this facility of IR£5.1m will be repaid.

We have other existing loans totalling IR£1.8m approved to Freezone and Kiril for the past two years and these will also be paid off at that point in time.

The facility is accordingly recommended for sanction.

RISK EVALUATED AND FACILITIES APPROVED/RECOMMENDED

ASSOCIATE DIRECTOR	<u></u>	MANAGER	<u></u>
MANAGING DIRECTOR	<u></u>	DATE	<u>25th July 1991</u>
CHAIRMAN	<u></u>	DATE	<u>28 August 1991</u>
	<u></u>	<u>ADVISERS</u>	

Solicitors W.J. McGuire Esq., Messrs. McKeever & Son

Valuers _____

RVM/CCF

GILBEYS OF IRELAND GROUP

Naas Road, Dublin 12

17th July, 1991

STRICTLY PRIVATE AND CONFIDENTIAL:

The Directors,
Freezone Investments Limited,
Douglas,
Isle of Man.

Dear Sirs,

Having reviewed the matter at a board meeting of Gilbeys of Ireland Group ("GOIG") today, this is to indicate that GOIG would be prepared to consider (without obligation) making a first and final offer for the entire issued ordinary share capital of R & J Emmet plc ("RJE") at IRE2.25 per share depending on your response to the following matters:

1. Whether the unanimous recommendation of the entire Board of RJE to all shareholders to accept any such offer (if made) would be forthcoming.
2. Whether Freezone Investments Limited ("FIL") as beneficial owner of the 50.7% shareholding would enter into an irrevocable undertaking to accept any such offer (if made) not later than 5 p.m. on the day of any such announcement of a bid (but in any event after any such announcement).
3. Whether (subject to Panel approval if necessary) on the day following the publication of any formal offer document (if the offer is made) FIL will transfer immediately thereafter pursuant to the offer at the offer price 29.9% of the issued share capital of RJE.
4. Whether immediate arrangements can be made for GOIG to carry out an appropriate due diligence exercise on the business and liabilities of RJE Group.

In addition, GOIG would be prepared to consider providing, as part of the terms of any such offer (if made), a choice of consideration for each issued ordinary share of RJE as follows:

- (a) IRE2.25 in cash; or
- (b) an equivalent amount of 10% guaranteed loan notes redeemable at the holder's discretion on 30 days

notice at any time up to the expiration of five years from the date of issue following which date such loan notes would be redeemed by GOIG.

This letter does not, and is not intended to, constitute an offer or an expression of an intention to make an offer for the issued share capital of RJE; nor is it intended as an inducement or an attempt to induce any person to make or to offer to make any agreement relating to any of those shares. Moreover, the Board of GOIG will not make any decision on whether to make an offer for the shares in RJE pending consideration of your response to this letter.

Please note that any initial announcement of an intention to make an offer (if any such intention is formed) would contain a pre-condition reflecting 2 above. No bid would be proceeded with if such condition was not fully satisfied.

Please also note that all other usual conditions appropriate to such an offer would form part of any such offer, if made.

Yours faithfully,



David I. Dand
Chairman.

Houses of the Oireachtas

LETTER OF HYPOTHECATION

To: Ansbacher Bankers Limited
Ansbacher House
52 lower Leeson Street
Dublin 2

In consideration of your granting or continuing to grant loan facilities to us ("the Borrower") we state that we have deposited with Ansbacher Bankers Limited the sum of IRE500,000 (Five Hundred Thousand Pounds) and hereby hypothecate such deposit by way of security for the aforesaid loan facility.

It is agreed that the aforesaid deposit should be hypothecated to you as security for all funds due to you by us including any sums in respect of any interest, legal costs, charges and expenses and other banking charges which may become due from us during the validity of the facility. If, however, the amount outstanding under the said loan facilities is repaid in full or in part, it is further agreed that the said deposit may be deduced proportionately, provided that the amount of the deposit does not fall below the total amount outstanding in respect of the said loan facilities.

It is agreed that you may at any time and without notice claim such portion of the aforesaid deposit as may be necessary to discharge the liabilities of the Borrower under the loan facilities.

In respect of our liability under the loan facilities it is acknowledged that you should have a lien and charge on our monies now or hereafter standing to the credit of our deposit account with Ansbacher Bankers Limited. It is further agreed that the security hereby given to us shall be a continuing security during the validity of the said loan facility to us.

A Certificate by the Officer of the Bank as to the amount due by us shall be conclusive evidence against us in any legal proceedings.

FOR AND ON BEHALF OF: FREEZONE INVESTMENTS LIMITED

SIGNED: 

DATE : 15 October 1991

101. Dealings of Shares
102. R.C. Walker
103. Joint Assets
104. General Administration

105. The Trust will make a bid for 100% of the shares of the Company and will acquire the other 50% of the shares of the Company. The other 50% of the shares of the Company will also acquire the other 50% of the shares of the Company on a rights issue basis. The rights issue will be placed with institutions afterwards.

In the event that the Trust fails to acquire 100% of the shares of the Company, the Trust will offer to purchase the shares of the Company which are not held by the Trust and a company related to the Trust will acquire the shares of the Company.

The proposed new loan of £10 million will be repaid by the Trust over a period of 10 years. The proposed new loan of £10 million will be repaid by the Trust over a period of 10 years. The proposed new loan of £10 million will be repaid by the Trust over a period of 10 years. The proposed new loan of £10 million will be repaid by the Trust over a period of 10 years.

APPENDIX 17
PARAGRAPH 9.5.4

106. The Trust will make a bid for 100% of the shares of the Company and will acquire the other 50% of the shares of the Company. The other 50% of the shares of the Company will also acquire the other 50% of the shares of the Company on a rights issue basis. The rights issue will be placed with institutions afterwards.

107. The Trust will make a bid for 100% of the shares of the Company and will acquire the other 50% of the shares of the Company. The other 50% of the shares of the Company will also acquire the other 50% of the shares of the Company on a rights issue basis. The rights issue will be placed with institutions afterwards.

108. The Trust will make a bid for 100% of the shares of the Company and will acquire the other 50% of the shares of the Company. The other 50% of the shares of the Company will also acquire the other 50% of the shares of the Company on a rights issue basis. The rights issue will be placed with institutions afterwards.

MEMORANDUM

TO: Pauline O'Toole
FROM: G.J. Moloney
DATE: 21st March 1990
RE.: Dermot Desmond/R&J Emmet

R&J Emmet will make a bid for UPH. DD has an interest in 47% of UPH and will accept the offer and hopes that the other shareholders will also accept the offer. The offer will be against Emmet Paper on a rights issue some of which will be placed with institutions afterwards.

We have an R&J Emmet file which needs to be studied in that you will see that Freezone holds a controlling interest in R&J Emmet and a company called Kirl has a big holding. Pascal Taggart is a nominee for Kirl.

The proposal now is that Kirl will borrow from us IRE1.8 million to buy 1.8 million R&J Emmet shares from Freezone at IRE1, total cost IRE1.8 million, which flows into Freezone and is used to repay some of the Hill Samuel loan that Freezone has. As security we will have the R&J Emmet shares supported by a cash deposit (details further on). Dermot will enter into an option to buy back the R&J Emmet shares after one year at a price to take into consideration the interest for one year (say for example 1.20). *No margin*
include in sale

We are to work out the interest rate and therefore the price at which they would have to be bought back to include interest costs. When the JM & O'B deal has gone through and the offer by Emmet has been accepted by all the shareholders of UPH, Emmet will then own the loan Paper which we will have guaranteed.

Our guarantee will have been secured by a deposit with us of IRE1.8 million out of the proceeds of the JM & O'B deal. Emmet at that point and time will release Ansbacher from their guarantee which in effect will release the deposit of IRE1.8 million which DD says Ansbacher can have as secondary security for the loan to Kirl. Our primary security would be shares in R&J Emmet.

Dermot confirms that we will receive from the sale of JM & O'B IRE9.4 million. We have on deposit with us about IRE2 million, total IRE11.4 million, from which they repay the Chestvale loan and Dermot's loan, which in total comes to about IRE5 million, leaving about IRE6 million on deposit with us. Roger Conan of NCB will come to talk to you, Pauline, to put this together. Roger is not aware of the source of the IRE1.8 million, however, he will be aware from Dermot that it is from a foreign source. He will be aware that the guarantee is backed by the cash, however that on the release of that guarantee the cash will be used to repay the loan.

Roger does not know the source of the funds and does not need to be told or to know.

Regarding R&J Emmet, after the takeover of UPH by Emmets, which is by way of property exchange for shares against a rights issue, this will add IRE12 million to the value of the shares and UPH will have no gearing.

They are therefore in a position to make an offer to PM for Monarch and to gear up for this they would pay for Monarch as follows:

IRE6 million	Cash
IRE8 million	Equity
Balance	Loan Stock

Emmet is projected to make a profit of IRE1.8 million this year and he has every confidence that it will achieve that as it is up 20% in the first three months of the year.

GJM
21.3.1990

Houses of the Oireachtas

APPENDIX 18

PARAGRAPH 10.12.8

Ne

Received from
Mr. Mc Govern at
meeting in his
Office this AM.
- 11/1/90



Mr Fergus McGovern,
Chief Executive,
Telecom Eireann,
St. Stephens Green West,
DUBLIN 2.

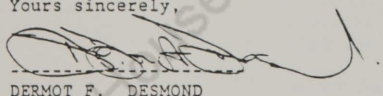
9th January 1990.

RE: JOHNSON MOONEY & O'BRIEN SITE

Dear Fergus,

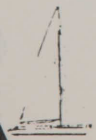
Further to our conversation of this morning, I have spoken to the principals and the best offer that I have obtained from them, is that they would be prepared to sell the entire site for £9.4 million. However, there is one condition that they be granted an option to purchase the residential element, pro-rata to the sale price. If you decide not to develop the residential units on the site, the option would lapse

Yours sincerely,



DERMOT F. DESMOND

*Confirmed by phone to me
that I've accept these terms
11/1/90*



RECEIVED JOHNSON MOONEY & O'BRIEN
11/1/90

10
B
P
10
10
10
10
10

ALLIANCE PARTY

THE HOUSE OF COMMONS
IN PARLIAMENT ASSEMBLED

ORDER

OF THE HOUSE

OF COMMONS

IN PARLIAMENT

ASSEMBLED

APPENDIX 19

PARAGRAPH 10.14.22

Houses of the Oireachtas

THE HOUSE OF COMMONS
IN PARLIAMENT ASSEMBLED
ORDER OF THE HOUSE
OF COMMONS

BALLSBRIDGE PROJECT

Kieran O.
Donoghue
- next meeting
- March 90

NOTE OF MEETING HELD IN ST. STEPHENS GREEN
ON WEDNESDAY 21ST FEBRUARY 1990

1. PRESENT

Telecom Eireann

Dan O'Neill
Patrick McGovern
Kieran O'Donoghue

Mitchell O'Muire Smyth, Architects

Toal O'Muire
John Smyth

Noel Smyth & Partners, Solicitors

Assumpta Kenny

(Noel Smyth of Noel Smyth and Partners was to attend but was unable to do so as he had to travel urgently to Rome).

2. DISCUSSION

Dan O'Neill in reviewing the previous meeting said that the proposed share option purchase arrangement required the sanction of three Government Departments and could delay matters. The preferred choice for Telecom Eireann is to purchase sufficient of the property to site the office block. This would be about three acres with an adjustment as necessary to fit-in with the subsequent planning permission requirements (residential - v - office development).

On this John Smyth did not anticipate any difficulty. On the apportionment of pro rata costs he had been asked by Noel Smyth to work on some figures. He had done so and an estimate has been given to Noel Smyth.

Handwritten notes at the top left of the page, including the name "Houses of the Oireachtas" and other illegible scribbles.

BALLIBRIDGE PROJECT

NOTE ON SETTING OUT IN THE STATION HOUSE
ON WEDNESDAY 11TH JANUARY 1988

DISCUSSION

Mr. O'Sullivan is reviewing the previous meeting and that the
proposed scheme option purchase arrangements regarding the
function of these Government Departments and could delay
setback. The proposed scheme for Telecom Eireann is to
purchase additional of the property to site the office
block. This would be about three acres with an adjustment
as necessary to fit in with the subsequent planning
permission requirements (residential - v - office
development).

DISCUSSION

Mr. O'Sullivan is reviewing the previous meeting and that the
proposed scheme option purchase arrangements regarding the
function of these Government Departments and could delay
setback. The proposed scheme for Telecom Eireann is to
purchase additional of the property to site the office
block. This would be about three acres with an adjustment
as necessary to fit in with the subsequent planning
permission requirements (residential - v - office
development).

John Smith further explained that under the original proposal Telecom was to buy the total site and then sell back. It was desirable that there should be a single planning application for the full site. On the vendors option to purchase back the residential element John Smyth pointed out that this was a "call" option rather than a "put" option.

On Telecom Eireann's preferred choice of buying enough land for the office development, John Smyth asked how the divide would be valued. Dan O'Neill replied that it would be on a pro-rata basis. After querying whether this was "acre for acre irrespective of type" and having had this confirmed by Dan O'Neill, John Smyth agreed that this was logical.

Dan O'Neill then mentioned the question of planning permission as a condition of purchase. John Smyth queried whether this was a condition of the original arrangement. Assumpta Kenny confirmed that it was not. It was agreed that this was best left over until Noel Smyth could attend.

Dan O'Neill confirmed that if details could be agreed, Telecom Eireann was in a position to pay the deposit within the current financial year which ends on the 2nd April next. Telecom Eireann was keen that this possibility be explored.

It was agreed at this point - in the absence of Noel Smyth - that no further useful discussion could take place.

John Smyth summed up the position as follows:

- 1. Telecom preferred direct sale rather than a share option.
- 2. Telecom preferred a purchase of portion of the site rather than the full site with the associated "call option" (in favour of the vendor).
- 3. Method of purchase - date and closure - still to be worked out.
- 4. Telecom Eireann is willing to pay a deposit immediately details are agreed.
- 5. Telecom Eireann is seeking that the deal be subject to planning permission

NEXT MEETING

It was agreed that a further meeting would be held on Wednesday 7th March at the offices of Noel Smyth and Partners, 22 Fitzwilliam Square, Dublin 2 at 4pm. Noel Smyth to be available for this meeting.

John Smyth will confirm the arrangements to Dan O'Neill

APPENDIX 20

PARAGRAPH 10.14.23

Houses of the Oireachtas

March 5, 1990

Dan O'Neill, Esq.,
Telecom Eireann,
St. Stephens Green,
Dublin, 2.

RE: Chestvale Properties Limited and Telecom Eireann ("Telecom").

Dear Dan,

I refer to the meeting which took place on Monday last the 26th February.

I confirm that I have had the opportunity of now discussing further the possibilities as announced by you at that meeting.

We would be prepared to move on the basis of entering a Contract with An Bord Telecom at this time to sell as agreed the property for the sum of IR£9.4 million on the following conditions:-

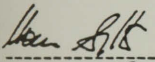
- (a) The sale would be subject to An Bord Telecom obtaining planning permission for circa 50,000 sq. ft. of offices.
- (b) Pay a deposit of 15% of the purchase price to be held by the Vendor's Solicitors as Stakeholders.
- (c) Be responsible for interest on the purchase money from 28th February 1990 to closing of sale at dibar plus 1%.
- (d) There would be an Option in favour of the Vendor to buy back that portion of the property not utilised by Telecom in their application for the purposes of residential use.
- (e) The terms of the buy-back would be on an open market basis, less an agreed discount for the fact that the property is now being sold to Telecom subject to planning permission.
- (f) As part of the overall package and in order to allow the Developer the best opportunity of developing the site in the most correct way, given that the property is now being sold subject to planning permission, Telecom would give the Vendor a Put Option to require Telecom to take a Lease in respect of the property for 50,000 sq. ft. at an agreed rental on planning permission being granted. This would be in substitution for the above Contract, in which case the deposit would be returned to Telecom. Conversely, there would then be a Call Option in favour of Telecom to acquire the completed building, when built either at a pre-agreed rate, or at the open market value.
- (g) The Agreement would contain a provision that in the event of no planning permission being granted in respect of the property for the

offices required by Telecom, Telecom would receive back their deposit monies, less one-third thereof (5%), the remainder of the monies being repaid without interest, cost, or compensation. The Vendor being entitled to retain interest on the deposit.

- (h) Telecom would have control on its own planning development and project management of the office building whether bought or leased. In the event of a lease, a project management fee would be paid to Telecom.
- (i) In the event of a stamp duty mitigation scheme being provided or co-operated on with Telecom by the Vendor, Telecom would share the savings on a 50/50 basis with the Vendor.
- (j) Telecom would co-operate fully in the proper planning and development of the property by the Vendor and in respect of any application being made by the Vendor in respect of offices for Telecom, the application would be lodged in the name of Telecom.

Yours sincerely,

CHESTVALE PROPERTIES LIMITED,



DIRECTOR.

BALLSBRIDGE PROJECT

NOTE OF MEETING HELD AT

22 FITZWILLIAM SQUARE

ON WEDNESDAY, 7TH MARCH 1990

1. PRESENT

Telecom Eireann

Dan O'Neill

Patrick McGovern

John McGrath

Kieran O'Donoghue

Mitchell O'Muire Smyth, Architects

Toal O'Muire

John Smyth

Noel Smyth & Partners, Solicitors

Noel Smyth

Assumpta Kenny

2. DISCUSSION

2.1 Opening the meeting Dan O'Neill summarised the present position. The scenario was that the owners had a call option to buy back that portion of the site approved for residential development. This left Telecom Eireann carrying the risk if the planning application went awry. Telecom would now like to have any other options explored.

2.2 Noel Smyth said that they were prepared to step back from the original proposal. They are now saying that they will adopt a semi-developmental role to give Telecom Eireann comfort on the planning position risk.

2.3 Noel Smyth outlined the options as follows:

- Option 1

The original proposal was to sell the full site with a call option by the vendors to repurchase the residential area. A sub-set of this option was to sell by means of a share option.

- Option 2

Telecom Eireann buys the site but on receipt of planning permission Telecom has the right to opt ^{instead} its deposit back and ~~indeed~~ to avail of a 35 year standard lease based on the open market rent. Furthermore the vendors are prepared to make a contribution/refund to Telecom Eireann equal to its share of the added value resulting from any additional office area which might be approved (i.e. in excess of the 60,000 square feet required by Telecom). A sub-option of this might be to give Telecom the right the buy out the freehold of the lease within six to twelve months.

2.4 Noel Smyth went on to point out that the vendors would now have to take the consequence of this reversal of the original role into account. For instance, they would have to bear the burden of interest for up to eighteen months. In addition they would have to stay on site and to get involved in the demolition work which they had not originally intended. There is, of course, the possibility of a better return on the site and they were prepared to share the financial consequences of this improvement with Telecom Eireann. In other words, Telecom Eireann would get a cheaper site if a greater density resulted. In effect this was a semi. partnership arrangement.

2.5 Summarising, at this point, Noel Smyth said they were, in fact, four options. These were:

1. The original option as discussed at ^{the} previous meetings
2. Telecom to lease on a 35 year lease with 5 year rent reviews as outlined at 2.3 above
3. Telecom to buy part of the site on a pro rata basis
4. Telecom to buy three acres and this area to be adjusted depending on ^{the} result of the planning permission

2.6 Dan O'Neill pointed out that Option 4 - buying three acres and adjusting subsequently was the preferred option for Telecom Eireann. It was agreed that Noel Smyth would write to Dan O'Neill outlining the options in detail. This letter to be delivered by Friday morning. Dan O'Neill explained that options could then be presented to an internal meeting on Monday morning and he expected to have a decision in by early next week.

2.7 Noel Smyth then elaborated further on the lease arrangement. This would be subject to planning permission. A deposit (stake) would be payable ~~subject to planning permission~~. Interest on the purchase price would be 1% plus the DIBR from a current date up to the closing date. On closing Telecom would have the right to opt for a 35 lease at an agreed rent. It would also have the option to purchase the freehold within a limited time e.g. six to twelve months.

2.8 If planning permission for further office space in excess of Telecom's 60,000 square feet is approved there would be an agreed refund to Telecom to cover this enhancement. The intention would be to close within seven to fourteen days of the planning permission outcome. The lease would be a standard lease 35 years (FRI) with five year rent reviews.

2.9 Dan O'Neill again outlined Telecom Eireann's ideal option which is to take portion of the site initially and adjust depending on the outcome of the planning permission. This would involve an adjustment for the interest on capital element borne by the vendors. Asked how he saw the pro rata arrangement working Dan O'Neill said that if it were three acres the calculation would be on the basis of

$$\frac{3}{55} \times 9.4m$$

From Noel Smyth's response it was evident that he did not see it that way. He went on to point out that it might be on the basis of £9.4m less £4m for a residential site of, say, 240 units leaving payment by Telecom of £5.4m and not pro rata. He then suggested that the ^{site}value left over after Telecom had taken its portion could be valued by two agreed valuers.

- 2.10 Dan O'Neill again suggested purchase of three acres with an adjustment when planning permission materialised. This to be on the basis of

$$\begin{array}{r} 3 \\ \hline \end{array} \times \text{£}9.4 \text{ ✓}$$

5.5

John Smyth suggested what he called an equalisation agreement. With this the site would be ~~derived~~^{derived} nominally at the outset but the risks and benefits of the ultimate site development would be shared equally by the two partners. Both shareholders proportionately share ~~share~~ the benefits irrespective of whether their nominal portion of the site lost or gained in the planning permission result.

- 2.11 Pat McGovern asked Noel Smyth about a stamp duty. Information not available. Pat McGovern pointed out it was undesirable that the land should be sold forward and backward thus unnecessarily attracting stamp duty. This was agreed.

As at the previous meeting, Dan O'Neill again pointed out that Telecom was willing to pay the deposit in the current financial year.

- 2.12 Finally, it was agreed that Noel Smyth would have a letter with Dan O'Neill by Friday morning so that the details therein could be presented to Telecom Eireann for decision at an internal meeting on Monday 12th next.

3. NEXT MEETING

It was agreed to meet again on Thursday 15th March 1990 in Dan O'Neill's Office at 2.15pm

4. NOTE

This meeting was held before Mr. Noel Smyth's letter of 5th March 1990 was received in Telecom Eireann. Its contents were unknown to the Telecom site and the other side made no reference to it at the meeting.

Houses of the Oireachtas

19/01/24
March 7, 1990

Mr. Donal O'Connell
Leinster Chambers
11, Upper Merrion Street,
Dublin 4.

Dear Sir,
The following information is being provided to you in accordance with the provisions of the Freedom of Information Act 1997.

Yours faithfully,
[Signature]

The following information is being provided to you in accordance with the provisions of the Freedom of Information Act 1997.

APPENDIX 21

PARAGRAPH 10.14.24

Houses of the Oireachtas

Houses of the Oireachtas

TEARDA

TEARDA

March 9, 1990

Mr. Dan O'Neill,
Telecom Eireann,
St. Stephen's Green,
Dublin 2.

Re: Chestvale Properties Limited ("Chestvale") and Telecom Eireann ("Telecom").

Dear Dan,

Further to the meeting here today, I confirm that the options being discussed are as follows:-

1. The existing position - That Telecom acquires the entire site for £9.4 Million and Chestvale has an option to buy back the residential element pro rata.
2. Telecom takes a Contract to buy the entire site for £9.4 Million subject to Telecom obtaining Planning Permission for c. 50,000 square feet of offices. Telecom pays interest at 1% over Dibar from a date (to be agreed) until closing.

On Telecom will have the right to require Chestvale to grant to it a 35 year Lease of a portion of the property the subject matter of Telecom's Planning Permission for offices on a FRI Lease at an agreed rent, on the exercise of which Chestvale refunds Telecom's deposit.

On Telecom taking a 35 year Lease, Telecom is given an option to acquire the Freehold of its leased premises within say six months to one year at an agreed price. Planning Permission will be sought for a development that will not alone satisfy Telecom's requirements but will also seek to maximise the value of the site and in the event of an increase in the office content, the price of the freehold to Telecom is discounted. The intention is that Telecom would have the prominent site at the front which it requires and that an office

content of 20,000 to 30,000 square feet be sought at the back, in addition to the residential content.

3. On the grant of Planning Permission, Telecom buys and builds and an adjustment is made in Chestvale's favour for the accrued interest on the capital of £9.4 Million. Telecom's purchase price is arrived at by valuing the remainder of the site with whatever permission has been obtained for it and instead of Chestvale's take being valued pro rata, Chestvale gets a discount on the added value to compensate it for the risk.

4. Telecom buys now say 2 to 3 acres and closes the sale straight away with no Planning condition. Planning Permission is applied for in consultation with Chestvale and when Planning Permission has been obtained, Chestvale and Telecom enter into an Equalisation Agreement to value Chestvale's take. The purpose of the Equalisation Agreement will be to value the entire site at £9.4 million now. In the event of a more favourable planning permission being obtained on the remaining 2.5 to 3 acres, (depending on the present requirements of Telecom), then the net cost to Telecom for the portion of the property required by them for their prestigious office development will be reduced. This will occur because of the increased value on the remainder of the property. For example:-

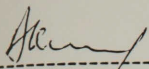
Assume the office portion is now valued at 50% more than the residential portion. This would value the 3 acres to be transferred to Telecom at say $£9.4 \times 3/5.5 + 50\% = £7.68 \text{ m}$.

Assume that on the remaining 2 acres a further office permission is granted, together with residential development, it is easy then to identify that the remaining site value will be in excess of the £1.72 million (i.e. $£7.68 \text{ m} - £9.4$), using the above calculation. In this event the Equalisation Agreement would ensure that the increased value on the remainder of the site would be shared by Telecom having the effect of reducing the cost of the area required by them.

In this event Telecom does not take a Conveyance at this stage but is given a charge on the portion of property to be transferred to them and it takes its legal title when planning permission granted and its take has been ascertained.

In any event it is recognised that one single Planning Application is made and that the input of Chestvale's Architect is taken on board by Telecom as already discussed.

Yours sincerely,



Noel Smyth
Noel Smyth & Partners.

Houses of the Oireachtas

APPENDIX 22

PARAGRAPH 10.15.4

Houses of the Oireachtas

Houses of the Oireachtas

Memo.

CONFIDENTIAL

Meeting with Chairman and Chief Executive,
re Ballsbridge Project on 12 March 1990

The meeting decided that we should proceed, as originally proposed per Mr. Desmond's letter of 9 January 1990 and as per option 1. of Noel Smyth's letter of 9 March 1990.

There was full agreement that, while the foregoing option leaves us exposed on Planning Permission and on the residential element of the overall development being left on our hands, the options 2. & 3. were extracting a very high price for sheltering us against that risk. They also led to the possibility of problems arising in legal interpretation relating to unfamiliar territory, as far as property transactions go and, most serious of all, there could be a conflict of interest in regard to Planning Permission, with the Vendors seeking to cram in more office space, which could either extend the time required to get Planning Permission or jeopardize a successful outcome.

If the vendors do not purchase the residential element under their "call" option, we are left in the happy enough position of either selling it off to the highest bidder or developing it ourselves and selling the houses on the open market.

D. O'Neill
D. O'Neill,
Head of Property &
Service Quality Department

12 March 1990

*copy to Pat Mc Govern,
Kieran O'Donoghue*

*P.S. Also agreed with Chairman
at this meeting that Brian
O'Halloran be appointed a
contractor.*

APPENDIX 23

PARAGRAPH 10.15.6

Houses of the Oireachtas

EXTRACT FROM THE EVIDENCE OF DOCTOR SMURFIT.

- 1 Q. INSPECTOR: I want to start, Dr. Smurfit, by discussing with you a meeting on the 12th of March 1990 which you had with Mr. O'Neill the property manager, and Mr. McGovern, the Chief Executive Officer when a decision was made to go along with the original proposal to buy the property without it being subject to planning permission. That meeting, as I understand it, took place immediately before a board meeting of the same date?
- A. Right.
- 2 Q. I think I have here Mr. O'Neill's minute of that meeting.
- A. Could I have a look at it?
- 3 Q. Yes. (Document handed to witness).
- A. This is, you will understand, the first time I have seen it.
- 4 Q. I accept that. It's a memorandum from Mr. O'Neill, for file, dated the 12th of March 1990. Sorry, you must be looking at the wrong document.

and they also told you that the reason or one of the reasons that they didn't look or pursue some of the other options was that as far as they were concerned it was unfamiliar territory.

A. To them or to me?

12 Q. To them.

A. Yes.

13 Q. This concerns me.

A. The planning permission aspect?

14 Q. No, not so much that. It was some of the - there are references in Option 4 to Telecom only buying two to three acres, closing the sale straight away and that would be subject to, sorry, that would not be subject to planning permission. Obviously the capital outlay would be considerably less and there was then reference to what is described as an equalisation agreement.

A. No.

(Mr. Fry then asked to make a statement off the record).

INSPECTOR: I'd prefer, I want everything on the record. I don't mind a comment like that being on the record.

MR. FRY: Can I just say on the record I think my client is saying that he has never seen this letter.

INSPECTOR: I accept he hasn't seen the letter but what I am asking about is whether, does he recollect at the meeting of the 12th of March -

A. No, I do not recollect.

15 Q. - any discussion of the options.

A. I don't recollect this. "Option 4, two to three acres". No, I don't have any recollection of that discussion, that the price would be less.

16 Q. Option 2 and 3 were options whereby Telecom could buy the property subject to planning permission and the memorandum from Mr. O'Neill of the meeting of the 12th of March indicates that there would be a very high

price for protection against that risk; do you remember that being discussed?

A. Yes, I think they did, it strikes a chord with me. I had formed the view that we were going to get planning permission. Obviously that view changed somewhat since the controversy that has surrounded the site. I was taking a decision and making a recommendation, which I did, and which I have no regret for.

17 Q. Sure. Did Mr. O'Neill indicate to you at that meeting of the 12th of March that he had discussed the matter with the architects, Mr. Hanna, of Brian O'Halloran & Associates that morning and Mr. Hanna's advice to him was that, and I quote, "His assessment is that there is a significant risk on obtaining planning permission". That was a memorandum of a discussion immediately before Mr. O'Neill went to meet Mr. McGovern.

A. I can never remember Mr. Hanna's name ever coming up at any meeting with the Chief Executive and Mr. O'Neill.

18 Q. Well, did Mr. O'Neill give you some indication there was some risk?

A. He may have done, I am afraid I can't recall.

19 Q. Can you remember how long that meeting may have taken?

A. I think I could probably find out. It was before a board meeting?

20 Q. It was before a board meeting.

A. Well then it would have been *A FEW MINUTES*

21 Q. Yes, I understand it was somewhere between five and fifteen minutes.

A. Yes, I was relying, as I have always done since, in the 12 years, on the Chief Executive of the company, he was my pole position man, if you will. I can't remember the circumstances that led up to them wanting to meet me.

22 Q. Sure, I think because the matter was going to be discussed at the board meeting that day.

- A. I see. Well, that is, I can't remember that, ^{and} they filled me in on the issues in the time allowed and I would just say "Fergus, are you happy?" and that would be the way I would be doing it, that would be the traditional way I have done it in any case. McGD
- 23 Q. Right. Do you recollect being told, either at that meeting of the 12th of March or indeed beforehand, of a letter from Dermot Desmond of the 20th of February where he suggested to Telecom that they could probably protect themselves from media criticism and indeed get a better commercial deal if they were to buy it subject to planning permission.
- A. I can't remember that, no. I don't have this in my file from Mr. McGovern, he didn't send me a copy of it or you would have a copy from my files.
- 24 Q. Yes, because subsequent to that meeting of the 20th of February a number of meetings took place between Mr. Smyth and Mr. O'Neill and, as I say, what concerns me is the decision-making process in Telecom whereby having been offered by Mr. Desmond or at least suggested initially by Mr. Desmond and then agreed to by Mr. Smyth negotiating on behalf of the vendors that it could be bought subject to planning permission, that a decision was taken and it seems to be quite summarily, not to have that protection for Telecom and to go ahead and buy it as per the original discussions.
- A. Well, I would like to be very clear. I mean, are you telling me that the same terms and conditions were available based upon your investigations, without planning permission, ^{AND} subject to planning permission?
- 25 Q. It's difficult to be quantitative about it, but in general terms I would say yes, from my understanding and my discussions with Mr. Smyth. It may be that he was going to try and persuade Telecom to allow him to put in a smaller office block as well but that was going to reduce the cost to Telecom, not increase it.

A. Well, my submission to you, Mr. Inspector, I stated here in my submission that I had no further part in that acquisition of the site and all further matters were dealt with by management. I was involved in progress from time to time. That is exactly the position. I mean, I am not aware of what you are saying.

26 Q. So, you weren't advised of this information, even though you were advised from time to time, you weren't aware of this, but in retrospect it's quite critical?

A. Everything in retrospect is quite critical. It's easy in hindsight, when one looks back with hindsight one could do things differently but what you are telling me, no, I am not aware of the options. I wasn't aware of the options, that there was going to be another building or anything like that, no. I would assume the executives of the company were.

27 Q. You didn't ask them, for instance, if they had checked with Dermot Desmond who was the facilitator at that stage, if anything could be done in relation to planning permission?

A. Mr. Inspector, Telecom, during my ten years, spent in the order of £1.5, £1.7 billion. That sum of money was handled by the management, approved by the board. That was the position which is as I stated in my summary earlier on. The details of all those negotiations in all the properties, and Telecom had hundreds of them, was done by the management, the Property Division, and by the - we, as the board, would give them the - mandate them a certain amount of money and approval and they would get on with the detail.

28 Q. But this was a particular property transaction that was being dealt with at board level and it was specifically brought to your attention, the decision was brought to your attention?

A. Approved at board level, sir.

- 29 Q. Approved at board level maybe.
A. Yes.
- 30 Q. But it was brought to your attention for your approval immediately before that board meeting of March 12th?
A. Yes, I think they were looking for guidance obviously or the meeting wouldn't have taken place, but I referred to my previous note where I said management had to be absolutely sure as to location, price and alternatives and I assumed that they had done all that and regarded them - I was quite confident in their abilities. I just *RELIED ON THEIR ABILITIES*
- 31 Q. Were you ever notified during the two and a half month period from the beginning of January when this was first really being broached by the management until the decision of the 12th of March that there was a proposal to buy the shares of Chestvale?
A. No.
- 32 Q. That was never part of a referral to you?
A. No.
- 33 Q. Mr. O'Neill is on record in a memorandum, an internal memorandum saying that this is one of the most complex property transactions which the company had been involved in; was that type of suggestion ever made to you?
A. No.
MR. FRY: Sorry, can you just verbalise that for the note. He has to hear "no".
A. No.
- 34 Q. We don't have a video. There appears to have been some concern within the executives of Telecom that they, concern that somebody else might come in and "gazump" them, to use a term.
A. Yes.
- 35 Q. Do you remember any discussion of that nature?
A. No, I don't, Mr. Inspector. I think I did state, if my memory serves me correctly in the previous document that there was something in the back of my mind about

dealing with legal procedures. Thank you. I hope that assists, Inspector.

141 Q. INSPECTOR: Can I refer to the meeting between yourself and Mr. O'Neill on the 12th of March 1990, which preceded a meeting with Dr. Smurfit on the same day?

A. Yes.

142 Q. Can I ask you if you had any notes of minutes taken of that meeting?

A. No, Mr. O'Neill, my recollection is that it took place out in Merrion before meeting the chairman, that it was Mr. O'Neill took any notes, that there were three things, my meeting with Mr. O'Neill, then with the chairman and then the board meeting.

143 Q. The board meeting?

A. Yes, following on this.

144 Q. Yes. Now, did Mr. O'Neill tell you at that meeting that before he went to the meeting he had a telephone conversation with Mr. Hanna of Brian O'Halloran's office?

A. Yes, his memo of the discussion with me indicates that. It's to the best of my recollection. I am sorry, he has two memos of the same date, I think, but almost certainly he conveyed the gist of his discussion with Mr. O'Halloran in reporting to me on the various assumptions, so -

145 Q. So, it is fair to say that he told you at that stage there was a significant risk in continuing?

X A. Yes, you have, in fact. in the second paragraph of the memo, "Option....." (Quoted).

146 Q. Yes. Do you recollect -

A. Yes, I would have to accept that that's a fair description of what took place and in his former memo he then, the typewritten one of the 12th of March, there was full agreement that while the foregoing option leaves us exposed on planning permission - I mean, there was a definite reference to the fact that

4 STILL INVOLVED RISK ON PLANNING, BUT ON A REDUCED AMOUNT ...

- the risk, however one might quarrel about the risk -
- 147 Q. Well, I think that it's this memorandum of the discussion with Mr. Hanna who referred to it as being a significant risk and, I mean, were you aware of that?
- A. I think that's relative. It depends on what one would consider, certainly there was no intimation in the slightest that risk had worsened from the time of the discussions with the planning authorities in early January.
- 148 Q. What I am trying to ascertain is the state of your knowledge at the time that the decision was made on the 12th of March.
- A. Yes.
- 149 Q. Mr. O'Neill certainly had been told that it was a significant risk and this was an up-to-date assessment from your advisors.
- A. Yes, but, I mean, it didn't say there was any change in circumstances over the previous two months.
- 150 Q. Well, I don't think that was specifically dealt with. It's certainly not noted by him.
- A. But if there were a change, that would have been - the mere fact that there was no reference to deterioration in the conditions led me to understand that there was no change in the likelihood of success.
- 151 Q. Well, I don't remember seeing in the earlier documentation any quantification of the risk.
- A. No, that has been - well, how does one quantify? One had to simply take the recommendation and, I mean, Mr. O'Halloran or his superior had given a recommendation to go ahead which was never countermanded.
- 152 Q. Yes, Mr. O'Halloran on the 6th of January, it says "Meeting with Chief Planning Officer must be regarded as positive reaction to our preliminary proposal for the project..... will have been made". (Quoted). Now, in the subsequent two months obviously Mr. O'Halloran has been doing some work for you and on the

12th of March, the day the decision is to be made, you are told there is a significant risk?

A. It was not.

153 Q. I beg your pardon, you were not told by - Mr. O'Neill is told.

A. Yes, but even Mr. O'Neill in subsequent conversations then and afterwards never implied to me that any deterioration in the prospects of getting planning permission had occurred from the time of Mr. O'Halloran's report in January.

154 Q. Well, I won't labour the point, but I am just looking at Mr. O'Halloran's letter of the 8th of January and Mr. Hanna's discussion with Mr. O'Neill, I would have thought that one could read between the lines. So, you came to the meeting with Mr. ^{O'Neill}, or learned at the meeting with Mr. O'Neill that there had been a discussion with Mr. Hanna but the planning situation wasn't any - hadn't deteriorated, no further cause for concern -

A. If you take the second paragraph, the discussion with Hanna, it nearly counteracts the first one. It says, "The attitude of the spectacular by comparison". (Quoted). So, to my mind the first paragraph was neutralised by the later portion of it.

155 Q. But remember what is underlined in that is that their property was zoned for offices and yet they only got half of what they sought.

A. Yes, but we are looking for more spectacular underutilisation.

156 Q. But in a site that is zoned for office, you still had that difficulty. Mr. O'Neill presumably went through the options with you, the four options that had been discussed with Mr. Smyth. I have made the point to Mr. O'Neill, he may have reported it to you, that I find his decision-making on this quite unusual, the basis by which the options two and three, and perhaps three and four, being dismissed - I just find that

very unusual and I would like you to explain to me what your - the grounds on which you came to the same conclusions as him.

A. Well, I was assured that it had been gone into in great detail by Mr. O'Neill with any relevant people with whom he should consult and that all the options did get due consideration and he had no hesitation in recommending the one he finally came up with. I had broadly delegated it to the people and I wouldn't be second-guessing. I didn't consider myself any more competent, once I was sure that the various options were considered then I trusted the experts who had come up with a firm recommendation.

157 Q. But the second option - Option 3 - I think it's effectively - yes, it's a variation of Option 2 but it involves the property being bought subject to planning permission.

A. Yes.

158 Q. And it says "Telecom buys and builds, adjustment made in Chestvale's favour for the accrued interest on the capital of 9.4 million", which I don't think, that wasn't in issue, "Telecom purchase price arrived at by valuing remainder of site..... whatever permission has been obtained for it - instead of Chestvale taking pro rata, Chestvale gets a discount, added value to compensate for risk." (Quoted). And Mr. O'Neill effectively discounted that on the grounds that it was going to - he wasn't clear what was intended by it. He assumed that there was some reference to another building being put on the site and on the 5.5 acres and he seems to think that that would be sufficient to get rid of that decision or that option.

A. He saw grave risks in going down that road, that one could encounter significant both delays and conflict as regards the, particularly the planning aspects. So I think it was in that context that he envisaged that if he could keep going back again and again to get

more residential to enhance their value out of it that would not have been at all in our interests.

159 Q. But my problem is he doesn't seem to have discussed that with them. He doesn't seem to have discussed that with them and tried to get some comfort on it.

A. Well, I am not -

160 Q. And I suppose my question to you is to what extent did you pursue that with him?

A. He assured me he had carefully considered all the positions and options and that his considered firm advice was that the course he had recommended was the only prudent one to follow.

161 Q. And Option 4, which involves taking a smaller site, in other words there would be smaller capital outlay, he seems to have dismissed that on the basis that it included certain, it involved, I think, tricky aspects.

A. I think we were back to the original disadvantage of trying to purchase one particular part of the site. We had to have full flexibility pending agreement on the planning conditions. We didn't know what portion of the site would be approved for one use rather than the other.

162 Q. Sure, but I think Mr. Smyth was allowing for that.

A. I don't see how.

163 Q. The equalisation agreement he was referring to, was that not intended to adjust for that? If you required further space for your offices, adjustment would be made.

A. Yes, but that two to three acres mightn't be suitable at all. It might be in the wrong place.

164 Q. But to what extent was that explored by you or by Mr. O'Neill with Mr. Smyth?

A. Not by me personally, but I am only assuming that Mr. O'Neill, with his usual thoroughness, did fully explore it. I have to trust my responsible experts in the various areas.

165 Q. But when he suggested to you that it was tricky and that one shouldn't go ahead with it because it was tricky, did you not suggest to him, well, that he talk to Mr. Finnegan or talk to some other expert, either internally or externally?

A. I assume that he had talked to all our in-house experts who would have consulted out-house experts if that were necessary.

166 Q. Okay. So, after the meeting with Mr. O'Neill you were going for Option 1?

A. Yes, that was the -

167 Q. The simple one.

A. His proposal, and as I say the chairman approved - simply with Mr. O'Neill and then he in turn repeated his recommendation to the chairman before the board meeting.

168 Q. How long did that meeting with the chairman take?

A. I can't say, but I would say to the order of five to fifteen minutes. It wouldn't normally, the chairman wasn't available for more than periods of that nature.

169 Q. One of Mr. McGovern's - I beg your pardon - Mr. O'Neill's concerns was that some of the options, and I think perhaps No. 2 and 4, that the main concern was that one would be entering into a deal with somebody who you didn't really know. Now, if the options were otherwise tenable and valid, wouldn't the obvious thing be to try and find out who the partners were? Was that discussed with you or considered by you?

A. The risk of going into - it obviously was an added risk and obviously if one had plenty of time and were concerned one might go down all the roads and spend long, but one - it's unlikely one would have been any more reassured, I think, at the end of the investigation. Again, I had only to assume that was his prudent judgment.

X MR. MCGOVERN: Perhaps, Inspector, could I please have a word on that? Inspector, at an early stage when I

picture?

- A. No, I didn't and I didn't see it as my function, I am a straight property man, Inspector, and these wider aspects are a matter for other people in the company.
- 40 Q. You say that you were executing a board decision to furnish a corporate headquarters and interpretative centre?
- A. That's right.
- 41 Q. Did the board minutes refer to the interpretative centre, where did that come from?
- A. The interpretative centre was there from day one as a requirement and Brian O'Halloran's submission to the board on the 10th of January, the interpretative centre is shown in that submission, that interpretative centre was an integral part of this proposal from day one. Corporate headquarters and interpretative centre and this seems to have been lost sight of in some of these discussions with Noel Smyth and Company, that it was an integral part of the development of the Johnston Mooney and O'Brien site.
- 42 Q. Why do you say it was lost sight of?
- A. There is no reference to it in the meetings we had with Noel Smyth. It is as if it wasn't there, yet it was a very definite and integral part of it, in the final design. It turns out to be a building of 14 thousand square feet, that's a very substantial building. The correspondence and the deal were in the terms of a corporate head office and residential site but this, the existence of the interpretative centre, was nowhere mentioned as if it didn't exist.
- 43 Q. But who lost sight of it? Was it Noel Smyth or you or legal people or who, when you say it was lost sight of?

- A. It wasn't mentioned in the terms in the correspondence. There were various deals proposed, you know, and it was all in the terms of corporate headquarters and the possibilities of putting more office accommodation on the residential side but there was no mention that this interpretative centre was also a requirement.
- 44 Q. Well, did anybody know during the time you were talking to Noel Smyth, did anybody know what size the interpretative centre was supposed to be?
- A. I knew what it was, the design hadn't evolved to the stage where we had a 14,000 square foot building. Certainly, the concept and the requirement was there from day one for an interpretative centre.
- 45 Q. Who explained that to you?
- A. The Chief Executive, as I recall it, had explained that to me.
- 46 Q. Would you have instructions on your file from him on the brief to you?
- A. I can't find it, but if I can produce Brian O'Halloran's submission to the board on the 10th of January, where the interpretative centre is shown on his drawing as connected by a covered way to the corporate head office, but I am sure that if I researched files in detail, at this point, I could establish or I would hope that I can establish this interpretative centre was part of the concept of the corporate head office from the outset.
- 47 Q. And would it have been mentioned at an early stage?
- A. It is shown in the sketch prepared by Brian O'Halloran for submission to the board on the 10th of January.
- 48 Q. And was it 14 thousand square feet?

- A. No no, it was a concept at that stage.
- 49 Q. Where did the concept come from?
- A. I believe it came from the chairman.
- 50 Q. To the Chief Executive and on to you?
- A. Yes, it was certainly I believe, a very vital part of the chairman's concept of the Ballsbridge development, that there be an interpretative centre as part of the overall development, with educational facilities etc. etc. and video representations of the telecommunications technology and so forth. It was very definitely part of the chairman's concept of the development of the Ballsbridge site.
- 51 Q. I would like if you could pinpoint for me, or produce for me your specific instructions on the interpretative centre, because you seem to be placing an awful lot of emphasis on it.
- A. Well, I am, because it is a factor in discussing options on the development of the site, that it was there, as a requirement.
- 52 Q. Yes?
- A. And also, it has relevance, what is the commercial value of the interpretative centre.
- 53 Q. But I have been through the file twice, I haven't seen any reference to that, either in internal notes, your notes or correspondence with Noel Smyth.
- A. All right, Inspector, I was trying to establish where a record, written records of where that came from, but I am stating that it was there from day one of the concept of this development.
- 54 Q. I would like to see all the documentation in relation to it and how it came into the reckoning in considering the various options.

- A. Well, it didn't come into the reckoning, I think. It wasn't shown as being part of the reckoning, it got sublimated like in the discussions with office accommodation, I am saying it was there as a consideration to us and it was also a factor which our architect advised us that we need, he had 3.5, three acres of the site for our development.
- 55 Q. Yes, can you explain to me why, with very detailed notes you have on I suppose anything, any meetings, preparations for meeting or whatever, that there isn't a reference to it?
- A. I accept that that is, it is a relatively small building compared to the main corporate head office and therefore, it was just pushed into the background, the background considerations.
- 56 Q. Because if one looks at the various, throughout the files, there are various costings of the buildings?
- A. Yes.
- 57 Q. And justification of what the capital value is going to be, compared to renting perhaps, done for various reasons, again I don't see any account being taken in those figures of the cost of the interpretative centre, which presumably wasn't going to be a profit centre, it was going to be a cost, it doesn't seem to be taken into account from that point of view either, so I find it strange. We will move on from that for the moment anyway. Again, just on the same few documents, there is a memorandum of Brian O'Halloran, dated 22nd March?
- A. Yes.
- 58 Q. And it's a meeting report?
- A. Yes.
- 59 Q. On the front page, there is a handwritten note in the

right hand corner, are you looking at the right place?
Again this is one of the - .

A. Note of the meeting held in St. Stephen's Green on
Thursday, 22nd March?

60 Q. Yes?

A. And Brian O'Halloran's version of it?

61 Q. Brian O'Halloran's, yes.

A. These notes? (indicating) .

62 Q. No, it's inside the file, remember the documents just
inside the fly of that file two. Yes. That's it.

A. Yes.

63 Q. Now you see the bottom right hand corner, the words
from the minute, "it is hoped to close the sale on the
30th May 1990", have been deleted and written in "the
money was to be paid on the 11th April. The 30th May
was an "optical" date so that we could maintain the
position that negotiations were still in progress to
the press. Have now abandoned this idea, close ASAP?"

A. That was - .

64 Q. What was the purpose of that?

A. We were being badgered by the press, bombarded for
information on this development in Ballsbridge and the
defence, the easiest defence, was that we say
negotiations were still in progress and we were able to
keep them off with it. I was anxious to hold that
position for as long as possible. I was saying there
if we can hold this position up to the 30th May, well
it keeps them off our back for that length of time, but
having discussed it internally, we decided that there
was no point in maintaining that optical position and
we should go along and have now abandoned this idea and
close as soon as possible.

- 65 Q. Surely saying negotiations would continue was going to keep them after you?
- A. No, as far as we were concerned, negotiations were in progress, they are not completed, therefore, they have to accept that. If they were completed, they want to know all the details. If you say negotiations is in progress - .
- 66 Q. Then aren't they going to be back the following week to see how they were getting on?
- A. Maybe, but that was the purpose of that entry, Inspector.
- 67 Q. Were you not at some stage concerned that somebody else was going to buy this site?
- A. Yes?
- 68 Q. Was that not a reason why you would say that you had it rather than leave it open and indicate to the public that somebody else could get in?
- A. Yes, that entry if I remember rightly, is back in February and - .
- 69 Q. No, March.
- A. No, no, but the one I had anxiety about the legal status of the site.
- 70 Q. Oh yes.
- A. I have a memo on file which is back in February, the date of this meeting is.
- 71 Q. 22nd March?
- A. 22nd March, yes, yes, that is so, what we might say to the press and to the prospective purchaser, that was solely for the press. If it is to be interpreted that way by someone, but that was the purpose of my entry, that you were to contain the press inquiries.
- 72 Q. Right. Over the page, in the same memorandum, there is

a reference half way down again, handwritten note, and it's referring to the rental values in the Customs House Financial Centre and it says "latest is 34 pounds square foot to Ulster Bank". Who would have informed you of that?

A. That was in the press, it was a matter maybe not necessarily in the press but I talked to property people around town.

73 Q. Yes?

A. And I am pretty sure that was in the press because elsewhere in the file, I think it's mentioned that the Taoiseach had intervened to try, there was a row between the Ulster Bank and the International Financial Services Centre over the rents being demanded and therefore that figure was certainly a broad - .

74 Q. So it was just general knowledge that you had picked up?

A. That's right.

75 Q. Okay. Can we go to the main body of that file?

A. File two?

76 Q. File two, yes.

A. All right, Inspector.

77 Q. The very first document, which would be the last.

A. Yes.

78 Q. Now, there is a reference there again, can I presume that this is your handwriting?

A. Which one? The figures five thousand, four thousand, eight thousand?

79 Q. No, the reverse, the back of that.

A. Oh yes, that is mine.

80 Q. Yes, the left hand side.

A. Yes.

- 81 Q. You have certain notes?
- A. I have, yes.
- 82 Q. Making Herbert Park - ?
- A. Known to Ballsbridge.
- 83 Q. Known to Ballsbridge?
- A. Yes.
- 84 Q. The next is representations from shareholders?
- A. Yes.
- 85 Q. Should have surfaced by now, is that it?
- A. Yes.
- 86 Q. What do you mean by that?
- A. The shareholders are the government department of finance if you like and the knowledge that we were providing a corporate headquarters in Ballsbridge, breaking, I think, with Cliona O'Donaghue's article in the Independent, therefore it was now known we were providing a corporate headquarters in Ballsbridge and therefore if they had great anxiety about it, they should have acted and enquired about it.
- 87 Q. You felt that was sufficient notification to the department?
- A. It wasn't notification as far as I was concerned, it wasn't my responsibility to notify the department. Our corporate affairs directorate are the people in Telecom Eireann who deal and liaise with the department.
- 88 Q. The shareholders?
- A. With the shareholders, not me.
- 89 Q. What's the next reference to Smurfit?
- A. In fact now when I look at this, these are my rough notes of the meeting with the Chairman and Chief Executive on the 12th March out in Ballsbridge and that note, the last Smurfit Business School, due to come in

with a high-tech design in any environment which called for tradition, this relates to the Smurfit business school, and at that meeting of the 12th March, it was decided to appoint Brian O'Halloran as architect for the Ballsbridge scheme.

90 Q. Yes?

A. And my clear recollection is that the Chairman said that he was a friend of his but we didn't have to appoint him for that reason and he pointed out that in fact, that he hadn't got the job of the Smurfit Business Headquarters, I presume up in U.C.D. - that was a note. The next note down from that, wants to see at least three models of proposed buildings, that is also consistent with that, below that, visits by school-goers to Interpretative Centre, very strong point.

91 Q. Yes?

A. So there is the interpretative centre.

92 Q. Yes, but this is 12th of March?

A. All right, Inspector.

93 Q. At least you are telling me this is 12th March?

A. I am telling you that is 12th March.

94 Q. Okay.

A. We mention then, Pater Noster Square, this is more or less the design of the building, Leeson Street Bridge, the I.B.I. building is another possible model, something reflecting the environment, R.D.S. in particular.

95 Q. Yes.

A. Blends into the environment, not high-tech, outline planning permission, proceeding on sketch plans, should not be necessary to have a QS at this stage, may have a

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QS in mind.

96 Q. Yes. Was that something that the chairman stated?

A. Yes, well - .

97 Q. That he might have a QS?

A. He said the QS is - most important is cost control, whoever is appointed, I record that the chairman may have a QS at that stage, it was too early since we were not gone into detail and design.

98 Q. He would have somebody in mind?

A. I recorded that he may have.

99 Q. Were these the only notes you kept of that meeting of the 12th March?

A. They were my rough notes. I came to that meeting as I recollect, it was at two o'clock in Merrion House before a board meeting. I came back and wrote my memo, my formal memo that same evening and it's on file.

100 Q. Yes, but you have no handwritten notes other than this page?

A. Not that I am aware of Inspector. I may have had other notes, but I can't say.

101 Q. I think you had, there is handwritten notes of discussions you had with Mr. McGovern that day?

A. Yes.

102 Q. And with Mr. Hannah?

A. That's correct, yes.

103 Q. And you reckon that meeting with the Chairman and Chief Executive was?

A. Prior to a board meeting about two o'clock, yes.

104 Q. Yes, okay. We will just move to that meeting then, or the immediate lead up to it. That morning you had a discussion with Mr. Hanna ?

A. That's correct.

105 Q. Of Brian O'Halloran and Associates?

A. Yes, and I have to point out - .

106 Q. There is a handwritten memorandum of?

A. Yes, sorry Inspector, the architects had not been appointed at that stage.

107 Q. Sure, no I accept that.

A. Therefore it was a hangover for the fact that they had done feasibility studies.

108 Q. Yes, yes, and your note of that meeting commences "his assessment is that there is a significant risk on obtaining planning permission"

A. Yes.

109 Q. You then spoke to Mr. McGovern and you then had your meeting with the chairman?

A. That's correct, yes.

110 Q. Did you report to Mr. McGovern and to the chairman what Mr. Hanna had told you about the planning permission?

A. I think it's recorded there, the foregoing leaves us exposed on planning permission.

111 Q. I accept it says that. Did you specifically tell them you had spoken to Mr. Hanna on it as late as that morning?

A. I can't recall Inspector but certainly the fact that we were exposed on planning permission, there was a risk on planning permission and they would have been aware of it.

112 Q. So they were fully aware of that?

A. Yes.

113 Q. You then used the term there was, sorry your memorandum of the meeting with the chairman, there was full agreement?

A. Yes.

114 Q. What exactly did you mean by that?

A. That there was unanimous agreement of the three people attending the meeting that we proceed as I outlined there.

115 Q. And no doubts about that or?

A. No dissent.

116 Q. Was there even any discussion about it?

A. I am sure that the issue was discussed.

117 Q. How long did the meeting last, do you know?

A. I would say about 40 minutes.

118 Q. Could you outline the meeting to me, how it progressed, were you asked to make a report to the other two or how did it start?

A. The Chief Executive, my recollection would be that the Chief Executive and I made our views on the situation known to the chairman and my recollection is that we outlined our doubts and our serious reservations about accepting any option other than option one which was the original one which gave us control of the planning permission and the application for planning permission, the only incumbrance on the site was a call option in favour of the vendors, but otherwise, we had control of the planning application, we had control of our own development and all the other options, that involved us in being drawn into a partnership or joint venture type arrangement with the people who owned the site, and the main reservation that I have about it was going into a joint venture development with a partner who was unknown. My view would be, and we did discuss at one stage, an office development in Sligo going into a financing arrangement, when we didn't have capital, to

outside parties, but the outside parties we discussed it with, were the people like Allied Irish Banks, institutions - we certainly wouldn't go into it with even one person.

119 Q. Did you ever ask Noel Smyth who you would have been dealing with?

A. No, Inspector I did not. As far as I was concerned we started on the basis that he was the solicitor for the owners, and that it got transformed then from initial contacts of conveyancing, it got transformed into a business of going into a joint venture.

120 Q. Had you any reason to believe it wasn't Allied Irish Investment Managers or Investment Bank of Ireland?

A. No, it was unknown.

121 Q. But you made the decision?

A. Sorry, Inspector, I didn't make any decision.

122 Q. You made a recommendation?

A. I made my views known at the meeting, yes.

123 Q. Without having checked out who it was?

A. All I said, Inspector, was that my reservations would be that the owners were unknown to me.

124 Q. Sure, but all I am asking you is did you consider it important enough to ask Mr. Smyth who the partners would have been?

A. No, he didn't volunteer it and I didn't establish it.

125 Q. You may not have considered it something that was important to you?

A. No, Inspector. As far as I was concerned, the owners were unknown to me and we were being asked and I was very very careful in my dealings with Noel Smyth to remain at my side of the table. He was at the other, he was a solicitor for another party and I kept my

relations with him strictly on that basis, negotiating with him as the representative of another party and I didn't, I saw my business to deal with him on that basis.

126 Q. But yet you seem to have dismissed what might otherwise be an attractive option for Telecom, some form of joint venture on the basis that you didn't know what they were?

A. That was one of the factors.

127 Q. Sure.

A. There were other factors. Straight financial factors, for instance, when we were in--- we were no longer on a pro rata basis, acre for acre of the site. The concept that the front of the site was more valuable than the back of the site came in and I couldn't accept, because we had paid 9.4 million for the site, therefore that 9.4 million embodies the front and back and in the front was - .

128 Q. Well hold on, at this stage you hadn't paid any money?

A. But we were - .

129 Q. You were still negotiating?

A. We were negotiating, yes, but it was coming up, we would be paying more than pro rata.

130 Q. Was there any discussion as to whether he meant a one percent difference or 50 percent difference? Did you discuss at all with him what he meant by a premium on one site.

A. We had three meetings, we had the meeting on the 26th February with Assumpta Kenny present, Noel Smyth wasn't present at that. We teased out these things.

131 Q. Did you discuss the particular relative value of residence as against the office context or elements of 162

that site?

A. Now look at this meeting, this letter of March 9, at option 4.

132 Q. Yes?

A. He sets out the thinking that - underlined, assume the office portion is now valued at 50 percent more than the residential portion, this would value the three acres to be transferred to Telecom at 9.4 over three, multiplied by five, in other words we would be paying 50 percent more for it.

133 Q. Surely he was only explaining the things - he was assuming?

A. He was outlining their thinking and I let it stand at that, that he was outlining their thinking and it wasn't for me to make a decision on it, we were teasing out all the options and then we were coming to a meeting on the 12th of March and the minutes of our meeting of the 7th March, clearly wind up with saying finally, it was agreed that Noel Smyth, paragraph two 12 of the minutes of our meeting, on the 7th March, that Noel Smyth would have a letter with Dan O'Neill by Friday morning that the details therein could be presented to Telecom Eireann for decision..."(Quoted). I saw my role this was a major decision and it wasn't for me to make, I was teasing out all the options and I was to consider them at the meeting.

134 Q. But you didn't, at that meeting with him?

A. With?

135 Q. With Smyth.

A. Yes.

136 Q. You went over some of these options, he then put it in writing?

A. Because again, Inspector, I have to explain that I am not a property professional. I have never been involved in anything prior to that, except a situation where we bought a site, we designed a building and we built it.

137 Q. Yes?

A This was taking me into strange territory, it was the first time, I had a call and put options and this whole business left me very uneasy and I have to say, Inspector, that I had a bitter experience, even in situations where we owned our site, that we had abandoned major building projects in developemental time because of problems with neighbours and rights of way, etc. therefore to suggest that I wouldn't be worried about going into a joint venture of that kind, I certainly would. I am not a property professional used to all these, I am an engineer who happens to have responsibility for property.

138 Q Sure, you were going to deal with what was one of the biggest property transactions in Dublin at that time?

A. I was dealing with it very cautiously and I wasn't going to - all these options worried me, because they were unfamiliar to me, and I asked him to elaborate again for us after the meeting on the 7th March, I asked him to elaborate again, his letter of the 9th March.

139 Q. On the 7th March, at your meeting, your notes of the meeting, you say that option four, buying three acres and adjusting subsequently was the preferred option for Telecom Eireann?

A. That is what we could have said at the meeting, that didn't commit me to Telecom Eireann making a decision

on it.

140 Q. But you then changed your mind completely?

A. Sorry, Inspector, what paragraph are you saying?

141 Q. I am saying if you look at your minutes of the meeting of the 7th March?

A. Yes.

142 Q. Paragraph 2.6?

A. 2.6, yes. Yes, as you tease out, what that means, you come up later on to this business of an equalisation agreement and that to me was a very worrisome concept, that you were now again going away from the idea of all very well to see that buying the site and the preferred options was to buy part of the site, but I was thinking in terms of buying it pro rata, acre for acre, all values being equal. Here we were now saying that is not so, we were now going in, it will not be acre for acre, you will pay more and there will be a complex agreement to work out the benefits and again, I have to say that I would be extremely uneasy in going into any of those arrangements with a partner who was unknown to us.

143 Q. Well, I come back to the point. Number one, you don't seem to have checked who the partner was?

A. No, I didn't.

144 Q. Number two, I would say that it appears from the way you have just described it and looking at the file, that you seem to have taken what they were showing as an example, as their final line on it?

A. As I say, we had three meetings with him, and our position was because the concepts were strange to us, we were asking them to elaborate so that we would have the best possible understanding of what all the options

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were.

145 Q. You were accompanied at the meeting by your legal advisors, were you not?

A. Yes.

146 Q. Did you discuss it with them the complications? The transaction you ended up doing was far more complicated than anything that was envisaged at this stage?

A. The complication, the deal, that option one?

147 Q. Yes.

A. No Inspector, we have control. That deal we wound up with, was the original one we set out on. It gives us control. We buy the site, we have control of the planning application for planning permission. We have control, the only incumbrance on us is the call option on the residence there is no question but it is, that is the nearest thing that we have to having an unencumbered site in the traditional way we operated.

148 Q. Do you really need an unencumbered site?

A. If I carried the responsibility, I make no apology for having seen that I am happy with and comfortable with it.

149 Q. My role isn't to query the value but just the decision making and the influences on it. I have to say I find it extremely strange.

A. Inspector, I am happy in the light of subsequent experience, even with that simplest arrangement that difficulties can arise and I am happy, in retrospect that we stayed with the simplest possible option which gives us overall control, which gives us a very tight legal agreement, a contractual interfacing with the parties at the other side of the table from us.

150 Q. Well, as I say, I am not going to get involved in the

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details of that. I don't agree with you, but it's not my role to evaluate whether it was right or wrong, simple or otherwise. At the meeting of the 12th March with the Chairman, and sorry, the first meeting was with Mr. McGovern?

A. Yes.

151 Q. Did Mr. McGovern have any input into your recommendations or did he just take what you said as?

A. No, Mr. McGovern - .

152 Q. He asked you to prepare some figures?

A. That's right.

153 Q. I saw those, that was just on one particular aspect?

A. Yes. He was teasing out, he asked a theoretical question, if you could get a second 60 thousand square foot residential site, what would be the added value. This question was asked of me about 11: 30, or 12 noon up in Merrion House, because I was asked, I had to do a very quick ball-park calculation for him and I came up with a figure there at the bottom of the second page of 3.25 million added value. Now I want to make a distinction here between added value and profit. Added value is not very meaningful. If you build an extension on to your house and it increases the market value by 50 thousand pounds, you haven't made much progress if that extension cost you over 60 thousand pounds, so if the question posed had been profit, the thing might be worth it, but anyway therefore he was asking to be informed about the various options and I gave him that figure.

154 Q. And this seems to relate to option three of Smyth's letter?

A. Option three, that's right.

155 Q. Right. Now, if you read option three of Smyth's letter, the 9th, it says on the granting of planning permission, Telecom buys and builds and an adjustment is made in Chestvale's favour for the accrued interest on the capital of 9.4 million. That's fairly straight-forward. Telecom's purchase price is arrived at by valuing the remainder of the site, with whatever permission has been obtained for it and instead of Chestvale's take being valued pro rata, Chestvale gets a discount on the added value to compensate it for the risk.

A. Yes.

156 Q. Now did you discuss with Noel Smyth what discount he was looking for?

A. No.

157 Q. What he had in mind?

A. No.

158 Q. So, option three which was the one which Dermot Desmond had recommended on the 20th February and which indeed Mr. McGovern had asked you to try and negotiate as early as early January, it seems to have been dismissed without, on the basis of assumptions which weren't checked with Mr. Smyth?

A. I can't say, Inspector, how they were dismissed because. I got figures for the Chief Executive as he asked me, on what the added value of the residential, if there was 60 thousand square feet put on the residential.

159 Q. No, office block of 60 thousand?

A. Yes, I have a manuscript note there, subset of two, planning made for maximisation, by that I mean that number three is a subset of option two, with purchasing

rather than leasing. Now, in option two, it is clearly said there that -

160 Q. This is the thing about maximising the value?

A. And in the event, increasing the office content, the price of the freehold to Telecom is discounted. "The intention is that Telecom would have the prominent site at the front which it requires and that an office content of 20,000 to 30,000 square feet will be sought at the back, in addition to the residential content. Now, this again to me was the idea that from our knowledge and our advice from our architect, that you could not put another 30,000 square feet in addition to residential, that you could not envisage getting a 30,000 square feet and a residential requirement -.

161 Q. If you couldn't get it, then it wasn't going to concern you?

A. Well, it was going to concern us because the planning permission, negotiations could go on indefinitely. Again, my remit was to provide a corporate headquarters, and an interpretative centre.

162 Q. The whole planning thing doesn't seem to have concerned you unduly, because you were told that getting planning even for the 60,000 was a serious risk?

A. There was a risk, yes, but to suggest that another 30,000 square feet - we have from day one, from the presentation of the office, we have had a positive attitude to the prospect of getting planning permission and that was the basis on which we went ahead.

163 Q. But perhaps in the face of all professional advice, your positive attitude, did it have any basis in reality, in any realistic basis?

A. The report, Brian O'Halloran's report to the board, of the submissions to the board, it's a formal document we made available to the State Department, I am not sure whether.

164 Q. I have seen it.

A. He said he had discussed the matter with the planners and the planners, you know, pointed out that material contravention was involved but their attitude towards the development was positive.

165 Q. But didn't they also say that it was the most delicate planning application in the previous ten years?

A. That has been said, but we were building a corporate headquarters, this is not a speculative office development. A corporate headquarters is a tremendous advantage to any locality, a corporate headquarters.

166 Q. With all due respects, Dublin Corporation don't think so and they ultimately are the people who are deciding that?

A. But a corporate headquarters is different from an ordinary office development in that it is a high quality building, of great architectural merit, long life and so it is only built once in a lifetime by any company and I would see it as rather abnormal that, for instance, I can't, couldn't envisage an organization such as Allied Irish Banks or the Bank of Ireland would build their corporate headquarters on some kind of a leasing arrangement. I would suspect that since you are projecting your, it is an expression of the corporate entity, you buy a site and you would build on it yourself.

167 Q. Dr. Smurfit himself envisaged leasing because he thought the superannuation fund were going to build it

so that?

- A. Yes, dealing, our superannuation fund, that is, I would say that that is an institution that we could be comfortable in dealing with, that we would have confidence in the people dealing with it and so forth and it would be a party, in my terms, that would be known to us.
- 168 Q. But you would know, Allied Irish Investment managers would be known to you as well, surely?
- A. Yes.
- 169 Q. Why not lease it from them, I mean is it the people or the concept that causes the problem?
- A. The board had made the decision on the 10th of January that the site be purchased for the purpose of providing a corporate headquarters. I didn't make the decision. I was implementing a board decision and I was executing policy. I wasn't deciding on it.
- 170 Q. Sure.
- A. And the board had made a decision to provide a corporate, to buy that site, to provide a corporate headquarters and interpretative centre and therefore I was executing policy which had been settled.
- 171 Q. But there were a lot of details to be worked out and what we are, you know, between that decision of the board and its final implementation, what we are really doing is looking at how those details - ?
- A. Yes, between that decision, between that decision of the board and other eventualities, there arrived a letter from Mr. Desmond.
- 172 Q. Yes.
- A. Altering the scenario, and I don't know why that arrived but it arrived.

173 Q. Yes. But wasn't the letter of Mr. Desmond effectively reiterating what Mr. McGovern had suggested at a very early stage to you, that you should try and buy this subject to planning permission?

A. Yes, and I still continued to do that subject to planning permission but also subject to, as far as I am concerned, to all other conditions, being happy with all other conditions as well, I would be happy to buy the, say three and half acres of it, with the, there would be one possibility, with a possible water tight guarantee that the rest of it wouldn't be, office accommodation wouldn't be crammed onto it which would jeopardize the prospect of a successful planning permission and from day one the only option that was available to us was if we were to purchase the whole site, we had to give an option in favour of the vendors to buy back the residential.

174 Q. On the 11th January, 1990 you had a meeting with Mr. McGovern?

A. Yes.

175 Q. Chief executive. And I think this was the meeting when he was reporting to you that the board had made a decision?

A. Yes.

176 Q. And as I understand it from the notes of that, he wanted to, he wanted an agreement that the purchase be subject to planning permission and you said there was no hope of getting that and it seems to have, it doesn't seem to be mentioned again until after Dermot Desmond wrote on the 20th of February. Could you perhaps explain that that to me?

A. It's mentioned in the meeting of the 7th of March.

177 Q. But that's after Dermot Desmond wrote. What I am saying to you is you seem to have dismissed it as a no-hope situation on the 11th January?

A. At the meeting with Mr. Smith on the 11th January I asked him if it was possible to buy the property subject to planning permission and, as I said the last day, my recollection is that he just smiled at me, in response to that question.

178 Q. Well maybe he smiled but he then put it in writing that you could?

A. Yes, but the purchase subject to planning permission was hedged around with all the conditions outlined at the meetings on the 26th of February and the 7th of March and in the letters of the 5th of March which, by the way, after a meeting which was supposed to consider it on the 7th of March and the letter of the 5th of March is considerably different to the 9th March letter. The letter of the 5th of March talks about 15% surcharge. That's no-where near the 9th of March. So the sands were shifting by the day on this whole situation.

179 Q. Well the 15% was merely a deposit?

A. Well it wasn't mentioned in the subsequent letter of the 9th of March.

180 Q. But certainly wouldn't take anything from that, even as a lawyer, there were certain dealings -?

A. I merely comment that the scene was changing.

181 Q. I don't think he said on the 9th March that he wasn't looking for a deposit of 15%. He wasn't dealing with that particular aspect, he was setting out the options in more detail, his letter of the 5th of March seems to be dealing with only two options there?

A. Yes, that letter didn't arrive until after the meeting was supposed to be considered on the 7th of March.

182 Q. Sure, I accept that, but you got it, you considered it. You went then to a subsequent meeting with him and then there was the letter from him of the 9th of March?

A. That's correct, yes.

183 Q. And what I am suggesting to you is that there is no major change, you seem to have read more into the letter of the 9th of March than any of the notes indicate should have been read into it?

A. I am extremely uneasy with those letters, I am not a lawyer and even now reading them, and reading the precise meaning into them, causes me some difficulty.

184 Q. Can I ask you why, if we just go back to the meeting of the 11th January with Mr. McGovern, where he asked you to try and buy this property subject to planning permission?

A. Yes.

185 Q. Why you almost immediately said there is no point in doing that, no hope?

A. No, my reasoning, when I, I have in the past bought property subject to planning permission but they are normally in a situation where you can expect to get planning permission, at least outline planning permission, within a period of three months. In this situation and in the light of Brian O'Hallorans report which set a bar chart showing that planning permission could take two years to obtain planning permission, it was my opinion that it was unlikely that you would get a deal, a legal agreement subject to something that might not occur for two years.

186 Q. But you, it doesn't seem to have been even discussed,

the Chief Executive, presumably, knew all that and yet felt it was worth while having, trying to get the contract subject to planning permission?

A. Yes, I agree, but I gave my assessment and I think I am on record on the 8th, in a letter, in a memo of the 8th of January saying that I didn't see much realistic hope of buying subject to planning permission. I think that's the 11th.

187 Q. Sorry, what are you looking for?

A. For a record of where I advised.

188 Q. I think that's 11th of January. It's in about the middle of File 1 and it's a handwritten note of yours, at least I think that's, I think that's where it is.

A. Yes. I said, it is the 11th of January I said I did not consider that there was any hope of getting such an agreement.

189 Q. Did you?

A. For that reason, yes.

190 Q. Did you raise it with Smyth or anybody else?

A. I raised it with him at a meeting on the 12th March, no, the 12th January, the first meeting I had with him.

191 Q. I see.

A. But we went through all this process, subsequently, when it was offered for, with planning permission, subject to various conditions.

192 Q. Can you just point out to me in your minutes where that arises. You have a memo of, marked confidential, Ballsbridge project, "I requested a meeting with Noel. . . ." (Quoted), on file 1.

A. Yes, Inspector.

193 Q. Now can you point out to me there where you have discussed with Mr. Smyth the question of the contract

being subject to planning permission?

A. I don't see it in it, Inspector.

194 Q. Well if it was discussed at the meeting of the 12th of January isn't it likely that it's something that he would have noted. Can I just go on to the same memorandum, the third page?

A. Yes.

195 Q. Paragraph number 4, about half way down?

A. Yes.

196 Q. "Brian O'Halloran has been involved in the design of some of the most prestigious office buildings in Dublin"?

A. Yes.

197 Q. Including the Smurfit Building Head Office. . . . " (Quoted). What's written after that?

A. 'No'.

198 Q. He wasn't involved in that?

A. That emerged at the meeting with the Chairman on the 12th of March, I understood that he had done it and it emerged at the meeting with the Chairman on the 12th of March that he hadn't done it.

199 Q. O.k.. There is another, File 2, there was a meeting, minutes of a meeting of the 21st February, 1990 and this was a meeting attended by yourself, "Mr. McGovern's solicitors, Kieran O'Donoghue. " (quoted).

A. That's right.

200 Q. And there are two sets of the minutes?

A. That is a matter outstanding from the last day which, with your permission, I'd like to offer some explanation.

201 Q. O.k.

APPENDIX 24

PARAGRAPH 10.17.5

Houses of the Oireachtas

CERTIFIED EXTRACTS FROM TELECOM EIREANN EXECUTIVE COMMITTEE MEETINGS

Meeting of 2nd January 1990

"Corporate Headquarters

Mr McGovern said he wished to bring this matter to the Executive Committee for information.

The Chairman had raised with the Board the matter of a new Corporate Headquarters. A site of 5 3/4 acres had come on the market where the Johnson Mooney & O'Brien factory had operated. The land is zoned as industrial but portion of the site may have to be rezoned residential. It may be possible to acquire portion of it for offices.

Mr McGovern said the site was the best one left within the business sector area of the city. The matter is still under discussion with the vendor; the final decision will be taken by the Board."

Meeting of 8th January 1990

"Corporate Headquarters

Mr McGovern reported that an architect had looked at the site and had produced some drawings which he showed to the Executive Committee. The matter had been discussed with the Dublin Corporation who regard the site as a prestigious one and consider its proper development would greatly enhance the surrounding environs.

The costs of buying and developing the site were fully discussed and it was agreed that a recommendation for its purchase be brought to the Board meeting on Wednesday next."

Meeting of 16th January 1990

"Corporate Headquarters:

Mr Brian O'Halloran, Architect and Mr McGovern made a joint presentation. Authority was given to proceed with the acquisition of the site at the best possible terms."

Meeting of 12th February 1990

"Corporate Headquarters

Mr McGovern mentioned this matter; acquisition of the site is still in progress.

Meeting of 19th February 1990

"Corporate Headquarters

Mr McGovern referred to a report, which was quite untrue, in the property section of last Friday's Irish Independent regarding the sale of the proposed site. The Chairman's solicitors protested and the report was retracted in today's Independent with an apology.

Mr Joyce mentioned that if the Chairman's solicitors had drawn up a statement about the matter, he would like to circulate copies to the Board members for clarification."

Meeting of 26th February 1990

"Corporate headquarters

Mr McGovern referred to the retraction by the Irish Independent regarding the sale of the proposed site."

Meeting of 2nd July 1990

"Corporate Headquarters

Mr Joyce said an exhibit of the new headquarters design would be on view with the architect in attendance to answer any queries."

Meeting of 9th July 1990

"Corporate Headquarters

Mr Joyce reported as follows:-

New H.Q. - models of the proposed designs were inspected and a preference was agreed on."

Meeting of 1st October 1990

"Corporate headquarters

Mr McGovern reported that compliance with the Environment Impact Study may hold up the planning procedure initially."

Meeting of 29th April 1991

"Corporate Headquarters

Mr McGovern stated that he would advise the Board of developments regarding planning permission on the Ballsbridge site."

Meeting of 6th May 1991

"Corporate Headquarters

Mr McGovern reported that a final decision on planning permission for the proposed Ballsbridge headquarters had been deferred to July."

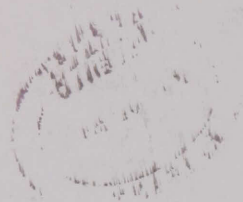
Meeting of 13th May 1991

"Corporate Headquarters

Mr McGovern confirmed that the time limit for submission of the revised planning permission proposals for the new headquarters building in Ballsbridge had been extended to the end of June.

Houses of the Oireachtas

Houses of the Oireachtas



Houses of the Oireachtas