

## The Moriarty Tribunal, Volume 2

### Part 2,

In last month's *Irish Political Review* the first volume of the second part of the Moriarty Report was reviewed. This largely dealt with alleged payments made by Denis O'Brien to Michael Lowry. O'Brien has always denied that he gave even one red cent to Lowry. Last month it was concluded that the evidence adduced by Moriarty against O'Brien was weak to the point of non existence.

In the second volume of his Report Moriarty examined the possible favours which Lowry gave in return for the alleged payments. This reviewer can only conclude that, if O'Brien paid even one red cent, he was grossly overcharged.

#### BACKGROUND

Before discussing the findings of the Moriarty Report it is worth reviewing the reason for the awarding of a second mobile phone licence. The decision was prompted by an EU Directive requiring competition in the mobile phone market.

The Fianna Fáil/Labour Coalition had proposed an access fee of £3 million for the successful applicant, plus an open-ended annual royalty, which the State owned telecommunications company Eir-cell would also pay. Following the collapse of the Reynolds-led Government at the end of 1994 Michael Lowry was appointed Minister for Transport, Enterprise and Communications. The launch of the competition for the licence was in March 1995 with changed Terms of Reference. The open-ended annual royalty was dropped. Instead, the up-front access fee was to be open-ended with a minimum fee of £5 million. This financial criterion was ranked fourth among a list of other criteria relating to the roll-out of the service.

The competition, as launched in March 1995, was described as a hybrid: it had, on the one hand, elements of an auction where the highest bidder won; and, on the other hand, a beauty contest where the "best" plan was awarded the licence.

All applicants were obliged to pay a non-refundable fee of £5k. The closing date for applications was originally 23rd June 1995 and a decision on the award was planned for the end of October that year.

However, in June the EU Commission lodged an objection to the criteria for the competition. It objected to the open-ended licence fee element. This was on the grounds that it would have restricted

competition with the existing State monopoly. My impression is that the Government could have retained the open-ended or "auction" element of the competition if it had confined it to an annual royalty fee (as envisaged by the previous Fianna Fáil-led Government) while also imposing such a fee on Eircell. Nevertheless, the Government agreed to put a cap on the access fee at £15 million. In my view this completely changed the nature of the competition. If, as turned out to be the case, all the applicants were prepared to pay the maximum amount of £15 million for the licence, the "auction" element would cease to have any importance in distinguishing the applicants. The competition would, in effect, have been transformed from being a "hybrid" to a beauty contest pure and simple.

As a result of the changed criteria, the closing date for applications was deferred until 5th August 1995. Accordingly, a decision on the award of the licence was put back a month to the end of November.

The Department's approach to the competition was, first of all, to appoint a consultant to design a tender document. The tender document or "*Request for Proposals*" (RFP) was designed by KPMG Consultants. This document formed the basis for the launch of the competition. The Department also decided that outside consultants would be appointed for the evaluation process. Unusually, the consultants who were appointed to help evaluate the applications were not the same consultants who designed the RFP document. A Danish firm, Andersen Management International (AMI), was appointed for the evaluation process.

The Department set up a Project Team, consisting of civil servants from the various divisions of the Department of Transport, Enterprise and Communications, as well as personnel from the Department of Finance. This Project Team was to work closely with AMI with a view to making a recommendation for consideration by Government.

The evolution of the process from a hybrid auction/beauty contest to a "beauty contest" was fraught with danger. Since the criteria for success would be largely qualitative rather than quantitative any result would be open to question. Also, the beauty contest form ensured, in my view, that the licence was even more lucrative than would otherwise be the case. In a game of such high stakes any

#### THE TASK OF MORIARTY

Before delving into the minutiae of the Report it is worth taking a step back in order to obtain some perspective. The licence was awarded to Esat Digifone. The legal contracts were signed in May 1996. It is generally agreed that Esat successfully competed against the State-owned Eircell by building an alternative network. The owners of Esat did what they said they would do. Moriarty has been enquiring into a process whose outcome has been satisfactory. If the process was flawed, it is by no means clear that there were any damaging consequences. By any reasonable measure the time and expense involved in this inquiry has been out of all proportion to the "problem" which it seeks to ameliorate.

At the beginning of Volume Two of his Report consisting of 1,700 pages, Moriarty claims that it is not the role of the Tribunal to adjudicate on the "*fairness, objectivity or legality of the award*". Nor is its role to decide on whether Esat Digifone "*should or should not have been the winner*". Its only role was to decide on whether Lowry conferred a benefit.

This in my view is a little disingenuous. Firstly, according to media reports, Moriarty's provisional finding declared that the licence was awarded "*illegally*". So it would be more accurate to say that, having failed to sustain a charge of illegality, he decided it was not his role to pronounce on the legality of the award.

Secondly, in my opinion, the Report goes way beyond assessing whether Lowry conferred a benefit. It examines critically technical aspects of the Report over which Lowry could not have had any influence. Moriarty even employed a consultant, Peter Bacon, to second-guess the recommendations of AMI. The Report is, in effect, a re-running of the licence competition.

#### CONCLUSIONS

Rather than give a blow by blow account of the 1700 pages I propose to start at the end of the Report with the *Conclusions* and then return to the body of the Report to assess if the *Conclusions* are warranted by the evidence.

Moriarty begins the *Conclusion* section of the Report with the following criticisms of the process:

- 1) The quantitative limb of the evaluation process was excluded
- 2) An irregular application of weightings
- 3) Deficiency of financial weightings

- 4) Erosion of Project Group as decision maker
- 5) Consultants provide no guarantee—budgetary problems.
- 6) Emergence of problems in licensing process not dealt with.

#### TECHNICAL CRITICISMS

The first three points are technical criticisms of AMI, the consultants employed to assist in the evaluation process. Moriarty, with the help of his own consultant Peter Bacon, is second-guessing the professional judgements of AMI. In my view this goes beyond the scope of the Tribunal's Terms of Reference, which was to examine improper influence exerted by Michael Lowry.

Even if these three criticisms were within the Terms of Reference, it is by no means certain that they are valid criticisms. Michael Andersen of AMI made a number of points in defence of his methodology. The quantitative limb of the evaluation became almost irrelevant following the intervention of the EU. As indicated above, the competition had been transformed from a hybrid auction/beauty contest to a beauty contest pure and simple. For example if, as in the case of an auction, the winning candidate had bid an enormous amount of money to obtain the licence, there might be a serious question over the financial viability of the project. However, with a cap put on the licence fee, financial criteria become less important since the winner of the project was much more likely to recoup the initial investment.

Regarding point 2 above Andersen argued that the RFP document, which AMI did not design, was vague. As a consequence it does not seem unreasonable for AMI to change the weightings of the various evaluation criteria to take account of the content of the applications.

Point 3 on the deficiency of the financial weighting is a constant theme throughout the Report. Denis O'Brien's Communicorp (later Esat Holdings) was considered a weak element in the Esat Digifone consortium. However, Esat's partner, Telenor, was a very profitable and well-financed company. Esat Digifone's main competitor Persona had also a weak financial link. However, it was always likely that all the elements of the winning consortium would have no difficulty in obtaining finance. It was the view of AMI and the Department's project team that "bankability" was more relevant than the existing financial position of consortium members.

Peter Bacon in his Report for the Tribunal disagrees with the concept of "bankability". He says: "bankability was not a remedy for insolvency". But there

was little doubt that the winners would be embarking on a profitable enterprise. So the banks would not be throwing good money after bad.

There is no suggestion by Moriarty anywhere in his long Report that AMI came under any influence from Michael Lowry. However, in Chapter 51 he says that Peter Bacon "continued to hold the view that Mr Andersen was manipulated". There is not a shred of evidence adduced to support this bald statement. There is not even speculation as to how Anderson was manipulated or by whom. The statement is just left hanging there with no visible means of support.

Despite the speculation of Bacon, the above three criticisms are technical matters. The reader can choose between two experts. On the one hand there is the opinion of Peter Bacon who is something of a jack of all trades. As well as advising on telecommunications competitions, he has consulted on NAMA and many years ago also turned his hand to property price inflation (his conclusion, as far as I remember, was that the market would solve this problem by encouraging greater supply). On the other hand there is Michael Andersen and AMI which specialise in telecommunications competitions and have consulted on such competitions in over 100 countries.

In my opinion Andersen is a more credible expert, but Moriarty disagrees. Indeed, he is quite protective of Bacon. In response to criticism from Denis O'Brien's lawyers, Moriarty says: "aspersions sought to be cast on the professionalism, objectivity and standing of Mr Bacon were unwarranted, ill-judged and wholly unsustainable".

On the other hand here is Moriarty's rather pompous view of Andersen:

"...the tribunal is left with a clear impression that the weight, reliability and extent of accurate recollection apparent from Mr Andersen's evidence fell so appreciably below what might have been expected as to amount to very little assistance to the Tribunal on those matters that were of major consequence. Indeed, the assurance conveyed by his solicitors, as late as 20th October, 2010, that he would attend, 'to give evidence to assist the Tribunal with its enquiries on the 26th October, next' must, in all the circumstances, be viewed as verging on the incongruous".

I will return to the issue of Michael Andersen's credibility. At this point it should be stressed that, while Bacon disagrees with Andersen, he does not say that Esat Digifone should not have won. All he is saying is that it is "impossible to say who won".

#### OTHER CRITICISMS

The 'erosion of the Project Group as decision maker' has also nothing to do with Michael Lowry. Moriarty claims that there were flaws in the operation of the Project Group. There was no "constitution" for this group, nor were there standing orders. Minutes of the group's meetings were confined to decisions that had been made (the members of the group may not have considered themselves to be archivists). Also, different members had different levels of influence. Apparently, the most influential members were the Chairman of the Group, Martin Brennan (who was in charge of the development division of the Telecommunications division) and his deputy, Fintan Towey.

Moriarty makes the point that employing consultants is no guarantee of a correct decision. He also refers to the budgetary problems of AMI. The original contract put a cap on fees to AMI at about 300k. AMI demanded that this ceiling be lifted since the workload had increased as a result of the changes in the terms of the reference of the competition following the EU intervention. A compromise was reached in which AMI received an extra amount on condition that it complied with strict reporting deadlines. Again, it is difficult to see the relevance of all this. None of these problems can be attributed to Lowry. However, it would be understandable if this made shocking reading for Moriarty. Here was a world of financial constraints and strict deadlines, a world that appears to be unknown to this Tribunal.

Moriarty identifies problems following the selection of Esat Digifone in October 1995 and before signing of the contracts in May 1996. Among the problems were: the financial weakness of O'Brien's part of the consortium (Communicorp, later Esat Holdings); and the change of ownership. I have already dealt with the issue of the financial weakness of Communicorp. I will deal with the issue of the change of ownership in greater detail later in this article. But it should be said that it appears that Esat Digifone is damned if it does and damned if it doesn't. The attempts by O'Brien to involve Dermot Desmond in the Consortium were precisely to address the perception of financial weakness. The reasoning of Moriarty would not be out of place in Joseph Heller's famous novel *Catch 22*. The only way Esat Digifone could address its perceived financial weakness was to change its ownership structure; but changing its ownership structure, in Moriarty's opinion, is forbidden.

Once a recommendation had been made, Michael Lowry and the Depart-

ment's project team wanted the decision to be implemented. They did not want to undermine their decision after October 1995 by continuing to pick holes in it. The focus of the Department was to negotiate a legally-binding contract with a view to the timely rolling out of the alternative mobile phone network. Moriarty, on the other hand, thinks that the recommendation should really have been a discussion document and any problems that emerged during the period of negotiation should have prompted the Department and Government to revisit its decision to award the licence to Esat Digifone. In my opinion, it is difficult to see how any decision could be made on a timely basis if the Moriarty approach was adopted.

#### LOWRY'S INFLUENCE

As will be gathered by the reader, a large part of the conclusions and indeed the body of the Report relate to matters, which have nothing to do with the influence of Michael Lowry. This leads me to the conclusion that Moriarty, for whatever reason, wishes to re-run the competition rather than confine his enquiry to an examination of any improper influence exerted by Michael Lowry.

On the question of influence exerted by Lowry, Moriarty appears to believe that all influence exerted by Lowry is necessarily "*improper*". Indeed, he also thinks that Lowry should have made himself impervious to being influenced.

When the project team was set up there was a set of protocols issued for the members of the team, which also applied to AMI. Members should not meet applicants socially. All meetings with applicants should be on a formal basis. At formal meetings there should always be more than one member of the project team present. These seem to be sensible, but should the same protocols be applied to the Minister? Moriarty believes they should have. However, this is a very moot point. Apart from the practicalities of preventing access to Irish politicians, in my view there is a strong case for democratic supervision (through the Minister) of the work of the Civil Service.

Of course, nobody could justify Ministerial intervention to the disadvantage of the State. However, there is absolutely no evidence that Lowry's influence was of this kind. So how does Moriarty say Lowry did influence the process?

#### GOSSIP

The influence ranges from the trivial to the slightly less trivial. In descending order of triviality, Moriarty says Lowry shared a rumour with his Fine Gael colleagues

that, if the second-ranked applicant, Persona, had won, it would have been a big nest egg for a Fianna Fail politician. The relevant politician was Albert Reynolds. Moriarty assures us that there was no foundation to this gossip. There is no evidence that such gossip reached the ears of AMI or the project team. The body of the Report also mentions that Lowry believed that Denis O'Brien was a Fianna Fáiler, possibly because one of Esat Digifone's consultants was the well-known FF personality P.J. Mara.

This is not the only piece of gossip in the Report. Although, the following incident does not make it to the conclusion of the Report, Moriarty cannot resist mentioning a conversation, which occurred at the Aintree racing festival in April 1995. Apparently, the financier Dermot Desmond said to the Chairman of the Persona Group, Tony Boyle, that he would not be involved in the Esat consortium. According to Boyle, Desmond also said that he knew who Denis O'Brien would use to "*get at*" Lowry. Desmond denies that this conversation ever took place. There was another member of the Persona group at Aintree. This was Michael McGinley (father of the golfer Paul). McGinley remembers Boyle telling him that Desmond would not be involved with Esat Digifone, but doesn't recall the bit about O'Brien knowing who to use to get at Lowry. Moriarty thinks that Boyle's version is correct on the grounds that, if Boyle was lying, he would have made a more damning allegation. Of course, Moriarty is not one to gossip, but he thought he would mention it nevertheless.

#### INFLUENCE ON PROJECT TEAM

In my view the "*influence*" which Lowry exerted over the project team was trivial. Lowry made a phone call in early September 1995 to Martin Brennan, the Chairman of the project team. When the receptionist could not access Brennan, the Minister was put through to his deputy, Fintan Towey. Towey says that Lowry asked him about the progress of the competition and in particular whether the result was a foregone conclusion. The reason for the phone call was that Lowry had heard that Persona would win the competition because of fears that one of its members, Motorola, would pull out of Ireland resulting in a loss of thousands of jobs. Towey assured him that the result was not a foregone conclusion and a decision had not been made. Towey was under the impression that Lowry was asking the question on behalf of another applicant in the competition, but Lowry's

evidence was that he was responding to rumours that he had heard from his programme manager. Needless to say, Moriarty finds Towey's impression more credible. Indeed, for reasons that are unclear, he finds Lowry's version "*wholly improbable*".

Lowry's "*influence*" over the project team was also reflected in his ability to obtain information from it. Moriarty says this "*coincided*" with a deviation in the evaluation criteria as well as the erosion of the project group. It is fortunate that Moriarty uses the verb "*coincide*" rather than "*cause*", since the idea that the mere act of seeking information would have any influence on the evaluation criteria or the functioning of the project team is too ridiculous to even consider.

It is noteworthy that Moriarty does not claim that Lowry ever expressed any preference to the project team before a recommendation was made.

#### APPLICATION OF GUILLOTINE

Once a recommendation was made Lowry was anxious that a final decision be made as soon as possible. It should be said that Lowry had no influence over the timetable over which the recommendation for Esat Digifone was made (the end of October). His influence was over the political response to the recommendation. The original plan was that the Government would deliberate over the recommendation over a period of a month. What happened was that the decision was made a very short time after the recommendation.

In the Conclusion section of the Report Moriarty says that nobody could explain why the process needed to be accelerated. But in the body of the Report it is stated that four different people independently advised Lowry to make a quick announcement. Lowry's Press Officer, Joe Jennings, advised an announcement be made immediately after the next Cabinet meeting to avoid unauthorised leaks. Martin Brennan, the Chairman of the project group and Michael Andersen of AMI also advised a quick announcement for similar reasons. John Loughrey the Secretary General of the Department advised Michael Lowry of the decision on 25th October 1995.

Loughrey said in evidence that he was under the impression that this was the first time that Lowry had been appraised of the decision. He advised Lowry that the approval of the Party Leaders and the Minister for Finance should be sought that day to avoid the potential for interference and lobbying. Moriarty considers all of this irrelevant. Indeed, he believes that the Secretary General's evidence was

without "foundation in reality". According to Moriarty, Lowry had made his decision as far back as 3rd October 1995 and other advice agreeing with him was therefore fortuitous.

Lowry followed Loughrey's advice (or as Moriarty might prefer: decided independently on a course of action, which by chance happened to coincide with all the advice he had received). He met the Taoiseach John Bruton later that day. Bruton's diary record of the meeting indicates that Lowry said that "*Albert had promised it to Motorola*" (i.e. the Persona Consortium). According to Bruton, Lowry also said that, if the Government did not follow the recommendation, it would be subject to a legal challenge as was the case in Italy. Moriarty says this was inaccurate. Lowry said in evidence that he meant the Belgian Government. Moriarty does not say if the substitution of the country Belgium for Italy would have made the statement accurate or not. Lowry also indicated that the Minister for Finance Ruairi Quinn had a brother, Lochlann Quinn, involved in the third-placed consortium and therefore should not be involved in discussions of the winner.

The decision to grant Esat Digifone exclusive negotiations rights for the award of the Licence was ratified by a Cabinet Committee (not a full cabinet meeting) consisting of the Minister for Finance, Lowry and the party leaders of the coalition parties (Bruton, Spring and de Rossa). Lowry, on that evening, made a public announcement of the decision that had been made.

It seems to me that, apart from the piece of groundless, political gossip concerning Albert Reynolds, Lowry's comments to Bruton were reasonable. But that is not how Moriarty sees it. In the body of the Report he says:

"In securing what was de facto Government approval, otherwise than through the route of bringing a recommendation to Cabinet on foot of an Aide Memoire, or a Memorandum for Government, or even by deferring the matter to the scheduled Cabinet meeting the following day, all of the procedures which had so carefully been put in place by Mr. Bruton and his colleagues, when the Rainbow Coalition entered Government were rendered of no application to the GSM decision."

In the conclusion section of the Report he says:

"but even more reprehensibly he {i.e. Lowry—JM} sought to overreach his own party leader, the Taoiseach Mr. John Bruton TD, by intimating that the government should have no discretion in the matter."

If Lowry was "*reprehensible*", John Bruton was complicit or at least acquiescent in the reprehensible action. In this Conclusion section Moriarty goes on to say Civil Servants—

"found themselves at an irregular and improper intersection of business and politics in the persons of Mr. Michael Lowry and Denis O'Brien, of which they had no knowledge at any time."

They were influenced by the devious duo even though they didn't know they were?!

Moriarty adds that Lowry's actions were a "*cynical and venal abuse of office*".

There is certainly an arguable case that the Government should not have acted as a rubber stamp for the recommendations of the Civil Service or outside consultants. But to hold the contrary view is hardly "*reprehensible*". The Government, or to be more precise the leaders of the Government Parties as well as the Minister for Finance, were presented with a highly technical Report which was giving a clear recommendation. There was no obvious reason of State for rejection of this recommendation.

It is interesting that Moriarty appears to believe that the process leading up to the recommendation should be completely sealed off from political influence and yet, after the recommendation, there should be total discretion on behalf of Government. However, in my opinion Moriarty was yet again going beyond his Terms of Reference. It was not the function of the Tribunal to pronounce on how the Government conducted itself. The Tribunal's concern should have been only the actions of Michael Lowry. Was it reasonable for the Minister to truncate the time for political consideration of the recommendation? Given the advice that was available to him it is difficult to impute any sinister motive for his action.

#### LOWRY'S "FAVOURS" TO O'BRIEN

Moriarty gives two examples of favours given by Lowry to O'Brien. The first is quite trivial. In April 1995 Lowry recommended that O'Brien approach France Telecom with a view to making an application with this company. April 1995 was after the competition was launched but before the applications had been submitted. In my opinion it was reasonable for a Minister to encourage applications. Lowry had apparently heard that France Telecom along with officials of the French Embassy had met Department officials in connection with the licence competition.

Moriarty falls short of saying that Lowry's behaviour was improper, but does

say it was "*indiscreet*". It's interesting that the French State (through its Embassy officials) could take an active role in the competition, but the Irish State was obliged to be supine.

In the event the proposed deal with O'Brien and France Telecom never happened because O'Brien felt that France Telecom was not serious, but the long business lunches in Paris were very good!

The second favour bestowed on O'Brien was information given by Lowry in a pub conversation after the All Ireland Final on 17th September 1995. This is dealt with in Chapter 27, which begins in a sneering style in which the word "*happened*" is repeatedly used in a sarcastic manner as in O'Brien just "*happened*" to meet Lowry on that day.

It appears that, for whatever reason, O'Brien sought out Lowry after the match. They made contact in Hartigans but this pub was too noisy and they decided to repair to Houricans. As clandestine conspiracies go, this was probably not the most sophisticated.

O'Brien and Lowry have always denied that that Licence was discussed. O'Brien in an interview with Pat Kenny said that he discussed matters relating to his fixed line business because the Licence was considered a taboo subject. Moriarty, on the other hand, considers the idea that the licence was not discussed "*bereft of credibility*".

There is some corroborating evidence to support Moriarty. Per Simonsen, a senior Telenor Executive, told the Tribunal that O'Brien had been told by Lowry that Esat Digifone needed to have Dermot Desmond on board. But Simonsen also said that he didn't take what O'Brien said seriously. At the time O'Brien was pushing for Dermot Desmond to invest in the consortium. Unlike other potential investors, Desmond was prepared to put money up front before the awarding of the licence. Even more important from O'Brien's perspective, Desmond was going to underwrite O'Brien's share of the consortium. So, if O'Brien could not access finance from other sources, Desmond was prepared to step in.

The Telenor Executives must have been amused at O'Brien's *chutzpah*. Even though O'Brien would have been the main beneficiary of Desmond's participation, he wanted Desmond's increased share of Esat Digifone to be at the expense of Telenor!

Even though Telenor didn't take O'Brien seriously in this instance Moriarty, for once, does. But in my opinion the idea that Lowry would advise O'Brien to encourage

Desmond to invest in Digifone is—to use a Moriarty phrase—“*bereft of credibility*”. Lowry had no known connection with Desmond. Indeed the associations with Desmond would have been in the opposite direction. Desmond was associated with Charlie Haughey and the *Irish Financial Services Centre*.

But let us assume that O'Brien and Lowry's memory is faulty or that they were lying. While it is almost impossible to imagine that Lowry could have advised O'Brien to ensure that Desmond would invest in Esat Digifone, it is just about possible that he would have said that Esat Digifone's weak point was the financial fragility of the O'Brien element of the consortium.

What would have been the value of this piece of information? It is very noticeable that Moriarty produces evidence to support one theory he holds, but ignores the same evidence if it does not support another theory he has. For example, in Chapter 48 of the Report he says that the Programme Manager for Dick Spring, Greg Sparks, was “*surprised*” in October 1995 that Esat Digifone was awarded the Licence. The reason why he was surprised was that he “*knew*” of the financial frailty of the O'Brien element of the Esat Digifone consortium. In this Chapter the reader is invited to conclude that Esat Digifone should not have been awarded the licence because Sparks, a Chartered Accountant who had no direct involvement in the licence competition, “*knew*” that there was a weak financial link in the Esat Digifone consortium. And, of course, the Bookies' favourite was the Persona Group.

If Lowry had told O'Brien in that pub on All Ireland day that Esat Digifone's weak point was the financial frailty of O'Brien's company, he would have been telling him no more than what the “*dogs in the streets*” or “*informed*” sources would have told him. The information that Lowry communicated would most definitely not have been “*inside knowledge*”, since we now know that AMI and the Project Group had come to the conclusion that the “*beauty contest*” nature of the competition had rendered the financial aspect less important than was widely perceived at the time. Lowry's information therefore would have been less than helpful.

Another example of Moriarty's one-sided examination of the evidence is the conclusion that he draws from contacts that Lowry had made with other applicants in the competition. Moriarty says that Lowry told Anthony O'Reilly of Independent Newspapers at a business function that his consortium had not done well. He

also says that Lowry met Tony Boyle, the Chairman of the Persona Group, at Fitz Patrick's Hotel, Killiney on 16th August 1995. Boyle was allowed make a sales pitch directly to Lowry. Although Lowry was accompanied by a Fine Gael colleague, this person remained at the bar while Boyle and Lowry discussed the licence competition at a separate table.

Moriarty concludes that, if Lowry was quite prepared to discuss the licence competition with Boyle and O'Reilly, what possible constraint would have prevented him from discussing the licence with O'Brien in Houricans on 17th September 1995?

It is difficult to fault Moriarty's logic on this. But there is another obvious conclusion that can be drawn from Lowry's behaviour, which does not seem to have occurred to Moriarty. If Lowry was “*indiscreet*” or “*imprudent*”, his indiscretion and imprudence was not confined to the Esat Digifone application; it was relatively even-handed between the various applicants.

There was one big problem with the meeting at Houricans which, notwithstanding Lowry's habitual indiscretion, suggests that it is possible that the Licence was not discussed. A few days before that meeting the oral hearings of the applicants had been completed. The Project Group had indicated that they would not accept any more submissions from applicants. So, unlike with the Boyle meeting of a month before, if Lowry had revealed anything of interest to O'Brien it would have been of limited value.

How does Moriarty overcome this hurdle? The answer is that he makes, in my opinion, a big leap of faith. Here is what he says:

“The Tribunal likewise considers it unworthy of belief that Mr Lowry did not give some comfort to Mr O'Brien on the consequences of notifying that information {i.e. Dermot Desmond's involvement in the Esat Digifone consortium—JM} to the Department notwithstanding the competition rules which prohibited the submission of further information after the conclusion of oral presentations.”

There is absolutely no evidence to support this theory. Again we see how Moriarty examines the evidence in a one-sided manner. He says that, at the end of the Esat Digifone oral submission, Denis O'Brien asked if the project group would accept more submissions. Moriarty tells us this to establish that O'Brien was fully aware that, if he did make a submission, he would be breaking the rules. However, the fact that O'Brien asked the question also indicates that it was always his

intention to make a submission in some form.

To be legalistic about it, Esat Digifone did not make a submission to the Project Group after the closing date of submissions. IIU, a company owned by Dermot Desmond, sent a document to the Project Group's designated fax. The document indicated that it would underwrite O'Brien's share of the consortium as well as the balance of shares not owned by either O'Brien's company or Telenor. Esat Digifone was advised by William Fry solicitors. It is obvious that there was considerable thought put into the content of the document as well as the source (IIU rather than Esat Digifone). It is inconceivable that all of this was dreamed up at an impromptu meeting between Denis O'Brien and Michael Lowry at Hourican's pub.

Nevertheless, Moriarty has no hesitation in stating that the IIU submission was a breach of the competition rules. Also, in the Conclusion section of his Report, he says that the meeting in Hourican's was a “*profoundly reprehensible occasion*” (“reprehensible” seems to be Moriarty's favourite word).

So, how did the Project group respond to the IIU submission? There were only two members who had sight of the document. These were Martin Brennan and Fintan Towey. This must have presented a dilemma for them. On the one hand the submission was in breach of the spirit if not the letter of the rules. On the other hand the information materially affected the strength of the Esat Digifone bid. Brennan decided that the document would not be shown or mentioned to either AMI or the remaining members of the Project Group. There is absolutely no evidence that Michael Lowry was even aware of the document at the time. Moriarty thinks that Lowry may have been aware of the document months after October 1995. The “*evidence*” is an unscripted Dáil statement which does not even mention Dermot Desmond or IIU. But even Moriarty could find no evidence to indicate that Lowry did anything about the submission (e.g. attempting to ensure that it would be circulated).

#### CHANGE OF OWNERSHIP

The most disturbing aspect of the Tribunal's Report relates to the change of ownership of Esat Digifone. But the “*disturbing aspect*” does not relate to the “*reprehensible*” behaviour of Denis O'Brien, Dermot Desmond or Michael Lowry; it relates to the conduct of the Tribunal itself.

In Esat Digifone's original submission it was proposed that O'Brien's company (Communicorp) would own 40%, Telenor would own 40% and the balance would be financed by AIB, Bank of Ireland, Standard Life among others. The problem was that these latter institutions were not financing any of the costs of the application and there was no binding commitment to raise finance in the event of Esat Digifone winning the competition. A venture capital company called Advent, which owned 34% of Communicorp, also indicated that it would invest in Esat Digifone, but this was not a legally-binding commitment.

O'Brien felt that this was a weakness in the bid. He also may have felt that his own position within the Esat Digifone consortium was vulnerable. It was for these reasons that he sought the involvement of Dermot Desmond. It is unnecessary to go into all the twists and turns of the ownership structure of Esat Digifone. At one stage the plan was to divide the cake in the ratio 37.5%, 37.5% with the remaining 25% to Desmond. At another stage O'Brien was pushing for 50% ownership. Just before the signing of the legal contract in May 1996, Michael Lowry and the Department insisted that the ownership structure should revert to a 40%, 40%, 20% ratio. This was in line with the original application, except that the original application gave the impression that the 20% not owned by Communicorp and Telenor would be widely dispersed.

It is difficult to see how this "change" of ownership could have affected the validity of the award. Nevertheless, the Department through a letter from Fintan Towey felt it necessary to refer the matter to the Attorney General's Office. The Attorney General's Office, of course, had its own legal expertise, but decided to seek external legal advice.

In a letter of 9th May 1996 Richard Nesbitt SC expressed the following opinion:

"If one analyses why the Minister is concerned about the ownership of shares in the licensee the only legitimate concern he can have is that if there is a change of ownership the service that has to be provided will in some way be compromised. Rather the licensee has been awarded the licence because its plans and proposals were the most meritorious and it provided a funding plan which looked feasible. There is no reason why any of these matters have to be compromised because of a change of ownership."

Moriarty chose to interpret this advice as being "forward looking". In other words, all it meant was that in the future the consortium would be entitled to change

the structure of its ownership providing the service would not be compromised. But it did not mean that the ownership changes that had already been implemented were legally valid. At this stage common sense goes out the window.

The facts of the matter are that the two principals in the Esat Digifone consortium had precisely the same percentage shareholding on the signing of the contract in May 1996 as they had proposed in the closing date for applications on 5th August 1995.

Even more damning from the Tribunal's point of view is that the Tribunal lawyers were told in October 2002 that the advice was not just forward-looking but also applied to ownership changes since the application. And yet Moriarty was still picking on the 'ownership bone' almost 8 years later in 2010.

This is a shocking reflection on the professionalism and objectivity of the Tribunal. Chapter 57 is a rambling incoherent attempt to defend the indefensible.

Justice Moriarty finishes the Chapter with a quite disgraceful criticism of the advice by Civil Servants to Alan Dukes in response to a parliamentary question from Bobby Molloy.

#### MICHAEL ANDERSEN

One of the big weaknesses of the Report is that it fails to suggest that any improper influence was exerted on Michael Andersen or AMI. And yet AMI recommended that Esat Digifone should be awarded the licence. The best (or should that be worst?) that Moriarty can do is to suggest that Andersen was untrustworthy and incompetent. Andersen did not want to appear before the Tribunal without an indemnity because he perceived that the Tribunal was hostile to him. The State refused to grant him this indemnity.

When he eventually appeared before the Tribunal, the manner in which he was questioned showed that his original suspicions were well founded. The Tribunal called him in response to a letter from Denis O'Brien's solicitors. He was originally due to appear in July 2010 but this was postponed until later. In the meantime Moriarty discovered that O'Brien had given Andersen the indemnity that he had required.

Moriarty is shocked at this. The Tribunal could have interviewed Andersen in July without knowing about this "clandestine" indemnity! This is really pathetic. The letter to the Tribunal indicating that Andersen was available to give evidence came from O'Brien's solicitors!

The Tribunal lawyers, apparently, picked Andersen up on a minor inconsistency between a statement he made in 2002 and one made in 2010. In 2002 a statement from Andersen said that he didn't know why Lowry made a prompt announcement on 25th October 1995, shortly after the recommendation was made to give exclusive negotiating rights to Esat Digifone, but he agreed with Lowry's action. But in 2010 he said that Lowry had followed his strong advice to Martin Brennan. Moriarty concludes that because there is an inconsistency between the statement in 2002, in which Andersen does not know why Lowry made his prompt announcement, and the statement in 2010 in which he says that Lowry was following the advice that he (Andersen) gave to Martin Brennan, then Andersen's evidence is not credible. In my opinion Moriarty is really scraping the bottom of the barrel here. The statement of 2010 is merely making an assumption that Lowry followed advice from Brennan, which he (Andersen) had given. In the 2002 statement he had declined to make that assumption.

There is one more point about Andersen's evidence that is worthy of note. Andersen remarked that all the questions put to him by Tribunal Counsel related to Esat Digifone. None related to Persona. He would have liked matters relating to Persona put to him on a like-for-like basis.

#### CONCLUSION

The Moriarty Report has been a scandalous waste of time and money. It has had the effect of undermining confidence in the institutions of the State for no good purpose. The legal profession should never again be accorded such power by the State. It is time that the democratic representatives of the State reassert themselves.

#### NOTE:

There was an error in the article on the Moriarty Report in the May issue of the Irish Political Review. I stated that Fine Gael had received the \$50,000 dollars from David Austin. In fact, John Bruton initially refused the amount and Fine Gael only later accepted the money some time later under the impression that it was a personal contribution from David Austin. It could be said that this was an example of what Barry Moloney referred to as money from O'Brien being "stuck with an intermediary". However, the amount claimed by Moloney was 100,000 and not about £31,000 which was the Irish pound equivalent of \$50,000.

**John Martin**