

THE TRIBUNAL RESUMED ON THE 16th NOVEMBER, 2005, AS

FOLLOWS:

MR. SHIPSEY: Sir, I just wonder, before Mr. Towey

CHAIRMAN: Yes, Mr. Shipsey.

MR. SHIPSEY: If I can just mention something briefly to you, sir. It appears to us, and appears, you know, from Mr. Desmond that this may be the last opportunity for examining Mr. Towey, unless he is recalled. And I am concerned I just asked two questions yesterday of Mr. Brennan in relation to the now infamous opinion of Mr. Nesbitt, and as you know sir, we have been in correspondence since 2003 with the Tribunal in relation to this matter, and on the 10th October, there was an indication given that the Tribunal hoped to be in a position to let us know what the State's attitude was in relation to the opinion and to the claim to privilege or confidentiality that they were claiming in relation to it. If it is the case, and we haven't received a response, and I assume that is because the Tribunal has not itself received any response from the State in relation to the opinion, but I am concerned that Mr. Towey is now being called in circumstances where Mr. Desmond would have wished to ask him questions in relation to that opinion in circumstances where we don't have the opinion. And secondly, from Mr. Brennan's evidence yesterday, it was clear, if it hadn't been clear already, that there were meetings with Mr. Nesbitt around the time of the decision

to grant the licence. And there may be further documentation surrounding that; I am not sure whether the Tribunal has that documentation. But I would be concerned that you, sir, would rule as you indicated, or at least your legal advisers indicated as far back as 2003 that you may have to rule on the States's claim to privilege in relation to that letter, and I would, on behalf of Mr. Desmond, want obviously either to be heard now or sometime in relation to reaching some finality in relation to that particular opinion and any other documentation that surrounds it.

And clearly I don't want to hold up Mr. Towe giving evidence, but it may, in the event that you rule that the State have to provide, or in the event that the State do provide it may be unfortunately necessary to have Mr. Towe, Mr. Brennan or Mr. Loughrey re-called in relation to that matter. I just wanted to raise it now before Mr. Towe gives evidence so that that would be known.

CHAIRMAN: I understand that, Mr. Shipsey, and it was mentioned by Mr. Barron last week. And on the face of matters, as I indicated to Mr. Barron, it is a matter that I am not in a position to effectively drive a coach and fours through what prima facie would appear to be a situation of privilege existing between Mr. Nesbitt and his clients, the State. I had indicated, and I think in ongoing correspondence on the part of my legal team with the State, I had indicated my particular anxiety that as

far as conceivably possible, you'd be accommodate this regard, and if it is necessary that some latter provision is made, obviously I'd rather that we finalise Mr. Towey's evidence today. Of course I'll have regard to that, and perhaps I might just make inquiry of Mr. O'Donnell as to whether he is in a position to give any assistance further.

MR. O'DONNELL: All I can tell you, sir, is that the opinion has been the subject matter of another opinion the issue of privilege has been the subject matter of another opinion. That has been forwarded to the State. How long it will take for that to be resolved within the State, I don't know. But it has we have I have given an opinion on the issue of the privilege, and it has been forwarded to the State, and it then depends on what the State want to do.

So I can't really bring the matter any further except that it has been considered by us, and it's now a matter for the State to decide what they want to document. But I would have thought, let's wait and see what the State do decide to do in respect of the claim of privilege; and depending on that, it will depend on whether or not it's necessary to bring Mr. Towey back at all. I'm not absolutely sure that it would be, even if the claim to privilege was waived, but that's another matter.

CHAIRMAN: All right, Mr. O'Donnell.

It does seem that we haven't yet been able to attain finality on this, Mr. Shipsey. I will have regard to the

ongoing position, and I'll do what is reasonably within my power to try and assist you being in a position to meet this aspect of things. It can be mentioned again.

Mr. Towey, of course you are already sworn; thank you for coming back.

MR. MCGONIGAL: I should just indicate, Mr. Chairman, I would have an interest in that issue, and we had deliberately left it because we felt, in view of the fact that there were certain issues in relation to Andersen and Mr. Bacon before the High Court, and because the Tribunal has taken a view that it hasn't decided Mr. Bacon's status, that it may depending on how the courts rule it may be necessary for Mr. Brennan and Mr. Towey to come back in the future; and I also had an idea that, rightly or wrongly, that an area which the Tribunal has to focus on to some extent, and it's not absolutely clear from memory, is the period between the winning of the licence and the issuing of the licence. And there are issues that have already been raised in relation to that which I thought we will probably be going back to at some stage, but I just signal it; no more than that. I may be wrong and I may be right, but it can be taken up at a later stage.

CHAIRMAN: Thanks, Mr. McGonigal. I note your interest in that too. Thank you.

FINTAN TOWEY, PREVIOUSLY SWORN, WAS EXAMINED AS FOLLOWS BY

MR. COUGHLAN:

Q. MR. COUGHLAN: I think, Mr. Towey, you have furnished

another supplemental Memorandum of Intended Evidence dealing with a few discrete matters; correct?

A. Correct.

Q. These were the matters that were touched on in the course of the evidence of Mr. Brennan also yesterday. And I think I'll just take you through it, and if any clarification is necessary, we can deal with it as we go through it.

A. Okay.

Q. I think you say that you are responding to questions raised by the Tribunal in a letter dated the 21st May of 2004.

And I think the first question directed to you was if you could furnish details of all dealings between the

Department and France Telecom in relation to the GSM process, and in particular, in relation to any interest

expressed by France Telecom in bidding for the second GSM licence or in forming a consortium to bid for the licence.

And you have responded that you have no particular recollection of interest expressed by France Telecom in

bidding for the second GSM licence or in forming a consortium to bid for the licence.

I just want to clarify there. It's just the use of the word "no particular recollection". I take it you have no recollection; is that what you are saying?

A. Yes, when I wrote this. I have since learned that the report of the meeting that took place with France Telecom was referred to me in the course of its way to a file and but that is the extent of

Q. That's the extent of your knowledge or involvement?

A. Yes.

Q. I think you were asked for details of dealings between the departmental officials and Mr. Lowry in connection with France Telecom's expressed interest in the licence, and at the time, you had no knowledge or recollection in relation to anything of that nature?

A. That's correct.

Q. I think you were also asked for your knowledge, direct or indirect, of the officials of any contact between Mr. Michael Lowry and Mr. Denis O'Brien or any person on their behalf prior to the 5th April, 1985, and in particular, relating to France Telecom's expressed interest in the licence. And you have informed the Tribunal that you have no particular recollection of any such contacts.

Again, just the word you have no recollection

A. That's correct.

Q. or you know nothing about it?

A. Yes.

Q. I think you were asked for the contents of a document about about the contents of a document entitled "Possible questions arising at a press briefing on the second GSM licence, Friday 19th April, 1996," including the person by whom it was prepared, and in particular, in relation to the 7th bullet point on the second page of the document, which states as follows: "Given Dermot Desmond's checkered history in the telecommunications area, surely the

Department would have reservations about this investment".

And you were asked for precise details of what was meant by reference to Mr. Desmond's checkered history in the telecommunications area and all consequent matters of consideration which might have given rise to anticipated questions regarding "Reservations about this investment."

And I think you have informed the Tribunal that you recall that John Loughrey, then Secretary General, saying at some point that he had dictated a number of questions for the purpose of preparing for a press conference or perhaps a Dail statement. You cannot say whether this document is the output of that exercise, but this may be the case. You have no specific recollection of preparing any such questions yourself, or of this document being produced by any other person.

So can I take it the first time you became aware of the document was when it was brought to your attention by the Tribunal now?

A. Certainly I don't recall seeing it previously.

Q. And just for to clarify one matter. The date the 19th April, that was around the time of the what was described as the officials or civil servants' press conference; isn't that right?

A. I think that's correct.

Q. I think you were then asked, or what was brought to your attention was the draft letter dated the 10th May, 1995, prepared by Mr. Owen O'Connell in response to the

Department's request made on the 3rd May 1996 at a meeting between Mr. Martin Brennan, Mr. Fintan Towey, Mr. Owen O'Connell and Mr. Knut Digerud for an explanation of the substitution of the IIU Limited/Mr. Dermot Desmond for Davy's Stockbrokers and the institutions named in the Esat Digifone's bid documents, and in particular details of all contacts between the Esat Digifone consortium and the departmental officials regarding the contents of the letter and details of any request or agreement by the Department that the portion of the draft letter comprising such explanation should be excised from the final version of the letter which was received on the 13th May, 1996. In this regard your attention was drawn to the evidence of Mr. Owen O'Connell on the 24th October 2003, Day 262 of the Tribunal's public sittings.

And you have informed the Tribunal that you have no specific recollection

MR. SHIPSEY: Sir, just in relation to that matter, it seems there was a typographical error, that 1995, end of the May 1995 is used in the question and the answer, and I think the document itself makes it clear that it's an error.

CHAIRMAN: Thanks for that, Mr. Shipsey.

MR. COUGHLAN: Mr. Shipsey is absolutely right. It should be 1996.

I think you say that you have no specific recollection of having previously seen the draft letter dated 10th May 1996

referred to. You believe that you did not see it, as you think you would recall if you had. As there is no copy of the document on the Department's file, it is clear that the draft letter was not sent to the Department. The draft letter contains an important clarification about the emergence of IIU as the 20% shareholder in Digifone, information which had been sought by the Department. As such, this clarification would have been a welcome confirmation of the understanding at the time; that is, that IIU were providing the best deal to Digifone. You do not accept that there is any possibility, as speculated upon in the evidence of Mr. Owen O'Connell, that the Department or you, in particular, either requested or agreed to the deletion of this information from the letter finally sent to the Department. You cannot think of any possible reason why Mr. O'Connell might speculate that the Department might have an interest in such information being deleted.

You also reject the assertion made by Mr. O'Connell that the Department "weren't always or even very often in the habit of advancing reasons." On the contrary, in any instance where a request by the Department was not self-explanatory, given its context, the Department would provide a clear explanation on request. It would be extraordinary for any public servant or organisation not to provide any such explanation.

To take the example set by Mr. O'Connell, the reason why

the Department had insisted on a 40:40:20 structure because that was the structure specified in the application. If this was not explained at the time, you expect that it was because the reason for the request was obvious. If it was not obvious, it is regrettable that an explanation was not sought.

Then you were asked, finally, circumstances in which and the purpose for which a press release was issued by the Department on the 5th December, 1996, together with details of the input of the civil servants into the drafting of the press release and your knowledge, direct or indirect, of all matters which prompted the omission of any reference in the press release to the holding of 25% in the shares in Esat Digifone by IIU Nominees.

And you say that you have no particular recollection of this press release. You imagine that it was intended to provide clarification of the investors in Esat Digifone, following exchanges in the Dail on this question.

And I think we looked at the press release yesterday, and it's on the overhead projector now. Can I take it that, again, like previous documents referred to in this phase of your evidence, this is a matter which perhaps only came to your attention when the Tribunal brought the matter to your attention recently?

A. I have no specific recollection of it, yes.

Q. Thank you very much, Mr. Towey.

CHAIRMAN: I'll just check if other legal advisers may have

a few matters to raise with you, Mr. Towey.

Mr. Fitzsimons?

MR. FITZSIMONS: No questions.

CHAIRMAN: Mr. McGonigal?

MR. MCGONIGAL: I have no questions.

CHAIRMAN: Thank you. Mr. Shipsey?

MR. SHIPSEY: No.

CHAIRMAN: Mr. Fanning?

MR. FANNING: No questions.

CHAIRMAN: And Mr. O'Donnell?

MR. O'DONNELL: No questions.

CHAIRMAN: Well, obviously, then, you have nothing to raise in conclusion then, Mr. Coughlan.

Thank you very much for your assistance, Mr. Towey. I am sorry it was necessary to bring you back for what has transpired to be a short day, but at one period, it did seem likely that it might have been somewhat more lengthy.

Accordingly, that's the remaining evidence for today,

Mr. Coughlan.

MR. COUGHLAN: That's correct, sir.

CHAIRMAN: As I think was indicated last week in the course of Ms. O'Brien's Opening Statement, the remaining substantive matters in relation to the GSM evidence are the evidence that has already been fixed for the couple of outstanding matters that arose in Mr. O'Brien's evidence last year, and also, insofar as is substantively possible, at the conclusion of the phase, the evidence of Mr. Michael

Lowry.

MR. COUGHLAN: That's correct, sir.

CHAIRMAN: And in addition to that, there is one much shorter passage of evidence that is wholly unconnected with the GSM or the various legal teams other than the Tribunal presented to, and an announcement will be made as to taking up those brief sittings in the very near future in the usual fashion.

MR. FANNING: I might just raise one issue very briefly. I might lay it down as a marker, and perhaps it's a matter I might explore with Mr. Coughlan. I will have a concern on behalf of Mr. Lowry insofar as he is going to be asked to give evidence whilst any other matters are still pending in relation to the GSM process.

From Mr. Shipsey's interjection today, it's not entirely clear to me whether or not Mr. Brennan or Mr. Towey will be recalled again subsequently. And I'm not sure if I'd have what I would call final clarification on the issue as to whether Mr. Bacon will give evidence, as to whether Mr. Andersen will give evidence, and as to whether anybody else will give evidence. Perhaps I'll explore this most profitably with your legal team. I lay down a marker that I would have a concern on behalf of Mr. Lowry if any other evidence is out there left hanging before he is called to give evidence.

CHAIRMAN: Well I think I'd referred, in dealing with the matter, Mr. Fanning, to the concept of evidence being

substantively concluded; if there was something major that was out there, I would be disposed to accept it would be not desirable, in general terms, that Mr. Lowry should give evidence. But I'll endeavour to deal with that as fairly as I can, and of course you should discuss it with members of the Tribunal legal team as you see fit in advance.

Very good. Thank you.

THE TRIBUNAL ADJOURNED UNTIL FURTHER NOTICE