

THE TRIBUNAL RESUMED ON THE 11TH JUNE 2009 AS FOLLOWS:

MS. O'BRIEN: Sir, before Mr. Towey's cross-examination resumes, I just want to refer briefly to the matter that was raised by Mr. O'Callaghan in proceedings yesterday afternoon, and in particular where Mr. O'Callaghan sought clarification in relation to his contention that the letters from the Attorney General of the 20th December and of 20th December 2002, and of February 2003 were not consistent with the references to that correspondence made by the Tribunal in its ruling of the 28th February 2008.

Now, the Tribunal's correspondence, sir, with the Attorney General in December 2002 and early 2003 was prompted by a newspaper report which suggested that legal advice had been provided to the effect that consortia involved in the Esat Digifone licence process would be permitted to alter the makeup of their investors. And I'd referred to that newspaper article yesterday afternoon. At that time the Tribunal had obtained access to Mr. Towey's letter of the 24th April 1996 and to Mr. Nesbitt's advices of the 9th May 1996, and it will be recalled, sir, that they were furnished under certain terms of confidentiality by the Department which were agreed to by the Tribunal.

Now, the Tribunal's view was that the advices did not contain an answer to the query concerning the restructuring of the winning consortium between the date of the application for the licence and the date of conclusion of the evaluation process, that is the 25th October 1996, or

between that date and the actual grant of the licence.

The advices of the 9th May 1996 examined the issues arising in connection with Article 8, that is issues concerning the restructuring of a winning consortium after the licence had been granted. And that was the Tribunal's view at that time when the article appeared in the Sunday Business Post in December of 1992.

And in those circumstances 2002, I should correct.

The contents of the newspaper article in those circumstances, sir, came as a surprise to the Tribunal, because it had not seen, within the privileged documents furnished to it under the terms of that agreement, any advices of the type referred to in that newspaper article.

The response of the Attorney General was contained in two letters, and those letters were opened in the course of yesterday afternoon, and indeed have been provided to affected persons who requested them. The Attorney General's letter of the 22nd of December 2002 contains a number of statements dealing with the matter stating that no advice as referred to in the newspaper article had been provided. It went on to say that no advice of the type mentioned had been given. It referred to the request for advice contained in Mr. Towey's letter of the 24th of May 1996 and it stated that Mr. Nesbitt's advices dealt with the matter.

It was that portion of the letter, sir, to which Mr.

O'Callaghan drew attention in the course of his submission

yesterday afternoon, and on the basis of which it appears he asserts that what was stated in your ruling of the 28th February 2008 was not consistent with the contents of the Attorney General's letter.

Now, as the Tribunal had seen those advices of the 9th May 1996, and had formed the view, on the ordinary and natural meaning of the words that those advices contained, that they did not address the matter, the Tribunal understood that reference to the advices of the 9th May 1996 in the letter from the Attorney General as signifying that they were the only advices given in response to the request of the 24th April 1996.

In a second letter, sir, of the 4th February 2003, again opened yesterday, the Attorney General referred to various contacts between the Department and the Attorney General's Office concerning advices requested by the Department in the period leading up to 16th May 1996, the date of issue of the licence. These advices, the Tribunal was informed by the Attorney General, following inquiries that he had made with departmental officials and with senior counsel who furnished the advices of the 9th May 1996 which the Attorney General, having made those inquiries, confirmed that that advice concerned ownership changes which were 'forward-looking', as it was described in that letter, that is concerning the situation which Article 8 of the draft licence was intended to regulate.

It had then never occurred to the Tribunal that the

Mr. Nesbitt's advices of the 9th May 1996 in any way touched on the question of the restructuring of ownership and its view was that this was plain from the face of the opinion. It cannot have come as a surprise to the Department or to any of its witnesses that the Tribunal took this view.

This was referred to in the course of evidence at the time - that is in early 1993, and it was I apologise in early 2003 and it was made plain to Mr. Loughrey in the clearest possible terms that this was the view the Tribunal took, and Mr. Loughrey, as will be recalled, agreed with that view. The matter was referred to at more than one juncture and ultimately was referred to, once again, in the course of the Tribunal's ruling of the 28th February 2008.

It is only since the memoranda of intended evidence of Mr. Towey, Mr. Brennan and Mr. Loughrey, and recent correspondence from the Department have come to the attention of the Tribunal, that it has been suggested for the first time that the Tribunal's view of the opinion is wrong and that, in fact, the opinion does contain a response to the question posed by Mr. Towey concerning the restructuring of ownership as set out in his letter of the 24th April 1996. It is because of the stark contrast between the Tribunal's view and the views now being expressed by Mr. Towey, Mr. Brennan and Mr. Loughrey, that these sittings became necessary, sir.

At this juncture, I should also say something regarding submissions already made, and repeatedly made, by Mr. O'Donnell concerning the inquiries being pursued with Mr. Towey in relation to his understanding of the meaning of the opinion regarding what the plain words of the opinion actually state.

No issue was taken with any statements made by the Tribunal concerning its view of the meaning of this opinion, either by any of the witnesses just mentioned or by any of the counsel for the Department, including Mr. Nesbitt, the author of the opinion, at any time during the course of the Tribunal's inquiries. It is in those circumstances that it becomes necessary to canvass with witnesses what the Tribunal believes is a reasonable view of the plain words of the opinion and how it could be suggested to contain the answer to Mr. Towey's non-Article 8 queries concerning restructuring in his letter of the 24th April of 1996.

Finally, I should add, sir, that the ruling of the 28th February 2008 was directed to one matter, and to one matter only, namely the legal question of whether the non-objection by counsel for the Department to Mr. O'Brien's counsel referring to passages from the opinion in the course of the cross-examination of Mr. Loughrey constituted a waiver of privilege on behalf of the state. And that is the only matter to which that ruling was directed and that was its sole status.

As we are now in a position, sir, where the State has

waived privilege, and this opinion is now being canvassed, the purpose of that ruling has been, in my respectful submission, entitled superseded.

CHAIRMAN: Thank you, Ms. O'Brien. Very good, Mr. Towey, if you'd like to please resume in the witness box.

I think persons present have been notified of some slight glitch in the amplification system that makes it desirable that people speak close to the respective microphones.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. O'CALLAGHAN:

Q. MR. O'CALLAGHAN: I appear for Denis O'Brien, I just wanted to ask you some questions about the evidence you have given over the past two days, Mr. Towey. You were here in May 2003 for eleven days, I think; isn't that correct.

A. Yes.

Q. And on that occasion you answered fairly extensive questions about your whole involvement in the second GSM process, I think, isn't that so?

A. Yes.

Q. Can I just get a brief overview, Mr. Towey, of the extent of your involvement in the process. Can I ask you; were you involved in the preparation of the RFP document that was issued on the 2nd March 1995?

A. Not in the preparation.

Q. Were you involved in the process of preparing for the competition prior to the 2nd March in any respect?

A. I joined the division in September 1994, at which point the RFP was practically in final form, I can't say it was in

absolutely final form, there may have been some small changes to it. But I don't particularly recall any significant changes.

Q. And what was your involvement in the mobile phone competition process up to March 1995 from the time you joined in September 1994?

A. At that time I think the priority for the division was to get the necessary Government decision to proceed with the competition and to launch the call for applications.

Q. I think you were heavily involved, Mr. Towey, in the consideration and the evaluation of the bids when the bids came in around the 4th August, 1995; isn't that correct?

A. I was, yes, I was a member of the Project Team that did that.

Q. And you were a member of the Secretariat as well; is that correct?

A. Yeah, I am not entirely clear on the meaning of the term 'Secretariat'. I think I used it myself in an earlier statement of intended evidence and in it I meant that I was a member of the division which had lead responsibility in relation to the process. So, yes, I was a member of that division which had responsibility for leading the process.

Q. And then that process ended, I think, Mr. Towey, in around the 25th October 1995 when the consideration of the competition was over and then ultimately Esat was told it won the competition in early November, isn't that so?

A. Correct.

Q. And then your involvement again recommenced in respect of the negotiation with Esat and I think you said in your evidence that you didn't really get back involved until April and May in 1996, is that so?

A. Yeah, the process of negotiating the licence began, I think, in November/December, and there were some meetings with Esat Digifone which I attended at but at some point in November/December, it was recognised that the Regulatory Division of the Department would have responsibility for regulating the relationship with Esat Digifone and, as such, they should take leadership in finalising the licence. So from the period from about November onwards through to April the main responsibility in relation to the licence rested with the Regulatory Division, and in the meantime I had responsibility for other telecommunications policy matters, but in particular the transposition of the mobile telephony directive that was adopted by the Commission in February 1996.

Q. And throughout your whole involvement in the GSM process, Mr. Towey, am I correct in stating that both you and the Department would have received legal advice in respect of the process?

A. In - in respect of different a number of different aspects of it, yes.

Q. And of course it was particularly important to have legal advice because there was always the potential that a disaffected competitor could initiate proceedings against

the Department, isn't that so?

A. Yes, that was always recognised.

Q. Am I correct in stating that when you got legal advice, either you or the Department, that you followed that legal advice?

A. Yes.

Q. And would you agree with me that it would have been dangerous and potentially could have led to litigation if you hadn't followed the advice you were given throughout the whole process?

A. Legal advice given would not have been departed from without being given very detailed consideration.

Q. Now, you know the issue we are dealing with here today is the ownership issue and I have to suggest to you the question of 'ownership conformity', as Ms. O'Brien referred to it, is a very simple issue, would you agree with that?

A. Well, I am not sure I'd describe it as simple but, I mean, it's not incredibly complex either.

Q. Well in comparison to, say, the evaluation process and the qualitative and quantitative assessments that went on during that process, here we are simply dealing with the replacement of one financial institution by another; isn't that correct?

A. Yeah. I mean, I think the particular ownership issue that presented was not terribly difficult but I couldn't say that no other ownership change would fall into the same category.

Q. Yes. And the issue we are dealing with here is that initially when Esat put in their bid the ownership was 40 Telenor, 40 Communicorp and 20 financial institutions, four of whom that were pencilled in and when the licence was being negotiated there had been a slight change because it went from 40 Telenor, 40 Communicorp, to 20 IIU; isn't that correct?

A. Well, not exactly. It was 50:50 when the application was submitted with a declared intention to place 20% in the period leading to licence licence award.

Q. But ultimately the issue that was of concern to you was the fact that there had been or was proposed to be a replacement of the 20% financial institutions with IIU?

A. Yes, yes.

Q. And would you agree with me in the context of the mobile phone competition, that that was not a significant change in ownership?

A. No, it it wasn't a significant change of ownership in the sense that it was clearly recognised that the equity partner would bring only money to the party. There was no other element of telecoms expertise or technical expertise in terms of building mobile telephony networks. It was only the equity financing that that particular partner was bringing and, as such, the identity of that partner was not significant.

Q. And your objective was to ensure - and when I say 'you' I mean the State - your objective was to ensure that there

was an effective and proper second mobile phone network established in this country, isn't that so?

A. Absolutely, yes. And as quickly as possible, because we were the laggards in Europe.

Q. And what encouraged you and what led to Esat Digifone winning the competition was because there was the experience of Telenor, an internationally renowned telecommunications company, and there was the plan that had been put forward by Esat Digifone, and they together was what won the competition, would you agree with that?

A. That's that's correct, yes.

Q. And really, in terms of the 20% financial institutions, they were simply what they were described as, financial institutions who were there to provide finance and to gain a financial reward at the end of it?

A. Yes.

Q. And the only condition, I have to suggest to you, that the Department would require from this financial investor, would be that they were, as you said yesterday, good for the money; isn't that correct?

A. Yes.

Q. And even if in August, 1995 when Esat put in the bid, even if IIU had been identified as the 20% financial investor, I have to suggest to you that that wouldn't have made a significant, or any, difference to the bid that had been put in by Esat, provided IIU was shown to be financially secure?

A. Well, clearly it didn't arise but I don't believe it would have.

Q. Now, you consulted with the Attorney General's Office in April/May 1996 in respect of this, what I described as 'a slight change of ownership'; isn't that correct?

A. Yes.

Q. And I have to suggest to you that the reason you did consult with the Attorney General's Office was out of an abundance of caution and out of a concern to ensure that there was nothing procedurally wrong by allowing IIU to come in in replacement for the other four?

A. They were the reasons, yes.

Q. And you sought legal advice, of that there is no doubt, and as far as you were concerned, Mr. Towey, you received legal advice, isn't that so?

A. That's correct.

Q. And the legal advice you believe you received was that there was no difficulty in IIU stepping in and that the licence, in fact, should be granted to Esat Digifone notwithstanding this slight change?

A. Yes.

Q. And even if Mr. Nesbitt had come back to you and had said to you, 'well, in fact, you can't do that because ownership has to be interpreted very strictly and IIU was not in the original bid', what would you have done in that situation?

A. In that situation we'd have followed that legal advice.

Q. And I have to suggest to you that the reason why the

licence was ultimately granted to Esat Digifone was because it won the competition; isn't that correct?

A. Yes.

Q. It was the best competitor, do you agree with that?

A. Yes.

Q. There was a slight change in ownership but that slight change, you were told on legal advice, had no material alteration on its entitlement to get the licence, isn't that so?

A. Yes.

Q. And if there was a suggestion that, in some respect, IIU were coming in by not being evaluated, what would you say in respect of that, Mr. Towey, that this was a sinister plot to try and ensure that IIU was evaluated; from your knowledge of what happened, do you think there is substance to that?

A. Well, I mean, I think in the course of the evaluation process it was clearly recognised that there would be no difficulty in raising the necessary equity participation in Esat Digifone. And when IIU were then identified as the equity investor a decision was taken that there would be a legal and financial vetting. So the financial a financial vetting was undertaken to ensure that IIU had sufficient financial capacity to deliver on the equity requirements for the Digifone project.

Q. It may be suggested that by bringing in IIU, that this constituted a breach of the RFP that was published in March

1995. You were given legal advice that it wasn't such a breach, isn't that correct; that was the effect of the legal advice you received from Mr. Nesbitt, that you should proceed to grant the licence?

A. I think the legal advice was clearly interpreted that the the ownership change did not did not give rise to an obstacle.

Q. And even if he had come back to you and said it did give rise to an obstacle would you agree with me that the likely scenario would be that simply IIU would be replaced by some other financial institution, isn't that so?

A. Absolutely.

Q. Because there was going to be no difficulty in raising the money?

A. That's very much my view.

Q. And, either way, Esat Digifone was going to get this licence irrespective of whether IIU were in for the 20% or some other financial institution was in for the 20%?

A. Yeah, I think, having come through the difficult process of beating off the opposing bids for this licence, I think that had IIU not been a participant that Digifone would have found an alternative equity partner.

Q. And if you if you had had not followed Mr. Nesbitt's legal advice and if instead you had decided 'well, we are not going to grant the licence to Esat Digifone because there is a slight alteration in ownership', what do you believe would have been the consequence of that?

A. Well, it would be I mean, it would be extraordinary not to follow legal advice in a matter of that kind.

Q. So this grant of the licence to the entity that had its ownership slightly changed, do you agree with me that this was not part of some sinister plot?

A. It wasn't part of a sinister plot.

Q. It's not part of some sinister plot orchestrated by Minister Lowry with you being a puppet at the end of string, is that correct?

A. Absolutely not. Minister Lowry had no role in the detail of this matter.

Q. And the reason this was granted was because you followed the legal advice that Mr. Nesbitt gave you?

A. That's correct.

Q. What I want to do is I want to hand you up a book, Mr. Towey, and, Chairman, I have one for you and for everyone else in the audience as well, and what it simply contains in the document in a chronological order so it makes it easier for us to look at the documents rather than moving from book to the other book. And I will give one to Ms. Moriarty so it can go up on the screen. If I could ask you to look at Tab 1. This won't take long.

Mr. Towey, you see at Tab 1 we have the RFP document and this is although it's not dated this was published on the 2nd March, 1995; isn't that correct?

A. Yes.

Q. And you will see at are these rules or are these like a

document that's put out publicly to invite interested parties to submit? What are they? Are these the rules of the competition or is this an invitation to people to put forward their proposals?

A. It set out the requirements to be addressed in applications.

Q. And you'll see at paragraph 3 it says "Applicants must give full ownership details for proposed licensee and will be expected to deal with the matters referred to in the following paragraphs in their submissions."

Can you tell me Mr. Towey, what is the reason for the Department wanting to have the "Full ownership details"?

A. I think the essential point was to identify, in order to have clear identity of who would be bringing expertise to bear in relation to this project.

Q. Could I ask you now to look at Tab 2, and this is the section of the Esat bid. It's from the management section.

This has been opened before by Ms. O'Brien but could I ask you to look at the third and fourth paragraphs. The third paragraph sets out what the ownership structure is to be, Mr. Towey. It says "50:50" and then it says "In the period leading up to the award of the licence, 20% of the equity, 10% from each of the partners, will be formally placed by Davy Stockbrokers, Ireland largest stockbroker."

So what that indicates, as you said, it's 50:50 but when it comes up to the award of the licence 20% will be put out to financial institutions, isn't that so?

A. Yes.

Q. And you will note that the paragraph that follows that begins by stating "As of submission of this application Davy Stockbrokers has received written investment commitments from..." and it lists the four following.

Would you agree with me Mr. Towey, that the subordinate clause 'as of submission of this application' indicates that implicit in that is the possibility of some change?

A. I can see how you might make that interpretation of it, yes.

Q. Could I now ask you to look at Tab 4. And you will see at Tab 4 we have a letter from you to Mr. Enda Hardiman, who was in Esat Telecom, and it's dated the 31st July, 1995.

Obviously this was a letter that was sent simply in advance of the bids coming in from the competitors, isn't that so?

A. Yes.

Q. And what he says is "Dear" what you say rather:

"Dear Mr. Hardiman, when submitting a tender for the competition for a licence for a GSM mobile telephony within Ireland on or before Friday August 4th, 1995, please confirm in writing that you have no objection to the following information being published by the Department. the name of your consortium.

the names of the various parties participating in your consortium; and.

the fact that a tender for the GSM competition has been received from you."

"Your cooperation in this matter would be much appreciated.

All other aspects of the applications will, of course, remain strictly confidential."

And the reply to that, Mr. Towey, is at the next tab, Tab

5.

A. Yes.

Q. And the reply was, in fact, sent by Mr. Seamus Lynch, who was the coordinator of the GSM competition for Esat

Digifone, and in the body of the reply he says;

"I would like to confirm that we have no objection to the following information being released.

1. The name of our consortium Esat Digifone.

2. The following names who go to make our consortia:

Communicorp Group Limited

Telenor

Institutional investors."

"We do not wish the names of the institutional investors to be released at any stage." and

"3. The fact that we have submitted a tender for the GSM competition."

So, while they are described there is that there were to be institutional investors; isn't that correct

A. Yes.

Q. And you had no difficulty with these institutional investors not being identified publicly, isn't that so?

A. That's so.

Q. But it appears there was a requirement to have Communicorp

and Telenor known publicly, isn't that so?

A. Yes.

Q. Could I now ask you to look at Tab 7 please, Mr. Towey, and

this is a note of a meeting in the Attorney General's

Office on the 29th August 1995 at which you attended, along

with Mr. O'Callaghan and Ms. Ms. Nic Lochlainn and

officials from the Attorney General's Office. But the

reason I want to refer you to it is twofold: First of all

you'll see from paragraph 1, 4 and 5 that Mr. Nesbitt's

name is mentioned in respect of other legal issues. So at

this stage, in August '95, Mr. Nesbitt is obviously helping

the Department in respect of the GSM bid; isn't that

correct?

A. Yes.

Q. And would it be fair to say that Mr. Nesbitt was always

there for you when you needed him?

A. We didn't have a direct relationship with Mr. Nesbitt from

the Department. The Office of the Attorney General acted

as intermediaries. So, in fact, barring a brief meeting in

'95 I don't think I in, sorry, in June 1995, I don't

think I met Mr. Nesbitt until quite a bit later.

Q. But it's apparent from this that he was providing advice to

the Office of the Attorney General, who in turn were

advising you as it went along?

A. Yes, yes.

Q. And you'll see in paragraph 3, Mr. Towey, of that document

there is a reference to transfer of ownership and it says

"It would be possible to allow a major change of ownership to occur only with the consent of the Minister, which shall not be unreasonably withheld."

Now, whether that's a reference to ownership into the future, would you agree with me that what it indicates is that the Department was concerned about major changes of ownership but not minor changes of ownership?

A. I think that we were guided by the precedent in relation to the minding licences which and we recognised in principle that ownership changes would be would be a potential reality.

Q. Mr. Towey, could I ask you to look at Tab 8, and what we have here is the Department's summary of Esat's application. I think you did summaries for each of the applications, isn't that so?

A. I think there are documents, yeah.

Q. Yeah. And you can see at the very beginning it refers to members of consortium and percentage of shares and it says "Communicorp (parent of Esat Telecom) 50 percent.

Telenor Invest AS 50%.

20% to be placed via Davy Stockbrokers with AIB, Bank of Ireland, Standard Life and Advent International after licence award, thereby reducing the Communicorp and Telenor shares to 40%."

And, again, it simply emphasises that there is a financial institutional part to the bid, isn't that so?

A. Yes.

Q. And can I ask you, if it had said '20% to be placed by IIU', do you think the Department would have had any difficulty with that at that stage?

A. I don't believe so, no.

Q. Could I ask you now to move forward to Tab 15, please, and this is the letter from Minister Lowry to Mr. O'Brien on the 9th November 1995 indicating that Esat Digifone had won the competition and that they would now enter into negotiation.

It says:

"Dear Mr. O'Brien,

I refer to your application for a licence to provide and operate a GSM mobile telephony service within Ireland in accordance with the competition process announced on 2 March 1995.

"I am pleased to confirm that the Esat Digifone application has, subject to agreement of appropriate licensing terms, been selected in accordance with the evaluation criteria prescribed in the competition documentation, to become the second operator of GSM mobile telephony within Ireland.

Yours sincerely

Michael Lowry."

And obviously that decision, Mr. Towey, led to considerable disappointment on the part of the losing consortia; isn't that correct?

A. Correct, yes.

Q. And it didn't simply lead to disappointment, it also led to

complaints being made by the losing consortia, isn't that so?

A. That's right, yes.

Q. And ultimately a complaint was made by Persona to the European Commission; isn't that correct?

A. That's right, yes.

Q. And if you look at Tab 16, you will see there is a more detailed letter from Mr. Brennan, in your Department, dated the 13th November 1995, to Mr. O'Brien, and I just want to open the last two paragraphs on the first page of that, where Mr. Brennan says:

"I am therefore directed by the Minister to enter into exclusive dialogue with Esat Digifone Limited on a bona fide basis, with the intention of clarifying issues to facilitate speedy progress to formal licence award. I wish to make clear at the outset however, that no liability shall attach to the Minister or to his agents for any expenses incurred by or on behalf of ESAT Digifone Limited based on any assumption made by Esat Digifone Limited regarding the award of the licence or any terms of the licence that might ultimately be awarded.

"The Minister's primary objective for these discussions is to ensure that the licence provides for all the ordinary terms and conditions that are incidental to a mobile service of this kind, with particular regard to the requirements of the GSM competition documentation and the commitments contained therein. The Minister also intends

that the commitments made by Esat Digifone Limited in its application should similarly be converted into binding conditions. We would welcome any views you may wish to offer, verbally or in writing, but of course without any commitment. The Minister is the licensor and remains the sole responsibility retains sole responsibility for the drafting of the licence.

As I explained yesterday, the GSM licence documentation will necessarily contain specific conditions with regard to your financing arrangements for this project and in relation to effective control of the future licensee, with particular reference to possible decision making structures, voting rights, etc. Matters relating to security interception must also be satisfactorily resolved. Further issues, some of which were explored by our consultant Mr. Andersen at yesterday's meeting, will also be included in the licence."

Now, what that was doing, Mr. Towey, was kicking off the negotiating process between the Department and Esat; isn't that correct?

A. Correct, yes.

Q. And can I ask you were you involved in that negotiation process at all as of November or was it later that you came back into the frame?

A. I think it was from around this time that the responsibility passed over to the Regulatory Division and it was the following April before I came involved again.

Q. When you came back in for the ownership issue?

A. I think so. There may have been a December meeting, but...

Q. Yes. Can I ask you just to jump forward to Tab 18, Mr.

Towey, because this is a newspaper report from The Irish

Times dated 22 November 1995, and underneath the photograph

of Mr. Lowry could I just refer to the paragraph there

which says in respect to the mobile phone licence

negotiations:

"Mr. Dermot Desmond's financial services company,

International Investment Underwriters, has been appointed

to advise on the sale of this 20%. However, both

Mr. Desmond and Esat have refused to comment on rumours

that Mr. Desmond or one of his companies has purchased a

portion of those shares."

So isn't it apparent that as of the 22nd November 1995, out

in the public domain was an awareness that IIU and Dermot

Desmond were involved in this?

A. Yeah, I think I think that's correct. I think we have

been been through this in evidence and I am not sure

that this was noted in the Department at the time.

Q. Well, whether you noted it or not it's in the public domain; isn't that correct?

A. Yes.

Q. And in terms of any suggestion that in April or in May

plots were being put together to disguise IIU's involvement

it's evident from this that the IIU involvement was out

there at this time in November, isn't that so?

A. Yes.

Q. It's apparent, if I can ask you to look back at Tab 17, I have to suggest to you that at around this stage the mobile phone licence had become a political football; would you agree with that, Mr. Towey?

A. I think that's probably not an unreasonable description.

Q. Because what we have at Tab 17 is a transcript of a Dail debate on the 22nd November 1995 and the pagination is at the top right hand corner, Mr. Towey, and if I could ask you to look at page 2 of 9?

A. Yeah.

Q. You'll see at paragraph 85 there Mr. Molloy asks the Minister for Transport, Energy and Communications "If article's 3 of his department's GSM competition licence documents were complied with in the awarding of the licence and the identity and ultimate beneficial ownership of the institutional investors who will own 20% of the successful bidding company."

So the issue was being discussed in the Dail at that stage; isn't that correct?

A. Yes.

Q. And if I could ask you to move forward to page 5, you will see there is - the second paragraph is a reference to Mr. Molloy and he, again, raises the issue about the identity and ultimate beneficial ownership of the institutional investors who will own the 20% of the successful bidding company.

And in the middle of the page there is a reply from

Minister Lowry. Five lines down he says:

"Paragraph 3 of the bid document to which the Deputy referred relates to full disclosure of ownership. That was adequately dealt with in the evaluation of all applications, including the successful one. The majority of the applications contained indications of probable changes in the ownership of minority interests by way of flotation, institutional investment, after licence award and the level of such proposed changes considered acceptable. The intentions of the"

that should be 'winning' I think

"applicant in this regard were fully disclosed."

And that debate goes on further down. So it's evident that it was being discussed in the Dail and the Minister was dealing with it as a political issue, isn't that so?

A. That's correct, yes.

Q. So can I now get on to the 'ownership conformity issue' as

Ms. O'Brien calls it, and could I ask you to look at Tab

20. Now, this is a fax from Regina Finn to yourself and

Mr. Brennan on the 16th April 1996. Am I correct in

stating that this is the time when you start getting back

involved, Mr. Towey?

A. I think that's right, yes.

Q. And you will see at the bottom of the page, there is the fax note which says

"Martin/Fintan, attached is the latest information to come

to light about the shareholdings in Esat Digifone. Owen O'Connell is to provide further detail in writing. You may wish to pursue further.

Regina."

So as of the 16th April, there is a concern in the Department about this slight change in the ownership of Esat Digifone, isn't that so?

A. Yes.

Q. And Ms. Finn has secured information from, obviously, Mr. O'Connell, I think, and if you turn over the page you will see this is the document that she appears to have prepared which sets out the ownership makeup of Esat Digifone, isn't that so?

A. Yes.

Q. And at the bottom of the page there is the reference to IIU, and I'll just read out the last two paragraphs on that page and it says:

"IIU (a Dermot Desmond company) currently holds 20% of Esat Digifone which it intends placing with institutional investors. It also has the right to acquire a further 5% by means of the 12% of Esat Telecom holdings which is held by miscellaneous.

Owen O'Connell is to provide further information in writing, including deadlines for this change in ownership."

So it's apparent from that the Department is seek further information from Esat Digifone and that information is going to be provided, isn't that so?

A. Yes.

Q. And then at Tab 21 we have the further information which is provided by Mr. O'Connell, and it's a letter I don't need to open again, but it's the letter of the 17th April 1996, and in that he sets out the further information about the change in ownership; isn't that correct?

A. Yes, that's right.

Q. And then this is obviously still a concern to you and at Tab 22 you have a discussion with officials from the Attorney General's Office on the 22nd April, 1996; isn't that correct?

A. That's correct.

Q. And on the second page of that it's, obviously, you or Ms. Finn who brings to the attention of the Attorney General's Office that you have a concern about the change in ownership; isn't that correct?

A. That's correct.

Q. And it's clear that you say you are wanting clarification from the Office of the Attorney General in respect of this change of ownership?

A. Absolutely, yes.

Q. And the only reason you are asking for this is because you have a genuine concern, as any cautious civil servant should have, isn't that so?

A. Yes.

Q. And not only do you ask them to consider it and provide clarification, you provide documentation, because the note

which you wrote records:

"The Department also gave to the Office of the Attorney General a copy of an extract from Esat Digifone's application outlining the ownership of the company, together with an internal departmental document and a letter from William Fry & Co., Solicitors concerning restructuring of the Esat element. The Department indicated that clarification would be necessary of any change in the ownership structure of Esat Digifone relative to that outlined in the application."

So, one thing there can be no doubt about in this hearing, Mr. Towey, is that the Department sought advice on this change of ownership; isn't that correct?

A. That's correct.

Q. And at the time you sought legal advice you didn't know what the advice was going to be. Mr. Nesbitt may have come back with advice that was different to the advice you say you received, isn't that so?

A. That's true, yes.

Q. So to suggest that you knew this was going to be okayed by Mr. Nesbitt, and IIU would be able to get in under the radar, that does not belong in any world of reality; isn't that correct?

A. Well, I mean, clearly I can't say that I knew what what advice would be would be forthcoming but I think it's fair to say that, as a working hypothesis, if I can use that term, having undertaken the evaluation process and

having formed a view in relation to the role of the institutional shareholders, from a telecommunications policy perspective I wouldn't have seen a change in institutional shareholding as being of any great significance. So, working from that perspective of relevance from a telecommunications policy perspective, I think I would have had an expectation that there wouldn't be any major legal impediment. And I think that was the working hypothesis.

Q. Well, if you were trying to do something sinister and allow IIU in under the radar you wouldn't have been seeking advice from Mr. Nesbitt because you wouldn't know what advice he would give ultimately; isn't that correct?

A. Well, I never really oriented myself towards trying to do something sinister.

Q. I know that. But I am saying if it was suggested, you wouldn't you would not know

A. I think

Q. You would not be going to the Attorney General's Office with this problem, setting out all the documentation, asking for legal advice on it?

A. I think that's correct.

Q. Can I ask you now to move forward to Tab 25 oh, yeah, sorry, Tab 23. Sorry, Mr. Towey, Tab 23. You had a meeting with the Office of the Attorney General on the 22nd April, you raised the ownership conformity issue, you give them the documents, you tell them you want clarification.

And then on the following day, as is evident from Tab 23, you have a meeting with Mr. Nesbitt and Mr. Gormley and Mr. McFadden; isn't that correct?

A. That's correct, yes.

Q. And this note is not a particularly thorough notes it reminds me of one of my own notes of a consultation but what's clear from it is that it's a meeting that went on for an hour and a half; isn't that correct?

A. That's that's what the note suggests, yes.

Q. from 4.15 to 5.45 and I doubt for the only thing that was discussed for the one and a half hour was the late Ms. Justice Carroll's Trips case, would you agree with me?

A. I think it's highly unlikely, yes.

Q. And you can't recall, and very honestly you have said, you can't recall what was discussed at that meeting, isn't that so?

A. That's correct, yes.

Q. But would you agree with me it must have been likely that the ownership conformity issue was discussed at that meeting, considering what had taken place the day before?

A. I think it's likely in the context that the issue was being referred to Mr. Nesbitt that there was some kind of a discussion of it, yes.

Q. And am I correct in stating that Mr. Nesbitt has told you that he believes the ownership issue was discussed at this meeting?

A. He certainly recalls meetings where the ownership issue was

discussed. I can't say if he specifically remembers it at this particular meeting.

Q. And his recollection, am I correct in stating, is that he advised there is no problem in proceeding with this grant of the licence, notwithstanding the slight change in ownership?

A. He certainly didn't see the ownership issues as being any kind of an impediment, that's correct.

Q. Could I ask you to go to Tab 25 now please, Mr. Towey. So you have had a meeting on the 22nd with the Office of the Attorney General. You have a meeting on the 23rd with officials from the Office of the Attorney General and Mr. Nesbitt and then on the 24th April 1996 you write a letter which, for the third time, seeks legal advice on this ownership conformity issue. And if I can just I know it's been opened before but can I open the penultimate paragraph on that page of the letter of the 24th April 1996. And again you say:

"I would also like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat Digifone. Relevant papers were provided at our meeting on 22 April. In particular, the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed."

And, again, what you are doing, Mr. Towey, is for the third

time you are looking for legal advice on this issue?

A. Yes.

Q. Now, if you go to Tab 26 we'll see there is a letter from the Office of the Attorney General on the same date, the 24th April 1996, to Mr. Nesbitt; isn't that correct?

A. Yes.

Q. And of course this letter has to be read in the context that one day earlier these officials from the Office of the Attorney General and you have met with Mr. Nesbitt?

A. Yes.

Q. So very clear in Mr. Nesbitt's mind is the issue he is being asked to deal with; isn't that correct?

A. I'd have thought so, yes.

Q. And perhaps that is the reason why the letter is quite brief in setting out what is required. But there is a number things I want to bring to your attention about it, Mr. Towey.

first of all, attached to the letter is the minute of the Department of Transport dated 24 April 2006. That's the minute that you prepared about the meeting on the 22nd April?

A. I think so, yes.

Q. And then let's look at the first paragraph.

"Dear Richard,

"With reference to the above matter and yesterday's consultation please find attached a copy of the above minute received from the Department and its enclosures."

So what Mr. Nesbitt gets is, he gets your memo of the minute of the meeting of the 22nd April, he gets the Regina Finn note with the map setting out the ownership structure of Esat Digifone, he gets the letter from William Fry setting out the ownership structure that is proposed, and he gets the documents from the Esat bid setting out the original ownership structure, isn't that so?

A. Yes.

Q. These are all going to Mr. Nesbitt, they are sitting on his desk when he is being asked to consider and provide an opinion; isn't that correct?

A. That's correct, yes.

Q. And then it also provides

"the consolidated text of Section 111 is not enclosed as it does not incorporate the more recent draft of the proposed amendments thereto."

"A copy of the "Relevant papers" referred to in the third paragraph of the Department's minute is also enclosed, together with a new draft Article 8..."

So the first thing that's been brought to the attention of Mr. Nesbitt for the purposes of this opinion is the memo you prepared and the enclosures, which all relate to the ownership conformity issue; isn't that correct?

A. That's correct, yes.

Q. And all the enclosures bar the ones which the relevant the ones referred to in the second paragraph there all the papers that are attached to this letter for Mr. Nesbitt

are the ones that concern the ownership conformity issue,  
isn't that so?

A. Yes.

Q. And then at Tab 27 we see that on the same day, which once again illustrates your cautious and responsible concern to ensure that proper advice is given to the Department, you fax through to the Office of the Attorney General seven pages, and they probably are the seven pages that are attached in the letter to Mr. Nesbitt; isn't that correct?

A. Yes.

Q. It's sent from you to Denis McFadden and if you'll see, if we just go through it, there is the sections on the Esat application, then there is the letter from William Fry and then there is the Departmental note from Regina Finn. And they are all sent by you.

And then if I could ask you to look at Tab 28, Mr. Towey. And, obviously, contemporaneously with this there is also the long-term ownership issue that's being discussed, isn't that so?

A. Yes.

Q. And what we have here is a note from Regina Finn to you on the 25th April, and if I can just open the second paragraph dealing with Article 8 ownership:

"As discussed, Denis McFadden advises that the revised draft should not go out to Esat Digifone until the ownership issue is resolved. He will consider this further and may request a meeting to clarify the Department's

request on this issue."

Now, obviously, Mr. Towey, that can be read 'ambiguously' is the wrong word but it can be read two ways: It can refer to the ownership issue in terms of long-term ownership or it can refer to the ownership conformity issue, isn't that so?

A. Well, I think, clearly, Mr. McFadden sees the linkage and he is linking the two things.

Q. Yeah, and what he says is 'don't send this licence out to Esat until the ownership issue is resolved'. And he continues

"He will consider this further and may request a meeting to clarify the Department's request on this issue."

now, do you know what type of a meeting he was seeking or is that a meeting between the Department and Esat or a meeting between the Mr. McFadden and the Department or can you assist us?

A. I don't know. I suspect it was a meeting with the Department.

Q. Okay. Now then if I could ask you to look at Tab 29. This is a note of a telephone conversation you had with Mr. Owen O'Connell, who was solicitor to Esat Digifone, on the 29th April 1996; isn't that correct?

A. Yes.

Q. And you are perfectly entitled to have a telephone conversation with Mr. O'Connell, who is the solicitor representing the company with whom the Department is in

negotiations, isn't that so?

A. Yes.

Q. And the fact that you haven't kept a note of it is not something that should cause any concern to anyone, would you agree?

A. Certainly, I'd agree.

Q. And it says this is Mr. O'Connell's note

"Fintan Towey"

"Trying to hammer down paper trail between beneficial ownership as in bid and as now proposed; to determine whether there are any differences. Legal people involved.

"If telecom interests held Esat Holdings and radio by Communicorp asset base of Communicorp reduced. Doesn't know whether it would be a problem.

"Suggested a meeting (I believe this to be a reference to my having suggested a meeting)

"Premature" (that I believe to be Mr. Towey's response to my suggestion of a meeting)

Question is whether company to be licensed is the same as company that applied. Has to be assured from a legal perspective."

So what that records, probably for the fourth or fifth time, Mr. Towey, is that you are emphasising to Esat Digifone that there is a legal issue in respect of the ownership conformity question; isn't that correct?

A. Yes.

Q. And you are telling Mr. O'Connell that you have got lawyers

involved on this specific issue; isn't that correct?

A. Yes.

Q. And the only lawyers we know you have met are lawyers from the Office of the Attorney General and Mr. Nesbitt?

A. Yes.

Q. So they must be the people, the legal people, involved in this ownership issue; isn't that correct?

A. Yes.

Q. And you once again indicate great caution in the fourth paragraph where you say you have to be assured from a legal perspective, because you don't want to find yourself granting a licence to Esat Digifone which has IIU in if you subsequently find out that you weren't permitted to do that under the rules or legally it was questionable to do so, isn't that so?

A. That's correct.

Q. And just at Tab 29 as well, there is the penultimate or it's at the third last paragraph which refers to 'warranties regarding ownership and financing, identifying institutional investors means ownership at date of licence'.

So your concern was, really, the financial viability as well of the new financial investor coming in, would that be correct to say?

A. Yes.

Q. And you want to be sure that who was coming in is as financially viable as the Esat did appear to be; isn't that

correct?

A. Yes.

Q. And just to divert slightly; from your position on the Project Group, you were perfectly satisfied with the financial capacity of Esat Digifone as a company to carry out this mobile phone network, isn't that so?

A. I was, yes.

Q. You had no question over it, you were satisfied with it?

A. I was conscious of the fact that the final evaluation report had identified some financial risks or that financial issues needed to be to be resolved. And I think that's captured in the letter that we opened that was sent to Digifone in November in relation to the licensing process.

Q. Can I ask you, Mr. Towey, to look at Tab 31. And, once again, this is a fax from you to Mr. McFadden in the Attorney General's Office on the 30th April 1996.

A. Yes.

Q. And, obviously, what you are doing is you are sending Mr. McFadden in the Attorney General's Office a draft of a letter that you propose to send back to Mr. O'Connell in reply to his letter; isn't that correct?

A. Correct, yes.

Q. And Mr. McFadden are they his manuscript changes at the end of the letter there on the front page?

A. I believe so.

Q. And then he makes some changes. So you get legal advice on

the letter that you are sending out to Owen O'Connell and then you incorporate those suggestions from the legal advisor. And at Tab 32 you write to Mr. O'Connell on the sorry, not you Mr. Brennan writes to Owen O'Connell on the 1st May; isn't that correct?

A. Correct.

Q. But you were liaising with the Attorney General's Office in order to ensure that this letter was appropriate?

A. Yes.

Q. And if I could just ask you to look at the penultimate paragraph on the first page of that letter, the 1st May 1996. And Mr. Brennan says:

"It is essential that the Department can identify precisely any changes in the effective ownership (both direct and indirect) of Esat Digifone since the time of submission of the application."

So, once again, you need to know that information and you need to know it because you are a cautious civil servant that recognises that there is a slight change and you have to see whether this is material, isn't that so?

A. Yes.

Q. Now, could I ask you to go to Tab 34, and this is a memo prepared by Mr. O'Connell of William Fry on the 3rd May 1996. And it's identified as being the licence negotiations and it's a meeting between Esat Digifone representatives and representatives of the Department including yourself, isn't that so?

A. Yes.

Q. And, again, the issue of the change in ownership is identified as an issue. First of all Mr. O'Connell records:

"Clear a political football."

obviously at this stage there was political issues about the change in ownership, isn't that so, or appears to be?

A. It was clearly known that there were political interest in it, yes.

Q. Yes. It continues with

"the identity of each shareholder legal and beneficial ownership.

Esat Digifone changes relative to bid."

So, that is the issue that is being discussed at the meeting, isn't that so?

A. Yes.

Q. And it continues:

"Change in institutional investment replacement of Advent and Davys by IIU."

"Need detailed information/quality about IIU."

"Confirmation that Telenor is same as at bid time"

and then two paragraphs down

"bid date."

Two paragraphs down it says "Numbers re IIU."

And the reference to 'numbers re IIU', Mr. Towey, I suggest, is that the Department need proof or satisfaction that IIU, if it's to be the new financial institution, is

as financially solid as the ones that it appears to have been replacing; isn't that correct?

A. Its financial capacity, I think, is being referred to, yeah.

Q. And that's the only thing you would be worried about in respect of a financial investor, its financial capacity; isn't that correct?

A. Yes.

Q. And then Tab 35, Mr. Towey, is another note from Mr. O'Connell dated 7th May 1996. And it records a conversation between you and Owen O'Connell and it has you recording

"The Minister has a very strong preference for 40:40:20 at time of licence. But understands need for flexibility afterwards. Will take Esat Holdings subject to no substantive difference and outline in writing."

And in terms of the Minister's preference for 40:40:20, would you agree with me that that can't have anything to do with a desire on the part of the Minister to hide the presence of IIU because IIU is already out there in the public domain, as the newspaper article of November 1995 illustrates?

A. Yes.

Q. And then at Tab 34 there is the decision of Government which sorry, it's not dated, the document but it's the decision of Government we think it's the 23rd April and you will note at the last sentence of the first

paragraph there is a reference to

"Legal clearance was awaited from the Attorney General's Office."

So certainly at this stage, as far as you were concerned, Mr. Towey, you are still waiting to hear back in respect of the although you have just raised it on the 22nd and you have a meeting on the 23rd April but there is the outstanding issue of ownership conformity that still needs to be resolved by the Attorney General's Office, isn't that so

A. Yes.

Q. And then at 37 we get to the famous document, which is Mr. Nesbitt's letter and Mr. Nesbitt's opinion, and there is just a couple of sentences to which I wish to refer you.

In his second paragraph, second sentence he said

"However, I remain of the view that the Minister should not drag his feet in issuing the licence. If there was to be litigation, so be it, but delaying does not achieve any end. Before issuing the licence you should make it clear to Persona's solicitors that he is not holding his hand on the issue of the licence. The form of the draft letter has already been discussed with you. My reasoning in this regard is that the Minister is committed to grant a licence."

Now, I have to suggest to you, Mr. Towey and I suspect you'll agree with me but in light of what we have seen of you consulting with the Attorney General's Office, of

you sending documents to the Attorney General's Office, that any person reading that advice from Mr. Nesbitt telling the reader that they should not drag their feet in issuing the licence, must believe that the issue about ownership conformity is not an issue?

A. That's correct.

Q. And it's not really the question of us trying to interpret Mr. Nesbitt's opinion and letter line by line. You understood that the advice was there was no obstacle in respect of ownership conformity; isn't that correct?

A. That's how it was understood, yes.

Q. And that's why you went ahead and why the Department went ahead and sanctioned the presence of IIU?

A. That's correct, yes.

Q. And there's nothing sinister or 'plotty' involved in this. You went through the procedures, you consulted with the Attorney General's Office, you got a letter back from senior counsel and an accompanying opinion, isn't that so?

A. That's correct, yes.

Q. And can I ask you now to look at that opinion and if you go to the second page of it, it's also in the same tab, Tab

37. And I am not going to open it but if you look at the second page and the second paragraph, I have to suggest to

you that this paragraph and I know you opinions,

Ms. O'Brien can say you have to read it in the context of everything but a reasonable reader of this paragraph, I have to suggest to you, would believe that the ownership

conformity issue is not an issue. And it says:

"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. I do not think it is tenable to suggest that the licensee has been awarded the licence because of the parties who own the licensee. 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 by a change in ownership. However, I do accept that there is a possibility that this might occur. It is also a real issue in the mind of the public."

And as you astutely pointed out yesterday, Mr. Towey, the only issue in the mind of the public at this stage was the ownership conformity issue, isn't that so?

A. I think so, yes.

Q. And you can't recall, in fairness to you, as to whether or not you relied upon this opinion at the time, is that correct, or you you can't recall whether this was the paragraph that influenced you at the time, is that so?

A. Well, clearly the view was taken that it was implicit that this opinion implicitly implicitly dealt with the ownership issue.

Q. Yes?

A. And I think that, as I said yesterday, that paragraph reflected what I understood to be Mr. Nesbitt's Nesbitt's view in relation to ownership, which was different to the view that I would have had myself, that every ownership change would have to pass through this filter of whether it had implications for the provision of the service.

Q. And you had no great desire, there was no agenda on your part, to try and ensure that this ownership conformity matter was passed through. If Mr. Nesbitt said to you 'it can't be done' you would have been very perfectly happy to go back to Mr. O'Connell and say 'no, that's not possible'?

A. We would have followed his advice.

Q. And irrespective of how we interpret the wording used in Mr. Nesbitt's opinion, what you are unambiguously telling the Chairman is that you believed that the advice you got was that there was no difficulty with the IIU part of the bid?

A. Correct.

Q. And you have also told us that Mr. Nesbitt has told you that he recalls at meetings and we don't know which specific ones that he said there was no difficulty with IIU coming into the bid?

A. That's correct.

Q. Then if you'll see at Tab 38 there is a letter from the Office of the Attorney General dated 13 May 1996, signed by both Mr. Gormley and Mr. McFadden, and just at the last

paragraph on the first page it says

"With reference to previous correspondence we have been directed by the Attorney General to forward to you the above-mentioned draft regulations and draft licence which have been prepared in the Office of the Parliamentary Draftsman by Mr. Bacon, together with the advices of Richard Law Nesbitt, dated 9 May 1996 concerning same."

So and it's to your attention, Mr. Towey do you see at the top of the page there, underneath the address?

A. Yes.

Q. "Attention Fintan Towey". So that opinion was definitely sent on to you on the 13th May 1996, isn't that so?

A. Yes.

Q. Now, could I ask you to look at Tab 39, then. This is a meeting that takes place on the same day at 12.30 so I don't know, Mr. Towey, in fairness to you, whether you have read Mr. Nesbitt's opinion as of yet, because it's the same day as the letter from the Attorney General's Office to you, attaching it, but you are at a meeting with representatives of Esat Digifone. And can I just refer you to the last paragraph on the first page, because it's a meeting that takes place in Mr. Brennan's office. Last paragraph on the first page it says:

"Martin Brennan and Fintan Towey scanned the letters with Martin Brennan noticeably pausing to read closely the letters concerning IIU."

So really your concern at this stage is that you want to

know whether IIU is financially solvent and financially viable to play the role of the financial investor; isn't that correct?

A. Yes.

Q. And, again, on the second page there is the large paragraph in the middle of the page, and you again raise the issue of the slight change in ownership and it says:

"Fintan Towey made the point that the bid had referred to 20% of the company being placed with the blue chip institutions, acknowledging that the institutions in question were not identified. He queried IIU's intentions in regard to placing of its holding."

So, again, you are raising this concern which you repeatedly have, Mr. Towey, about the status of IIU and the fact that there is a change here; isn't that correct?

A. Yes.

Q. And now if you look at Tab 40, we see on the 15th May, information is furnished to the Department by Farrell Grant Sparks, who are the accountants for Mr. Desmond in IIU, and it sets out information pertaining to their financial viability; isn't that correct?

A. Yes.

Q. And then at Tab 41 and then at Tab 41 there is an internal departmental memo from Mr. Buggy to the Secretary of the Department dated 15th May, 1996?

A. Yes.

Q. And it begins with:

"Mr. Martin Brennan and I have been involved in various discussions in respect of the financial strength of the members backing the Esat Digifone consortium over the last two days and detailed below is my understanding of the current position and an assessment of the consortium's financial strength."

"These discussions have been with a number of parties but principally Mr. Michael Walsh, a director of IIU."

And then if you go to the next page, you will see there are, two, three - the fourth bullet point down there is the reference to IIU being owned by Mr. Desmond, they have been in existence since 1995.

And the next bullet point says "In order to finance it" there is a reference how they must have finances of 17.3 million.

And then the next bullet point says

"To ascertain if DD has sufficient finances to support this project we discussed the matter with Mr. Michael Walsh. He informed us that DD had already put 0.75 million into the company and has put in another 5 million this evening in advance of signing the licence."

And then you will see the last bullet point on that page:

"An updated letter from Farrell Grant Sparks which confirms that DD is worth a certain sum of money and an amount totalling another sum of money."

And then if you go over the page there is the conclusion of the Department in respect of the financial viability of IIU

and it says

"Based on the discussions documented above and the letters received from the various parties as outlined above, the shareholders in Esat Digifone appear to have sufficient financial strength to ensure that Esat Digifone is financed in line with the expectations under the business plan and the required debt financing appears to be available to the company."

So that is satisfaction being given to the Department about the financial status of IIU, isn't that so?

A. That's correct, yes.

Q. And we come to the end of the process now, at Tab 42, Mr.

Towey, where there is the letter written to Mr. Digerud on

in May 1996 which effectively it talks about the,

effectively the grant of the licence, I think it is and at

Tab 43, you will see there is a press release from the

Department entitled "Lowry signs second mobile phone

licence". That's dated 16th May, 1996; isn't that correct?

A. Yes.

Q. That's the culmination of it, Esat gets the licence. And

then at Tab 44, on the same day, a press release is issued

by Esat Digifone, do you see that?

A. Yes.

Q. And can I just refer you to the second paragraph where it

says

"Esat Digifone also confirmed details of its shareholding

structure. Esat Telecom Holdings Limited holds 40% of the

shares, Telenor Invest owns 40% of the shares and IIU Nominees Limited holds the remaining 20% of the shares on behalf of Mr. Dermot Desmond."

So there is nothing being disguised from the public about the involvement of IIU at this stage; isn't that correct?

A. That's correct.

Q. And moving the ownership from 37.5:37.5:25 to 40:40:20 isn't for the purpose of trying to keep IIU hidden. IIU are out in the open as being a member of this consortium?

A. That's right.

Q. Could I now ask you to go to your statement and it's not in the tab and there is just a couple of aspects of your statement.

In paragraph 2.1, Mr. Towey, you emphasise what you have told us already sorry, Mr. Towey, have you got your statement?

A. It's okay, yeah.

Q. In 2.1 you emphasise what you have told us already, that you are of the view that Mr. Nesbitt said that, you know, this is putting it loosely now there was any "I recall being of the view that Mr. Nesbitt did not believe that any wish which the Department may have had to tightly control ownership changes could be sustained."

and you go on

"I cannot say whether this view arose from the opinion of 9 May or earlier or later meetings. I believe Richard Nesbitt also recalls meetings where this view was put by

him."

so you are simply repeating what you told me earlier on;  
isn't that correct?

A. Yes.

Q. And also he says "Martin Brennan" you had a discussion with him, in which he expressed the view that senior counsel's opinion confirmed that there was no legal reason to have concerns about the restructuring of ownership being undertaken in Esat. So again he also emphasised it to you and Mr. Brennan will be giving evidence.

And then at paragraph 5 you state that you are concerned that the views of Sean McMahon, Regina Finn and Sean Fitzgerald on this issue are not being sought by the Tribunal.

Can you tell me why you are concerned about that, Mr. Towey, and what do you think those three individuals would add to the Tribunal's understanding of this issue?

A. Well, I think all of those individuals would have been aware of the original ownership envisaged in the application and the placing of equity with institutional investors. And I think all would also have been aware that IIU emerged as the actual equity partner and I don't believe that any of those those people saw that there was any difficulty with IIU becoming the equity partner.

Q. Could I ask you to look at paragraph 6 of your statement now, please. And it says:

"It now appears that the Tribunal takes the view that the

opinion may not directly respond to the question asked. I can confirm that I, for one, had no questions in my mind as to what the position was after considering the opinion."

And I think, Mr. Towey, the reason why you know that the Tribunal has that view is because of the ruling that was issued on the 25th February 2008; is that correct?

A. Correct, yes.

Q. And could I ask you to look at that ruling now; it's at Tab 46 of the book. And you will see in the front page, it's entitled "Tribunal ruling re: Opinion dated 9th May, 1996" which is Mr. Nesbitt's opinion. And it's dated, this ruling, the 25th February, 2008 and it was dealing with the issue which had arisen as a result of privilege being claimed by the Department over Mr. Nesbitt's opinion. Could I ask you to go to page 5 of that ruling, please.

And I just need to open paragraph 8 and 9 to you, Mr. Towey. And it says:

"Having examined the privileged material, it was clear to the Tribunal that no opinion addressed to the issue raised in the Department's letter of"

it says '27th', I think it should be

"24 April 1996 had been provided and that in particular the opinion of 9th May, 1995, did not deal with the matter on which advice had been sought. The Tribunal was faced with the difficulty that this information had been obtained on foot of the facility provided by the Department of examining the documents on a without-prejudice basis.

"Without prejudice" in this context meant without prejudice to the Tribunal's right to call for the document ultimately and to contend that it was not privileged and to the Department's corresponding right to refuse production on the grounds that it was privileged. The Tribunal was, accordingly, obliged to balance, on the one hand the Government's right to privilege for its legal advices, and on the other, the necessity to demonstrate that this advice had been sought but had not been provided."

"There seemed to be only two ways of demonstrating that the advice actually sought had not been furnished, that is, either by disclosing the opinion, which would have been, firstly, in breach of the Tribunal's undertaking to the Department and, secondly, of the Government's privilege, or by conveying in some other way the fact that it did not contain the advice actually sought. The latter was achieved by obtaining from the then Attorney General a letter stating that the advice actually sought had not been provided."

"Furthermore, that was confirmed in the evidence of Mr. John Loughrey, who was the Secretary General of the Department at the time, and who was in direct control of the Department's dealings in connection with its consideration of the involvement of IIU Limited/Mr. Desmond in the Esat Digifone consortium, who testified that he was satisfied, following a review of all the Departmental documentation in advance of giving evidence, that an

opinion on that matter had not been provided to the

Department by the Office of the Attorney General."

So, Mr. Towey, when you say in your Memorandum of Intended

Evidence that the Tribunal takes the view that the opinion

didn't provide the advice sought, you base that on these

paragraphs I have just read out here to you, isn't that so?

A. That was my understanding, yes.

Q. And what the Tribunal has done in paragraph 9 is that it

says it has been able to it has satisfied itself that

the opinion does not contain the advice sought because it's

got a letter from the Attorney General confirming that the

advice was not provided. And it says, just at paragraph 9,

six lines down

"The latter was achieved by obtaining from the then

Attorney General a letter stating that the advice actually

sought had not been provided."

And could I ask you then, Mr. Towey, to turn to Tab 48.

And this is the letter from the Attorney General dated 20th

December, 2002. And could I just refer you to paragraph 3

at the bottom of the page where it says the Attorney

General writes to the Tribunal and states

"There was a request for advice contained in the

Department's minute of the 24th April 1996 concerning the

restructuring of the ownership of Esat Digifone since the

date of their application and the Attorney General's

response thereto has already been made available to the

Tribunal. Mr. Nesbitt's opinion of 9 May, 1996 which was

released to the Department with the sanction of the then Attorney General on the 13th May 1996, dealt with the matter."

Now, clearly "Dealt with the matter", Mr. Towey, is a reference to the restructuring of the ownership; isn't that correct?

A. I believe so.

Q. It's not a fair question to ask you but I will ask you anyway; can you see any basis, having read the letter from the Attorney General dated 20th December 2002, how the Tribunal can state that this was achieved, namely proof that the opinion didn't address the advice sought that it was achieved by obtaining from the then Attorney General a letter stating that the advice actually sought had not been provided?

A. It seems to me that paragraph 3 confirms that the request for advice had been responded to.

Q. Could I now ask you to go to the last part of your statement of intended evidence. And paragraph 7, you state:

"I should conclude by stating that I stand by my original assertion that I, in common with my fellow civil servants, carried out my role in relation to the GSM2 licence process independently of any Ministerial or other influence. My will was not over born. I was and am an experienced civil servant. I believe that if any attempt had been made to in some way suborn me or to steer me in a particular direction

other than for objectively justified reasons, I would have recognised this immediately. I would also have utterly resisted same."

How long had you been in the Department or in the civil service, Mr. Towey, as of 1995?

A. In 1995, eleven years.

Q. And presumably you have served under many Ministers before that, isn't that so?

A. Under a number, yes.

Q. And can you give evidence to this Tribunal that you did not follow the request of Minister Lowry in respect of allowing IIU coming into this process?

A. I didn't. He didn't make such a request.

Q. Were you in some respect a captive to Minister Lowry's wishes and you did whatever he directed you to do?

A. No, I wasn't. I was a servant of the Minister which meant that, as I do now, I work to serve the Minister but that does not mean that I follow any instruction that would have any inappropriate connotations or that would entail any element of dishonesty.

Q. Were you in thrall to this Minister?

A. No.

Q. And in your opinion, you spent a year, over a year working on the second GSM process. Are you happy with the way the work you conducted in that was carried out?

A. I was happy, yes.

Q. Did you carry out that work honestly and cautiously?

A. Absolutely.

Q. Did you do it to the best of your ability as a civil servant?

A. Absolutely.

Q. Do you agree that the reason Esat Digifone was awarded the licence was because first, it put in the best bid?

A. Yes, that is the case.

Q. And secondly, there was no legal issue arising from the fact that there was a slight change in ownership through the substitution of IIU?

A. That's correct.

Q. And in fact, the only reason you, as a cautious civil servant, gave the go-ahead to the replacement, or the introduction of IIU is because you were legally advised to do it?

A. Correct.

Q. By the Attorney General's Office on foot of advice from a distinguished senior counsel?

A. That is what I understood, yes.

Q. Thanks, Mr. Towey.

THE CHAIRMAN: Mr. Fanning.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FANNING AS FOLLOWS:

Q. MR. FANNING: Now, Mr. Towey, in the course of the past couple of days that you have been in the witness box, we have principally been revisiting the events of April and May of 1996 in the lead-up to the award of the second GSM

licence to Esat Digifone. And I think you are obviously aware that the Tribunal is vicariously concerned with, not so much your own role, albeit you are presently in the witness box, but the role of the Minister in the decision ultimately to issue that licence. And what we have been particularly focused on this week is the legal advice obtained by the Department in April and May 1996 from the Office of the Attorney General and from Mr. Nesbitt.

Can I just ask you this question: Which persons, in April and May of 1996, were particularly to the fore in instigating the process of seeking legal advice for the Department from the Attorney General's Office? Who in the Department was

A. Myself and Mr. Brennan.

Q. And that was a decision that you and Mr. Brennan reached on the basis that because of the looming decision which was a decision of some importance and significance, it was appropriate that you would have legal advice to backup the decision?

A. Yes.

Q. Is it any more complicated than that, or is that it in a nutshell?

A. I think that captures it.

Q. Did Mr. Lowry have any input in the decision that you have just described on the part of the Department through you and Mr. Brennan to seek the advice from the Attorney General's Office?

A. None.

Q. Did you have any role in insisting that legal advice be obtained or that it would be prudent?

A. No.

Q. Did Mr. Lowry attend any of the meetings that have been discussed, and I know you have a difficulty in recollecting at least one of them, but can you recollect Mr. Lowry attending any of the meetings with any of the officials from the Attorney General's Office or with Mr. Nesbitt?

A. If Mr. Lowry had attended, I have no doubt I would remember that. He didn't, to my knowledge.

Q. Indeed. And did Mr. Lowry play any role that you can recall in the review or digesting of the advice received by the Department from the Attorney General's Office and Mr. Nesbitt?

A. No.

Q. You see, Mr. Lowry's position is that he had nothing really whatsoever to do with any of these matters in April or May of 1996 leading up to the issue of the licence to Esat, and that he in effect abdicated his role to the Department officials and he relied almost exclusively at that point on the then Secretary General, Mr. Loughrey, for advice. And that was Mr. Lowry's evidence on Day 311, at page 158 of the transcript. Do you have any contrary recollection Mr. Lowry?

A. I understood that Minister Lowry was anxious that the process would be brought to finality, which is an objective

which I think was understood and shared by all of the officials involved. Beyond that, I am not aware that Minister Lowry had any role in relation to the more detailed matters being considered.

Q. And for the record, Mr. Lowry's position is that he never even read the legal advice that was obtained from Mr. Nesbitt, but accepted from Mr. Loughrey that such legal advice had been obtained and, in effect, from his perspective, all that he needed to know was that it contained a green light. Do you have any reason to doubt that?

A. I have no reason to doubt it.

Q. Now, I don't want to suggest to you that Mr. Lowry was enthralled to the Department officials, but from your recollection of this period, is that portrayal of Mr. Lowry in a fairly passive role in relation to these matters consistent with your recollection of how matters were unfolding up to the award of the licence in May 1996?

A. Yes, it's consistent.

Q. And you never had any discussion with Mr. Brennan or Mr. Loughrey that indicated that they thought differently?

A. No.

Q. And indeed, consistent with what you have just told the Tribunal a moment ago, Mr. Lowry gave evidence (Day 311, page 159 of the transcript) that he had really no concern or motivation at this time other than simply issuing the licence to fulfil an announcement that had now been made

six months previously?

A. Yes.

Q. Mr. Lowry also gave evidence in response to questions from Tribunal counsel, at page 79 of the same transcript on Day 311, and I might just go through a few of the questions on that page, but his evidence was to the effect that he wouldn't have signed the licence at the request of Mr. Loughrey unless he was a hundred percent satisfied and the staff under Mr. Loughrey, I think, were a hundred percent satisfied that they were within the terms and conditions of the licence. I wonder can we have page 79 of that transcript up.

Question 234:

"Question: So I must suggest to you that the deflection defecting attention away from the issue of ownership was that very question that what had been disclosed in the application as to who the proposed, the ownership of the proposed licensee would be was now completely different to the extent that Mr. Desmond was now in there for 20%.

Isn't that the issue that you wanted attention deflected away from?

Answer: No. I am absolutely certain, absolutely certain that I discussed this with John Loughrey and obviously I had previously put him responsible for negotiating it, and I would not have signed a licence at the request of John Loughrey unless he was a hundred percent satisfied and the staff that he had involved were a hundred percent satisfied

that they were within the terms and conditions of the licence, and that all of the regulation in respect of that was complied with.

"And I got an assurance from Mr. Loughrey that that was the case because I did ask the question in relation to the composition of it, because I had previously been asked about it in the Dail. And I received an assurance from John Loughrey

Question: What question did you ask?

Answer: I asked him in the context of you recall he came to me earlier, which I have told you about. His attitude at that stage was that if it was 37:37 with 25 percent to IIU, that it would not have complied with the bid. He told me quite clearly that by bringing it to 40:40:20, that it was in full conformity with the bid and with the terms of the licence, and I accepted that from him."

Now, that's Mr. Lowry's evidence of how this issue was crystallising towards the middle of May in 1996; that Mr. Loughrey was conveying the information to him. Do you recollect matters unfolding any differently in the Department from how Mr. Lowry recalls them?

A. No, I don't.

Q. I see. So therefore, Mr. Towey, from your perspective at least, there could be no real reality to any suggestion that it was Mr. Lowry, in any active sense of the word, who required the entity who was granted the exclusive

negotiating privilege to alter its configuration. It was the Department that had reached the view that it should be a 40:40:20 configuration, wasn't that so?

A. That's what I understand, yes.

Q. And Mr. Lowry was simply following the Department's view; isn't that right?

A. Yes.

Q. He may have even shared that view, but it was a view that the Department had reached first and had, through Mr. Loughrey, brought to Mr. Lowry?

A. Yes.

Q. And as far as you were concerned, therefore in the ultimate, may I take it that the decision to issue the licence to Esat was a decision that was entirely recommended by the Department to the Minister as a decision that he ought to make?

A. That's correct, yes.

Q. And from your perspective and from the perspective of your colleagues, the Department had insulated itself, as best one can in these situations from future criticism or worse, by seeking legal advice from the Attorney General's Office, who in turn retained independent senior counsel with a particular expertise in these areas?

A. Yes, that's correct.

Q. And therefore, any decision on the part of the Minister in May of 1996 to reject the advice of the Department at the point when the licence was ultimately issued, would have

been an extraordinary decision and would have been a perverse decision in light of the advice that the departmental officials were giving the Minister at that time, isn't that so?

A. That's correct.

Q. And it would have been a decision that, on the basis of Mr. Nesbitt's advice, what's thinly veiled in his covering letter of the 9th May 1996 would have had the potential to expose the Minister and the Department to a legal action at the suit of the Esat consortium, isn't that so?

A. Yes.

Q. Wasn't that what Mr. Nesbitt was clearly getting at from your perspective when you read his letter of the 9th May, 1996?

A. I think so, yes.

Q. So it would, far from it being inappropriate for Mr. Lowry to award the licence to Esat, it would have been entirely inappropriate and reckless for Mr. Lowry not to follow the advice of the departmental officials at that time, isn't that so?

A. I think so, yes.

Q. And in reality, whilst all Ministers of course theoretically exercise a degree of discretion in making a decision, this was an announcement from your perspective as an experienced civil servant, Mr. Lowry really had no wriggle room at all in respect of?

A. That is true.

Q. And therefore, any suggestion that by issuing the licence to Esat in May of 1996, Mr. Lowry was in some way exercising ministerial discretion inappropriately or seeking to confer some benefit on Mr. O'Brien would, from your perspective, be a fanciful suggestion which is entirely without foundation, isn't that so?

A. To my knowledge, yes.

Q. And from your perspective, in conclusion, the issuing of the licence to Esat was a straightforward case of a Minister adhering to the advice of his Department and his civil servants; isn't that right?

A. That is correct.

Q. Thank you, Mr. Towey.

THE WITNESS WAS EXAMINED BY MR. O'DONNELL AS FOLLOWS:

Q. MR. O'DONNELL: I think it was as a result of the memorandum from Ms. Finn and the letter from Owen O'Connell which was later forwarded to you by Ms. Finn, that you became aware that two developments had taken place within the Esat consortium, being firstly the proposed percentage split change and secondly, the historical change in ownership?

A. Yes.

Q. And while we'll deal with the percentage split change in due course, certainly these were both matters of concern to you at that time?

A. Yes.

Q. To the Department?

A. Yes.

Q. And I think that the decision was then taken at a meeting on the 22nd April of 1996 that you would obtain legal advice in respect of this issue from the Attorney General's Office?

A. It was conveyed on the 22nd. I am sure it was taken before then in fact.

Q. Now, were you aware that at that stage, prior to the 22nd April of 1996, Mr. Nesbitt had been retained by the Department to advise in respect of the drafting of the licence, but not in relation to issues of ownership?

A. I was aware that he had been engaged for that purpose, yes.

Q. He will say, Chairman, I don't wish to preempt your decision in this, but he will say, if asked, that he was already retained on the 18th April of 1996 to advise in respect of the draft licence and the proposal to grant it, but that there was no request at that stage for him to deal with the historical issue of ownership?

A. Correct.

Q. And I think that it was on the 23rd April of 1996 that you met Mr. Nesbitt in relation to the issues in relation to the granting of the licence?

A. Yes.

Q. And it was at that stage for the first time, and he will say that it was raised at that meeting, that the issue of historical ownership was raised?

A. I think that's reasonable, yes.

Q. That is the specific issue that you mentioned in your letter of the 24th April, which is the difference between, or the apparent difference between what was stated in the application and what now appeared in Mr. O'Connell's letter?

A. Exactly.

Q. And that was a new issue?

A. It was, yes.

Q. And that was not covered by the previous letter requested from the Attorney General requesting Mr. Nesbitt to advise?

A. Correct.

Q. So a new letter issued from the Attorney General's Office in response to your request seeking that separate advice?

A. Yes.

Q. Now, I think it's clear, therefore, that from as far back as the 22nd April of 1996, the Attorney General's Office were in on this request for legal advice on the change of ownership issue?

A. That is correct.

Q. And at all stages you were, presumably, able to say to them, to Mr. McFadden or to Mr. Gormley or to anybody else within the Attorney General's Office, if you were unhappy with the information that you were getting from the Attorney General's Office or if you were unhappy with the advices you were getting from counsel, you could make that clear to the Attorney General's Office?

A. Yes.

Q. I assume that it would have been open to you, if you required further information or further clarification or indeed a further opinion from the counsel, that you could have asked those officials or other officials within the Attorney General's Office to do that?

A. Yes.

Q. Now, as it transpires, the letter sent to Mr. a letter was sent to Mr. Nesbitt on the 24th April of 1996 enclosing your letter of the 24th April and also enclosing the diagram compiled by Ms. Finn and also enclosing the letter of Mr. O'Connell of the 17th April?

A. Yes.

Q. To deal expressly and specifically with the issue of ownership. And that's, if we use Mr. O'Callaghan's booklet, Tab 26 is the letter seeking advices from Mr. Nesbitt. And that refers expressly to the the second paragraph, it refers to a copy of the relevant papers referred to in the third paragraph of "the Department's minute is also enclosed together with the new draft Article 8 of the proposed licence which is relevant. And your opinion on the issues set out in that paragraph would be appreciated."

And that is the paragraph where you over in Tab 25 where you say "I would also like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat Digifone, in particular the question of whether recent correspondence suggests changes in the

identity of the beneficial owners of the company which would be incompatible with the ownership proposals outlined in the application must be addressed."

So it could not be clearer that this letter from the Attorney General's Office, not simply from you, but from the Attorney General's Office, required specific advice on the issue of ownership which you had raised, and enclosed a copy of your letter on that very issue?

A. Yes.

Q. So this was not a request by you for advices in respect of the contents of Article 8 or the draft licence; isn't that right?

A. That's correct.

Q. This was advice separate and distinct from anything to do with the contents of the draft licence.

And, again, I think we can see that in the on the 25th October, which is at Tab 28, the Attorney General's Office made it clear at their meeting, or Mr. McFadden says, "The revised draft should not go out to Esat until the ownership issue is resolved."

And that's Tab 28, it's the minute dated April 25 of 1996.

So at that stage

MS. O'BRIEN: In fairness to Mr. O'Donnell, sir, I don't think that's a record of a meeting. I think it's a memo

MR. O'DONNELL: It's a memo from Ms. Finn to Mr. Towey.

MS. O'BRIEN: And she says "As discussed Denis McFadden advises..." I don't think there is anything in that memo

to suggest a separate meeting.

MR. O'DONNELL: Isn't it clear it wasn't made up by either you or Ms. Finn?

A. No.

Q. And wasn't it clear, therefore, that the Attorney General's Office were taking very seriously your request for advice on the issue of ownership?

A. That's correct, yes.

Q. So the extent that they were saying until satisfactory advice is given to the Attorney General and, in due course, to you on the issue of ownership, the licence is not to issue?

A. Correct.

Q. And I think that that was your position at all stages, that you weren't waiting on this advice?

A. Yes.

Q. You were waiting to see whether or not the ownership details supplied in Mr. O'Connell's letter were in compliance with the previous ownership details?

A. Correct.

Q. Now, I think Mr. O'Callaghan has taken you through the subsequent communications with Mr. O'Connell in the early days of at the end of April and the early days of May 1996, but I think a number issues are clear.

Firstly, you made it clear to him that you were getting legal advice?

A. Yes.

Q. You didn't give any undertaking to revert to him with what that legal advice was?

A. No.

Q. But can I take it that if there had been a problem which was going to be a problem for Mr. O'Connell, that you would have reverted to him?

A. Absolutely, yes.

Q. The second issue that is clear is that, already there was an awareness, presumably because of media coverage, that the issuing of the licence was already a political football and was likely to attract political and press attention, and indeed was already doing so?

A. It was known it would, yes.

Q. And so it was known that you would have to anticipate questions about the makeup of the consortia and the circumstances in which the licence was issued?

A. Yes.

Q. Do you think it was inappropriate for you to prepare to anticipate those questions and to prepare to answer them as best you could in advance or do you think it would have been better for you to simply go in unprepared to any sort of press conference or press statement?

A. No, I think it was clearly the proper thing to do, part of my job.

Q. Your job as a civil servant?

A. Exactly.

Q. Now, I think by, certainly by the 7th May of 1996, the

Department had formed a firm view on the first issue that arose in Mr. O'Connell's letter, which was the 40:40:20?

A. Correct, yes.

Q. And what was that view?

A. Well the view was that a move away from 40:40:20 was inconsistent with the bid structure, and that it was a product of the equity partner seeking to increase its holding. And the view was taken that we would issue a licence in accordance with the application at 40:40:20.

Q. Now as it transpired, you therefore didn't need Mr. Nesbitt's advice to tell you whether you should stick them at 40:40:20 or whether you could live with 37.5:37.5:25, because you had made that decision yourselves already?

A. That was taken, yes, so it certainly wasn't seen that insisting on 40:40:20 could possibly be a legal problem.

Q. Yes. But the remaining issue was of course the ownership in respect of the institutional investors then and the institutional investors now. Now, Mr. Towey, in the course of your evidence, you expressed views about the nature of the institutional investment commitment, if I can put it that way, made in the ownership applications; isn't that right?

A. Yes.

Q. And I think you expressed the views that the letters, described as letters of commitment, were in fact somewhat weak and uninspiring?

A. They were qualified, yes.

Q. I think they all indicated an interest in making an investment, but there was absolutely no binding commitment?

A. They weren't letters of binding commitment, that was absolutely clear.

Q. And that was clear of all in respect of all four of the letters written in support?

A. Yes.

Q. And I suppose you also, I think you have also expressed the view, in the course of your evidence, that there would be no difficulty whatsoever in attracting investment for this project if Esat were to succeed in obtaining the licence in any event?

A. Absolutely. Yes.

Q. So, those two issues meant that you didn't have a strong view on the issue of who the institutional investor or investors would be?

A. That's correct, yeah.

Q. But you needed legal advice to make to clarify the position from a legal point of view?

A. Absolutely, yes.

Q. You also, I think, referred to the fact that separately there was going to be a financial analysis of the IIU, but you weren't obviously seeking the assistance of Mr. Nesbitt in respect of that matter?

A. No. We had a professional accountant on secondment to the Department that was leading in that exercise.

Q. Now, Mr. Nesbitt will say that the issue of ownership was raised for the first time with him at the meeting of the 23rd April, but that he did not advise at that meeting on the issue of ownership?

A. I think that's fair enough.

Q. I think to be fair, you have no real memory of that meeting?

A. No, that is correct.

Q. But he certainly has a memory of it being raised because it was a new issue?

A. Yes.

Q. He will say that thereafter he received papers from the Attorney General's Office with the letter of the 24th April enclosing your letter and the other documents we have talked about, the Regina Finn diagram and the Owen O'Connell letter, asking him to specifically advise on this issue of ownership. And that it was in that context that he prepared the letter of advices, the letter and the opinion of the 9th May of 1996. And can I just ask you just a couple of things just in respect of that opinion? I know that the opinion has been referred to on a number of occasions, but one of the issues that I think you made clear in your evidence is that Mr. Lowry had no hand, act or part in this process of legally evaluating whether or not IIU could now become the institutional investor?

A. Absolutely, that's right.

Q. Mr. Lowry's only concern was that the licence be issued, if

it could be issued quickly, to assist him, I suppose, if I can put this way, politically, to be able to give a good news story?

A. Correct, yes.

Q. So that was only, if I could minimise it this way, that was a political imperative?

A. Absolutely, yes.

Q. But Mr. Nesbitt's covering letter, Tab 37, says expressly that he remains of the view that the Minister should not drag his feet in issuing the licence. So in that letter there is a firm expression from an independent, well respected senior counsel indicating that as a legal imperative the licence should be issued?

A. That's correct, yes.

Q. Did you feel that it would be appropriate to ignore that?

A. No.

Q. And the opinion, you have described as giving composite advice, in that it looks back at the change that was made between, if it was a change, between application and the letter of Mr. O'Connell, but it also looks forward in relation to what changes might be made in the future and how the draft licence would be operated. Were you unhappy with the nature of the opinion in that it provided composite advice?

A. No. I believe that we were awaiting composite advice that would cover all remaining issues in relation to the issue of the licence.

Q. You never went to the Attorney General's Office and said we need more clarification on this opinion, we need further written advices?

A. No.

Q. The Attorney General's Office, through Mr. Gormley or Mr. McFadden, sever suggested to you that we might able to get you more written advice in respect of this issue?

A. No, they did not.

Q. Subsequent to the receipt of those advices, I think there were a number of other meetings, at least two of which were attended by Mr. Nesbitt?

A. Yes.

Q. And Mr. Nesbitt recalls specifically attending a meeting with you on the 14th May of 1996?

A. Yes.

Q. And that was a meeting where two representatives from the Attorney General's Office, being Mr. Gormley and

MR. COUGHLAN: Just, I am not objecting, it's just that it hasn't been proved in relation to these advices. I believe you were taking instructions on it.

MR. O'DONNELL: Sorry, Chairman, what I am reading from the is the proposed statement that I will be furnishing to the Tribunal.

MR. COUGHLAN: That's not point I am making at all, sir.

If legal advices were given at that time, we have asked, through the Office of the Attorney General, if privilege would be waived in relation to those letters.

Mr. O'Donnell's client has said that they are not in a position to waive privilege at this stage; that it would require a Government decision. We got that in a letter the other day. Mr. O'Donnell said yesterday that he would be taking instructions in relation to that, that he wasn't in any way trying to inhibit the Tribunal but it would need a decision. So if advices were given, I just caution him that he hasn't waived, or his client hasn't waived privilege in relation to it.

MR. O'DONNELL: Chairman, what I should say in relation to it is, the first issue that we dealt with yesterday was the documents in which we requested earlier in the week to waive privilege over and we are awaiting a decision within the Department and it may not be necessary to go to Cabinet, but we will certainly seek to try and expedite that decision as soon as possible.

This is a separate issue which I indicated at the outset I would be hoping to lead through evidence through Mr. Nesbitt, which is that he attended meetings at which this witness was present where he asserted what he says was already asserted in his opinion, namely that the change, if there is a change, in ownership was not a matter which the Minister or the Department should concern itself with. And it is not, in my respectful submission, a matter that is covered by privilege because it is simply a repetition of what was said and an amplification of what was said by him in his opinion. But he has an express memory of giving

specific advice and giving an example to the officials from the Department about this kind of issue.

And it seems to me that it would be appropriate that this witness be allowed comment on it, given that he has already given evidence that he received advices to that effect, although he couldn't remember what meeting it was at.

MR. COUGHLAN: Sorry, sir, this witness has given evidence that Mr. Nesbitt told him that he had given him this advice. I don't mind. I just wonder if My Friend realises that he is waiving privilege, that's the only point I am making.

MR. O'DONNELL: I waived that at the start when we said at the outset that Mr. Nesbitt will be able to give evidence of meetings he attended and advices that he gave. I waived that at the outset. In the same way that it relates to the opinion that we have already waived privilege on three months ago.

CHAIRMAN: Well I think in the discussion on it earlier in the week, Mr. O'Donnell, I did indicate fairly clearly that if I were to open the door to a ruling towards hearing Mr. Nesbitt, a disposition that from long experience I would not be particularly attracted by because it seems extremely unusual, and indeed in my 40 odd years unprecedented in these circumstances, but that if I did, I would expect that all the relevant material would be to hand and that there would not be some, I am not suggesting any selective withholding, of course not but perhaps I

better leave it, it's five past one now, and I think it's

better finalised perhaps at ten past two.

MR. O'DONNELL: Very good.

THE TRIBUNAL ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

MR. COUGHLAN: I think we can just proceed.

CONTINUATION OF EXAMINATION OF MR. TOWEY BY MR. O'DONNELL.

Q. MR. O'DONNELL: Mr. Towey, I think we were about to get to

a meeting that took place on the 14th May of 1996?

A. Yes.

Q. And I think the opinion of Mr. Nesbitt, and the covering

letter was sent to you on the 13th. Do you know did you

receive it on the 13th or the 14th or can you say?

A. I can't say for certain.

Q. All right. But the 14th May was the first time in which

you would have met Mr. Nesbitt after the opinion had been

written certainly?

A. Yes.

Q. And he will say that that Mr. Nesbitt will say that that

meeting was attended by Mr. Gormley and Mr. McFadden of the

Attorney General's Office?

A. Yes.

Q. And by yourself and by Mr. Brennan and also Mr. Sean

McMahon of the Department?

A. Yes.

Q. And I think there may have been telephone communication at

some stage with Mr. Andersen?

A. Yes, I have seen a note that suggests Mr. Andersen was involved in some way.

Q. And he will say that a number of topics arose for discussion at that meeting on the 14th May, that the first was the matter of how disappointed competitors would be responded to and how the question-and-answer session with them would go?

A. Yes.

Q. And I think the Department he will say that his recollection is that the Department wanted to be proactive in responding to their questions and to allow them a debriefing in why their entries had not proved to be the winning entries?

A. Yes.

Q. And he will say that he agreed that was an appropriate thing to be discussing at that stage?

A. Yes.

Q. And he will say that after that topic was dealt with, other issues that were dealt with included specifically the issue of the ownership of the Esat Digifone consortium?

A. Yeah.

Q. And he will say that he thinks that you had his opinion by that date, but he can't be sure whether you had it or if you had it, whether you had yet read it, but he thinks he certainly had it. And he recalls specifically outlining his views on change of ownership of the prospective licensee?

A. Yes.

Q. I.e. the change between application and the change between the award?

A. Yes.

Q. And he says that he specifically recalls making the point to the Department that ownership of shares in the licensee could only be of concern to the licensing body which would in this case of course have been the Department?

A. Yes.

Q. If a change in ownership might compromise the service to be provided. Do you remember I know you said that you have you believe he said it to you at some stage. Do you have any memory? Does that bring back anything to you of is that of assistance to you?

A. I don't recall the specific meeting but I do clearly remember Mr. Nesbitt having that view so I think I probably did discuss it with him at some stage.

Q. And that's a view that he expressed to you outside of a written document, outside of his opinion?

A. Yes.

Q. And, given that it wasn't expressed at the 23rd April, it is likely that it was expressed at this meeting or at some subsequent meeting?

A. I don't know whether it was expressed at the 23rd but I know Mr. Nesbitt's view in relation to it.

Q. Yes. And he says that he expressed the view that the to that meeting at the 14th May that the competition had

produced a winner based on the entrant, the winning entrant's plans and proposals?

A. Yes.

Q. And that the merit of those plans and the feasibility of the funding plan were what drove the selection of the winner?

A. Yes.

Q. And that he indicated to you that he saw no reason why those matters would be compromised by a change in ownership?

A. Yes.

Q. And he will say that he gave an illustration to illustrate the distinction between a change of ownership that might give rise to considerations on the part of the Department, would be if a change of ownership led to control of the licensee being obtained by a party or entity that would be unacceptable in public policy terms. Do you remember that issue being discussed?

A. I remember in a very broad sense that issue but I don't remember the specific meeting.

Q. He will say, for example he will say that he gave the example that if somebody involved in criminal activities, somebody he will say that he gave the example of, for example, a drug lord, a southern American drug lord or something of that nature, that had gained control of the consortia, that that would be an event that the from public policy point of view the Department might say 'well,

that's something we will have to consider seriously because we can't, as a matter of public policy, allow that to happen'. But he said that simple changes in ownership that would frequently occur in the course of business, commercial changes, couldn't ever be sufficient to deprive the winner of the right to negotiate and take the licence. And he will say that he expressed the view that that was the type of change that he regarded the IIU entrance into the consortia as being?

A. Yes.

Q. A commercial change without significance in relation to the service to be provided and certainly not one that could possibly ever have been unacceptable from a public policy point of view?

A. Yes.

Q. And he will say that there was a subsequent sorry, can I say, did you have any doubts after the 14th May of 1996 about the nature of the opinion or the nature of the advices you got?

A. I was clear that there was no legal obstacle to proceeding with the licence award.

Q. And again the representatives from the Attorney General's Office never reverted to you in relation to those matters?

A. They never suggested that there were any outstanding issues.

Q. And you never went back to seek further information or provide further documentation?

A. No.

Q. As a matter of interest, did the Attorney General's Office or Mr. Nesbitt ever suggest to you that they needed more information or more documentation?

A. No, they didn't.

Q. Were you present at a meeting on the 16th May of 1996, which was the day in which the licence was ultimately signed off I may have the date wrong, I think it was the 15th or the 16th May of 1996 were you present at the signing off?

A. It was the 16th May and I was there, yes.

Q. Do you remember Mr. Nesbitt being present for that?

A. He was present on the evening before it, the 15th May and I remember it, why he.

Q. And do you remember him having a discussion with Mr. O'Connell about ownership and the request, the requests made by Esat in respect of ownership?

A. Yeah, I recall that the discussion related to Article 8 of the licence and finalising that.

Q. Yes. And did you have any discussions with Mr. Nesbitt in relation to that?

A. I was involved in the discussions. It was myself, Mr. Brennan and Mr. Nesbitt were representing the State, if you like, and Mr. O'Connell was representing the consortium and in touch with them by telephone, so I was involved in all of those discussions.

Q. And he will say that his recollection is that that was the

clear understanding of the State, and indeed the clear understanding of Mr. O'Connell, that the 40:40:20 split was acceptable?

A. Yes.

Q. And he will say that it was the clear understanding of the State and the clear understanding of Mr. O'Connell that the that IIU, acting as institutional investor, was also entirely acceptable?

A. Absolutely.

Q. And while there were discussions about the condition 8, it was made clear that that was going to be a forward-looking, prospective condition, that there was no attempt made by the State to try to restrict the change, if change would be, that had occurred from the date of the application to the date of the award, i.e.

A. Yes.

Q. The replacement of the proposed institutional investors by IIU?

A. This was in relation to the side letter, yes.

Q. Yes, and there was, Mr. Towey, there was no concern about this, there was no concern about this as a legal issue.

You had legal advice to that effect?

A. Absolutely.

Q. And you were happy that you were dealing with it on foot of that legal advice?

A. Clearly Mr. Nesbitt was there to confirm it.

Q. And I think Mr. O'Callaghan has already dealt with your

statement. You are happy to make it clear that you carried out your role in relation to the GSM licence independent of any Ministerial influence?

A. Absolutely, yes.

Q. I think there is a reference at one stage in a note where some comment was made about it that the note on, I think the 3rd May, was to the suggestion that the Minister was clearly of the view sorry, I think it was the 7th May that the Minister has a strong preference for 40:40:20.

A. Yes.

Q. Can you explain the use of the phrase "Minister" in that context?

A. Well, certainly in relation to that phrase the Minister did not convey that position to me. I didn't have any discussion with the Minister in relation to that issue. So that position would have been arrived at by way of discussion within the Department with other officials. And it was a very clearly held and strongly held view that a 40:40:20 was the only consortium structure that would be acceptable. And it was based on that discussion that I would have conveyed the message. As to the use of the term "Minister," I think in all probability that I used that term on the basis that it was conveyed to me that I should convey the message with the authority of the Minister. It is not it is not unknown for civil servants to act in the name of the Minister, and indeed civil servants are empowered to act in the name of the Minister, specifically

through warrants of authorisation. So it is it is usual for ministers[sic] to invoke the authority of the Minister even where

Q. usual for civil servants to invoke the authority of the Minister?

A. Yes, indeed, to even if a specific issue has not been directly authorised by the Minister. So, I can't say the exact basis on which I would have used the term "Minister." I think at that stage of my career it's unlikely that on my own initiative I invoked the authority of the Minister but what I can say definitively is that it was not a position conveyed to me by the Minister.

Q. And you have said the Minister had no contact with you of any sort in relation to the 40:40:20?

A. No, absolutely not.

Q. Is that also the position in relation to the acting by IIU as institutional investor?

A. Correct.

Q. Yes. Now, the last issue that I want to deal with is just briefly deal with the discussion that you had with Ms. O'Brien about the decision to explain the 40:40:20 and, more particularly, to explain the intervention of IIU as institutional investor.

You were referred to a number of memoranda. I think on the 15th May of 1996 a document was referred to I'll just find the tab number of it yes, there was a hand it's Book 44, tag 217, but it's a handwritten note of a of a

meeting between Mr. O'Brien and Mr. Lowry and Mr. Loughrey, and it expressly refers to the fact that "legal ownership was extremely important. All reporters will be focused on this."

It may be You may be able to read it on the small screen?

A. Okay, yes.

Q. I think that that's that is a document which refers to preparations for the public announcement of the granting of the licence?

A. Yes.

Q. And midway down, I think you may be able to read it, there is a phrase

"Must be phenomenally well briefed on bid document and tender. OO'C to be present and to answer questions.

Legal ownership was extremely important. All reporters focused on this."

A. Yes.

Q. Mr. Towey, I take it that you'd be of the view that it's not appropriate for you in the discharge of your functions to simply attend an announcement of this magnitude and to simply say, parrot-like, 'well, here is the winner of the competition and they have been awarded the licence' and then to sit down. That's not adequate preparation for a press announcement of this sort?

A. Correct, that is correct, yes.

Q. And this made it clear that it was a certain of, certainly

the parties to this discussion, that there would be press attention to this issue?

A. Yes, that was clearly known.

Q. But the fact and then similarly, at paragraph Book 44, volume 227, there is a note of a meeting on the 16th May of 1996. And I don't know if we can get that and it's in the bottom third of the page under the 40:40:20 we see item 3: "Worst possible quest" "worst probable" but it may be "possible questions."

And, again, I suspect that's a note of Mr. O'Brien but, again, that's an attempt to anticipate the kinds of questions that will be asked; isn't that right?

A. Yes, yes.

Q. And again, that was an attempt to anticipate not only the questions that would be asked but how those questions might be answered?

A. Absolutely, yes.

Q. And did you see anything wrong or inappropriate with you, as a civil servant, participating in an organised attempt to present the answers to these questions in a coherent and proper way?

A. Absolutely not. I would see it as part of my job to try and foresee what issues might arise and to carry out the necessary preparatory work.

Q. And I take it that the fact that you participated in this presentation did not in any way lead you to have any doubt about the authority of the legal opinion that you had

received or the conviction that you had that legally, you were entitled to allow IIU to act as the institutional investor in this?

A. That's absolutely correct, I had no doubt.

Q. Yes. And was that also the position, insofar as you can say, of the other members of the Department who were liaising with you and working with you on this issue, insofar as you can say?

A. Absolutely, yes.

Q. And finally, I think you have made it clear that you were not in any way overborne by any other member of the team or by any Minister in the course of your work on the GSM process or in the course of your work in relation to the negotiation and award of the licence?

A. No, I was not.

Q. Thanks very much, Mr. Towey.

THE WITNESS WAS EXAMINED FURTHER BY MS. O'BRIEN AS FOLLOWS:

Q. MS. O'BRIEN: Now, Mr. Towey, one matter first. You have just told Mr. O'Donnell that the determination that the Cabinet configuration of the proposed licensee should be returned to 40:40:20, was a determination made by departmental officials, isn't that so?

A. Yes.

Q. Well, I have to bring to your attention that, in so doing, you have altered the evidence that you gave to the Tribunal on the 20th May of 2003. And when you were asked about that matter on the 20th May 2003 and I'll read out the

transcript for you it began at question 298:

"Question: Who would have instructed you to make that call?

Answer: I can't say but, I mean, it is a phone call, I mean"

there, it's on the monitor now

"I can't say but, I mean, it is a phone call. I mean, in conveying a message like that, it would have been a message that was agreed within the Department. Now, as to who specifically would have been involved in that, I can't say for certain but I would expect it was at a very senior level."

MR. O'DONNELL: Maybe if you read out the question before it.

MS. O'BRIEN: "Who would have instructed you to make that call?

Answer:"

MR. O'DONNELL: Sorry, it's 299, I beg your pardon.

MS. O'BRIEN: I am just about to do that. If you will just let me read it. Thank you

"Question: Who would have been instructed you to make that call?

Answer: I can't say but I mean, it is a phone call I mean, in conveying a message like that, it would have been a message that was agreed within the Department. Now, as to who specifically would have been involved in that, I can't say for certain but I would expect it was at a very

senior level."

and then it goes on, 299

"Question: Because you seem to be conveying the Minister's view on this; isn't that right? I take it you would at this stage you wouldn't have been taking the Minister's name in vain?

Answer: I would have to reject that question. I don't know if the Minister was consulted on this question.

Question: I see. You don't know? You don't know whether he was?

Answer: I don't know if the Minister was consulted on this question.

Question: On this question of 40:40:20?

Answer: On this question of 40:40:20.

Question: You don't whether the Minister was consulted.

Why would this particular information, which is very important, be conveyed in an informal way rather than a letter written about it?

Answer: Well, there is I mean, there is no reason why a letter wouldn't have been written.

Question: But it wasn't; there is no note?

Answer: Okay.

Question: There is no note in the Department files of this telephone contact either. "This is a very, very significant.

Answer: I agree this is an important message.

Question: Very significant. And there was no record of it

in the Department Department files?

Answer: Yes.

Question: Again, isn't it open to the suggestion that the reason for this is to conceal it in the Department?

Answer: Well

Question: To conceal the official record, to conceal it?

Answer: There is no reason. I mean, why would concealment arise? I mean, you know, it was a clear view on the part of the Department. At this stage I believe we were awaiting legal advice and, obviously, this was a view that the Department took, and whether or not the Minister was consulted, I cannot say but, I mean, it's a position that, you know, one can objectively stand over. So the issue ever concealment is a strange suggestion.

Question why I ask it is this: That if, as you say, you were awaiting legal advice and you were putting this as the proposition to the solicitor for ESAT Digifone, first of all one might ask the question; it seems extraordinary that you would be putting such a proposition without having obtained the legal advice; and secondly, I suggest to you it is extraordinary that you would be putting such a proposition without recording it in the Department?

Answer: Yeah, as I say, it would be normal to record something of this kind."

And then it passes on to the 7th May 1995 letter.

And what I have to put to you, Mr. Towey, is that on that occasion you clearly informed the Tribunal that you did not

know whether the Minister had been consulted about this matter?

A. Yes.

Q. And that remains the position, does it?

A. Well, it remains the position that I understood at that time the Minister wasn't consulted. I understand that other evidence

Q. Well now, Mr. Towey

MR. O'DONNELL: He has to be allowed answer the question.

CHAIRMAN: Mr. O'Donnell, please let the will you kindly let the proceedings ensue? If i if there is unfairness, I will intervene myself. But really, the incidence of your interruptions is not helpful to my task.

MR. O'DONNELL: Well, I am sorry that the that you see it that way, Judge, but he was about to qualify his answer and he was, in my respectful submission, cut off. I don't know what other people thought. And I am sorry if you feel that I am intervening in an inappropriate way. But he has to be allowed to amplify his answer if he wants to do it.

He is being presented with a transcript. He has read - he is now reading it and he is now giving his answer to it.

And when he started to qualify his answer he was he was stopped and presented with another question. And I think he is entitled, as a matter of fairness, to do that. And I am sorry if you feel that it's unfair but I am representing him and I am entitled to try to represent him to the best of my ability. And I think he should be allowed to answer

the question. Perhaps if it could simply be asked again.

CHAIRMAN: We'll hear what Mr. Towey has to say on it.

Q. MS. O'BRIEN: Mr. Towey, that's not the evidence that you gave when you gave evidence in May of 2003.

A. Well, I mean, what I said in 2003 is evident from - from from the record there in 2003. And I think it's important to say that, you know, in advance of giving evidence in 2003, there was no collaborative attempt on officials in relation to the recall of earlier events. So I gave what was my recall at that time. Now, I understand that evidence before the Tribunal since then asserts that the Minister wasn't consulted on the matter and I am willing to accept that that was the case.

Q. On the basis of your own knowledge of these matters you do not know whether the Minister was consulted; isn't that right?

A. That's correct.

Q. So according when you said this morning or you said in response to Mr. O'Donnell that he was not consulted that is not based on your own knowledge. That is based on knowledge that you have acquired from other people?

A. That's my understanding now, yes.

Q. Now, I just want to go back to the evidence in relation to the meetings with Mr. Nesbitt at which it's been suggested that he gave a further view in addition to what's in his opinion of the 9th May. And I just want to confirm with you, first of all, you have to memory at all of the meeting

of the 23rd April; isn't that right?

A. Correct.

Q. So when it was suggested to you this morning by

Mr. O'Donnell that no, by Mr. O'Callaghan by Mr.

O'Callaghan that Mr. Nesbitt may have conveyed a view to

you that it - that there was no difficulty at all in IIU

coming in, we know you have no recollection of that; isn't

that right?

A. Well, I am not sure exactly what the question was but I

think the point that I was trying to assert was that as a

matter of telecommunications policy the substitution of IIU

for other institutional investors wasn't something that I

saw as being a difficulty but legal advice had to be

obtained, yes.

Q. I understand - I understand, Mr. Towey, what you are

saying as a matter of telecommunications policy but I just

want to draw your attention to the fact that the matter on

which you were seeking legal advice had absolutely nothing

to do with telecommunications policy. What it was to do

with was whether the information that you were being given

on the 17th April was consistent with the information that

you were given as to the ownership of the proposed licensee

in the application and the information which was evaluated

by you; isn't that right?

A. That's what I was seeking legal advice, yeah, that's right.

Q. It wasn't about telecommunications policy that you were

seeking any legal advice, was it?

A. No.

Q. No. Now, the meeting of the 14th May, I just want to clarify; have you any memory of that meeting of the 14th May?

A. As I have said, I don't have a specific memory, no.

Q. Well, does that mean you have no memory at all?

A. That means I can't say what happened at that meeting.

Q. Now, just one final matter that I wanted to put to you arising from your evidence that we heard yesterday.

Now, we know that this new information regarding the share structure of the proposed licensee came to your attention by virtue of the information conveyed to Ms. Finn on the 16th April by Mr. O'Connell and by correspondence from Mr. O'Connell, Mr. O'Connell having been asked by Ms. Finn to clarify matters in the letter of the 17th April; isn't that right?

A. Yes.

Q. And we know that you and Mr. Brennan received both Ms. Finn's memorandum and a copy of Mr. O'Connell's letter; isn't that right?

A. Yes.

Q. And we know what your reaction to that was, that this was new information and this was different to what you had been told in the application; isn't that right?

A. Yes.

Q. Now, we know that you decided that legal advice was required regarding this matter; isn't that right?

A. Yes.

Q. And you attended a meeting at the Attorney General's Office on the 22nd April; isn't that right?

A. Yes.

Q. And at that meeting of the 22nd April, you had with you an extract from the Esat Digifone, the main body of the application, you had a copy of Ms. Finn's memorandum and you had a copy of Mr. O'Connell's letter; isn't that right?

A. Yes.

Q. And you conveyed to the officials of the Attorney General's Office that you required a legal opinion on this matter?

A. Correct.

Q. We know you had a meeting with Mr. Nesbitt on the 23rd, but you have no recollection of it; isn't that right?

A. Correct.

Q. We know on the 24th you went to the trouble of confirming, in your letter to the Attorney General's Office which dealt with a number of other matters, that you were reiterating your requirement for a legal opinion on this matter; isn't that right?

A. Yes.

Q. Now, we know then that on the 29th April, you contacted, or there was contact between you and Mr. Owen O'Connell; isn't that right?

A. On the 29th, yes.

Q. On the 29th April. And you conveyed to Mr. O'Connell what the Department's concerns were regarding the information

that had come to light on the 16th and 17th April; isn't that right?

A. Yes.

Q. And you were conveying to him the Department's concerns in relation to all of the information contained in that letter; isn't that right?

A. Well I am not sure.

Q. Well, we'll look at we'll put up the note. It's at Book 49, Tab 126 A and we distributed copies of it yesterday.

MR. O'DONNELL: It's Tab 30 in Mr. O'Callaghan's book.

MS. O'BRIEN: It's Tab 30 in the book we were looking at this morning. I don't know if you have it there with you, Mr. Towey.

"To: File

From: OOC

"Fintan Towey

"Trying to hammer down paper trail as between beneficial ownership as in bid and as now proposed to determine whether there are any differences. Legal people involved.

"If Telecom interests held Esat Holdings and radio by Communicorp asset base of Communicorp reduced. Doesn't know whether it would be a problem.

Suggested meeting"

as I indicated to you yesterday they were the comments that Mr. O'Connell made when he was reconstituting the note

"I believe this to be a reference to my having suggested a

meeting."

Below that: "Premature"

- and again Mr. O'Connell's comment

"(I believe this to be Mr. Towey's response to my suggestion of a meeting)

Question is whether company to be licensed is the same as company that applied. Has to be assured from a legal perspective."

"Haven't reached decision as to whether there is any difficulty, or anything they want done differently."

"Warranties regarding ownership and financing. Identifying institutional investors. Means ownership at date of licence."

Then "OO'C no difficulty with that at all."

do you see that note there?

A. Yes.

Q. And isn't it quite clear that that you are conveying to him that you are considering, firstly, the restructuring information that you have been given regarding the proposed licensee, Esat Digifone?

A. Yes.

Q. And secondly, the restructuring of Mr. O'Brien's interests, his radio and his telecommunications interests?

A. Yes.

Q. And what you are saying is, that you haven't reached a decision as to whether there is any difficulty or anything they want done differently?

A. Yes.

Q. And that is the communication from the Department to Mr. O'Connell in response to his letter of the 17th April; isn't that right?

A. Yes.

Q. Okay. Now, we know then that you the Department wrote to Mr. O'Connell on the 1st May; isn't that right?

A. Yes.

Q. Setting out that you required more information, more detailed information and it was essential that that information was provided to you; isn't that right?

A. Yes.

Q. And that was information in relation to ownership that you were looking for?

A. Yes.

Q. And the ownership of the proposed licensee; isn't that right?

A. Yes.

Q. And that was a letter which you carefully prepared, Mr. Towey. You drafted it yourself but you took the precaution of sending a copy of the draft to the AG's office the evening before, and we saw that?

A. Yes.

Q. You then met, four or five days later, with the Esat Digifone people on the 3rd May, you remember that?

A. Yes.

Q. And you reiterated that you required all of this

information on the 3rd May; isn't that right?

A. Yes.

Q. Okay. We then come to the 7th May and you recall that I brought all of this to your attention yesterday it's Tab 35 in Mr. O'Callaghan's book and again this is you telephoning Mr. O'Connell and you have accepted that it was your telephone call to Mr. O'Connell.

"Fintan Towey:

"Minister V strong preference for 40:40:20 at time of licence. But understands need for flexibility afterwards. Will take Esat Holdings subject to no substantive difference plus outline in writing."

Do you see that?

A. Yes.

Q. And as you agreed with me yesterday, in that you are addressing both the restructuring of the proposed licensee and the restructuring of Mr. O'Brien's interests; isn't that right?

A. Yes.

Q. And what you are doing is, I suggest to you, Mr. Towey, you are going back to Mr. O'Connell to indicate what the position is; isn't that right?

A. That's correct, yes.

Q. Now, what I have to suggest to you, Mr. Towey, is that in indicating to Mr. O'Connell that the Minister had a very strong preference for 40:40:20, you were in fact telling him that the Minister had no difficulty with IIU; isn't

that right?

A. I certainly, on the basis of that record, didn't indicate that there was a difficulty with IIU.

Q. No, so what I have to suggest to you, Mr. Towey, is that in reality, this whole ownership issue had come to a conclusion on the 7th May when you telephoned Mr. O'Connell and you said

"Minister very strong preference for 40:40:20, will take Esat Telecom Holdings"

and that thereafter the Department drew a line in its own mind under the ownership issue. And what I have to bring to your attention, Mr. Towey, again to enable you to comment on it, is that what I have to suggest to you is that that is what explains firstly, why you never got the information that you were looking for on the 1st May, you never got the information which you reiterated you were looking for on the 3rd May at the meeting, and the information which Mr. O'Connell had prepared in a draft letter but which, on his evidence which has been brought to your attention before and on which you commented, that he removed, either at the request of or at the - or with the acquiescence of the Department. And that, secondly, that is what explains why, when you received Mr. Nesbitt's opinion and letter of the 9th October, which I have to suggest to you on its plain and ordinary words, does not address the ownership conformity issue, that that did not register with either you or with the Department?

A. Well, I understand your hypothesis but I don't agree with it. I think I have covered pretty much all of the elements of it already.

Q. Okay. Thank you Mr. Towey.

THE WITNESS THEN WITHDREW.

MARTIN BRENNAN, PREVIOUSLY SWORN, WAS EXAMINED BY MR. HEALY

AS FOLLOWS:

CHAIRMAN: Thank you, Mr. Brennan, already sworn.

Q. MR. HEALY: Mr. Brennan, I think I'll just read your Memorandum of Intended Evidence into the record. Are you happy with that?

A. Yes.

Q. You say "It's now 13 years since the events being inquired into at this stage of the Tribunal's work actually took place. This fact has obviously implications for the quality of the recollections of those involved. For my part, I may have said in evidence several years ago that my recollection of the licensing process of the GSM were, even then, less robust than my recollections of the competition phase. This was the because the Regulatory Division was the de facto licensing authority and the Development Division's role was one of giving every assistance. in addition to that, my personal agenda had moved on and in 1996 I had a very heavy commitment to preparation for the EU presidency in the second half of the year which required me to travel to Brussels practically every week, eleven times in the period April to June.

Mr. Towey led for the Development Division in this matter.

He had earlier been assigned to me following promotion on the strong recommendation of Mr. Sean Fitzgerald.

I quickly came to appreciate his clear mind, sharp intellect and analytical act, to the extent that our working relationship was informal but a strong one. I am happy to stand over the matters we dealt with together.

The matter currently at issue seems to be the opinion of Richard Nesbitt, SC."

Perhaps a bit of an understatement, it seems.

"I note the Tribunal's indication that the opinion must speak for itself but I do not accept that it falls to be considered in isolation from the context which led to its creation. This context includes"

and you make a number of bullet points. First

"that Mr. Towey undoubtedly asked the appropriate question in his letter of 24th April 1996, namely:"

"I would also like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat Digifone. In particular the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed.

"Second, that the Attorney General's Office was the conduit for seeking the opinion and returning it to the Department.

"Third, that there were several consultations with counsel

during the relevant period.

"Fourth, that counsel was also advising on matters relating to the licence itself and the statutory regulations.

"The net position is the question whether the ownership then on the table had any negative implications for the award of the licence was raised. An opinion was furnished and then discussed with the senior counsel and the representatives of the Attorney General's Office. At the end of this, I formed a clear view that this issue, i.e. the difference, if any, between the ownership at the time of the competition and the ownership at the time of the licensing, presented no obstacle for the issuance of the licence. I believe that the other people involved in this analysis and discussion were of the same view. I should add that I cannot see how a fully informed or fair and proper view of this matter can be taken by selectively taking evidence from myself, Mr. Loughrey and Mr. Towey without also taking evidence on this issue from Richard Nesbitt, SC. I also believe that Richard Nesbitt remembers well the context in which this opinion was given. I cannot offer much by way of specific evidence about the opinion and surrounding discussions, although I do remember attending a meeting or meetings with counsel in the Department late in the evening. Again, I believe that Richard Nesbitt, SC attended this meeting and will have a clear recall of the issue raised and the answers given.

"It now appears that the Tribunal takes the view that the

opinion may not directly respond to the question asked. I can confirm that I, for one, had no questions in my mind after discussing the opinion with Richard Nesbitt and Fintan Towey.

"I also believe it should be borne in mind that the opinion was passed to us as non-lawyers by two experienced officers of the Attorney General's Office. I believe that they were fully aware of all the issues. I believe that if they, or any other civil servant, had raised doubts or queries as to the nature of the advice given by counsel, it is certain that they would have raised any such doubts or queries by seeking further clarification through the appropriate legal channels from counsel.

"I should say that there was no need for further instructions. I was clear that even if there had been a change in the makeup of the ownership of the consortium between the entry into the competition and the licensing stage, this had no impact on the entitlement of the consortium to be awarded the licence and could not prevent the Department from awarding the licence to the consortium in question.

"The stand out feature for me is that what was happening was a team of civil servants doing what they do best: Crossing the T's and dotting the I's before finally issuing the licence. I wish to state emphatically that there was no involvement whatsoever by the Minister, Mr. Lowry, in this work."

"The issue of haste in issuing the licence crops up here and there in the documentation around this episode. What I have to say about that is that it was then about eight months since the result of the competition had been announced. I was myself impatient at the delay in finalising the licence. My concerns were more about the reputation of the civil service in terms of customer service, focus on outcomes and generally doing things professionally. That said, it was a first for Ireland, very important, and essential that it be right. I was also aware that the consortium was becoming concerned at their ability to launch in time for a Christmas market lift off, which was crucial to early success. The consortium was clearly making representations accordingly to anyone who would listen."

"There may be some indication arising from the work of the Tribunal that the consortium may by then have more immediate and critical concerns but I was blind to any such concerns and took the Christmas market case at face value. If the Minister, or for that matter, anyone else, had additional knowledge about the affairs of the consortium or one of its members and I am not for a moment suggesting that he had I can state categorically that I was never made aware of such knowledge, nor did I see then or now any influence on the outcome."

"I should conclude by stating that I stand by my original assertion that I, in common with my fellow civil servants,

carried out my role in relation to the GSM2 licence process independent of any Ministerial or other influence. My will was in no way overborne. I was and am an extremely experienced civil servant who is now retired. I believe that if any attempt had been made to in some way suborn me or to steer me in a particular direction I would have recognised this immediately and I would also have utterly resisted same."

Mr. Brennan, I am hoping to avoid developing any sort of an adversarial stance in relation to this. I want to explain at the outset what where I am trying to go or what I am trying to get at so there will be no question of trying to trap somebody or anything like that.

in dealing with this matter when the Tribunal were first looking at it, the Tribunal had access to an opinion of Mr. Nesbitt, and the Tribunal's view of the opinion, which was canvassed in this room, was that it didn't contain the answer to the question posed by Mr. Towey in his letter of the 24th April.

What the Tribunal has now been informed is that either it does contain the answer or that, at least, the civil servants at the time were provided with the answer or provided with an explanation of the opinion which provided the answer. And what I am trying to establish is; did that really happen? I am not suggesting you are telling lies, I am saying 'is that what really happened' or is this what people are focusing on by looking back at the events of

1996 from now? I want you to understand where I am coming from.

Now, I take your point that your recollections of the licensing phase and you describe that as the phase from October '95 onwards are less robust than your recollections of the competition phase, which is earlier, but a phase in which you were more intimately involved.

And I take your point that looking at this context is important, at least in light of what is I think now being suggested in evidence there may be a wider context than the mere document itself.

In your statement I think you have, at least for me, framed the starting point. You say that Mr. Towey undoubtedly asked the appropriate question in his letter of the 24th April 1996, namely, "I would also like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat Digifone. In particular the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed."

Now, if I can call that question the 'compatibility' or the 'conformity' question, and the recent correspondence refers to the material that, if you like, landed up on Regina Finn's desk?

A. Yes.

Q. The letters setting out the different entities to be involved and the different share configurations. So there was a change of entities; the four investment institutions were going, IIU were coming in and there was a change in the holding of IIU as compared to the four entities; they were going to hold 25% in fact they already had 25% at that stage and Esat Telecom Holdings we'll call it Esat Holdings for short were going to, or indeed had at that stage Mr. Coughlan says I should say 'Communicorp', I think it's probably easier if I say Communicorp, then we get less nomenclature confusion. Communicorp had 37.5 percent and Telenor had 37.5 percent, making in total 100 per cent, and that's what I'll call the 'configuration issue'.

Now, the appropriate question, therefore, was whether those two issues, or those two new pieces of information, suggested there was any lack of compatibility or lack of conformity between the information you now had and the ownership proposals contained in, I think it's condition 3, is it, condition 3 of the RFP?

A. Yes.

Q. You go on in your memorandum to say that you got an opinion, you discussed it with senior counsel and the representatives of the Attorney General's Office. Maybe I should be more clear about that. You say and you use the passive voice you say 'an opinion was obtained, it was discussed with counsel and represented as the Attorney

General's Office'. Are you referring to yourself or the Department in general?

A. I am referring to both. I don't have a clear recollection of the content of meetings that we had but I have a very clear recollection of Mr. Nesbitt being physically present in the Department on at least one, and perhaps two, occasions and being available to us for advice and, in fact, had at one stage indicated if we wanted further contact he was available at the end of a phone as well.

Q. All right?

A. So we had an active engagement with Mr. Nesbitt at that time.

Q. All right. Would I be right in thinking that that active engagement, which I think went on until very late one night at one of the meetings you may have described, related to issues arising over Article 8 more than anything else?

A. As I say, I don't now, and I don't think I did when I was here before, have much recollection of the actual content of those meetings and there is no point in me trying to having heard Fintan's evidence in recent days, having been through all the transcripts of the last whatever number of years trying to say that I know things that I don't recall.

Q. Yes. You were saying that at the end of this you formed a clear view that this issue, i.e. the difference, if any, between the ownership at the time of the competition and the ownership at the time of the licensing, presented no

obstacle to the issuance of the licence.

"I believe that the other people involved in this analysis were of the same view."

So, can I ask you: Can you remember did you read the opinion? I am not suggesting it would have been necessary for you to read it but do you remember if you read it?

A. I couldn't contemplate circumstances where I would not have read it, but I can't say that I recall reading it back then.

Q. All right. So, when you say 'At the end of this' you mean that at the end of a process that involved you and other people in the Department and contact with counsel, you had formed a clear view either, can I suggest to you, because you had read the opinion and because of what you read in it, or because of the impression conveyed to you by people who had read it and who were present with the author of it, or a combination of both?

A. Well, trying now to reconstruct what was going on back then, it's clear that we asked the Attorney General's Office for advice and the Attorney General's Office engaged counsel and the advice came back to us from the Attorney General's Office. And they knew the questions we asked and they presumably read the opinion as well. And we I think we were entitled to take it if they raised no red flags and if we had ongoing discussions which confirmed the view that we thought was in the opinion that we didn't have a difficulty.

Q. Yes? Sorry, go ahead?

A. Now, I would like to say, just for a moment, you raised the configuration issue. To my way of thinking, then and now, and I believe Mr. Loughrey's way of thinking as well, that the 37.5:37.5:25 was the step that was so far out of accord with the bid that it was unthinkable that we would have adopted it. And we didn't need legal advice. We just so decided.

Q. So, recapping to some extent on what you said and, I think, you laid emphasis on, whether or not you had read the opinion, you had an opinion from counsel retained through the Attorney General's Office, you had asked questions, you got an answer leave aside the detail for the moment as far as you were concerned there were no red flags coming up.

Now, what I want to ask you about is a meeting you may have seen this document in a number of different places, but it's a note of a meeting on the 13th May with Mr. Owen O'Connell, Mr. Fintan Towey, Mr. Knut Digerud. I'll give you a book of the documents. I think they are in a book now called book 86. It's at Tab 8 of book 86. You have seen it in other places?

A. Yes.

Q. I am not going to go through the whole of this note. I think it's been mentioned already in the course of these particular group of sittings. It records a minute or it contains a record of a meeting held at 12.30 p.m. on

Monday 13th May, as far as I can see, in your office at 44 Kildare Street. And the subject was the grant of the licence. You were getting close to what we now know was the day you granted it three days later, isn't that right, or the launch, the official launch three days later.

And if you go to page 4 of the minute we'll see

Mr. O'Connell has recorded

"MB said that it was Minister's wish to announce the grant of the licence at a press conference co-attended by Digifone Esat Digifone. Great stress was repeatedly laid on the need to prepare extensively and exhaustively for this press conference and it was stressed that the journalists present would have been briefed in a hostile way by others."

This clearly being a reference to unsuccessful consortia. Obviously that was the sort of understandable preparation you were making at that time.

If you go onto the next page, on to page 5, you'll see that you are dealing in more detail with this and I don't think anyone has disputed Mr. O'Connell's note.

"MB" meaning Martin Brennan "stressed the need to have a number of" and interestingly these are in quotation marks "definite, clear and acceptable statements for use at the press conference and he outlined a number of "obvious questions" as follows."

Now, that does sound like your turn of phrase, doesn't it, "definite clear and acceptable statements"?

A. Yes, I think so.

Q. Yes. And then you outline a number of questions of which the first is:

"Is this the same consortium as that which applied?"

That was a shorthand for what I call the 'compatibility' or 'conformity' issue; isn't that right?

A. Yes. And there is an interesting side to this that came up this morning but, obviously, I was aware of it and would have made the point anyway, is that we were specifically precluded from very early on in the process from naming the financial institutions that were referred to in the original application. So that presented a difficulty for us and it was clear that it was better for the consortium to deal with that aspect than for us to deal with it in those circumstances.

CHAIRMAN: I think that arose yesterday.

Q. MR. HEALY: Yes, I can understand your point. Where you were in effect saying 'This was your baby, you'd have to deal with it'?

A. Yes.

Q. Now, you had just got, by this point, what I would describe, if we take your memorandum of evidence as something to go by, you had just got a definite, clear and a legal opinion, acceptable statement that the restructuring was not a problem and you had the opinion of the Attorney General; is that right?

A. Yes, yes.

Q. And this is, for me in any case, where I think questions do arise because the first time I saw that document I would have thought you didn't have a definite, clear and acceptable statement. You had an opinion which, to my mind, was not dealing with the matter. Now, the question I have for you is: Why wouldn't you have told Mr. O'Connell 'Look, we have got an opinion of counsel on this, this is not a problem. We have got an opinion through the Attorney General's Office, this is not a problem?

A. Well, since, as I say, I don't have particularly detailed recall of any of these meetings, this is Mr. O'Connell's shorthand note of what transpired. I have no idea what transpired. I don't know now whether I said something like that to him or not. I don't know whether it occurred to me to do so or not.

Q. Well, I can well understand that. It's difficult to remember precisely what happened, notwithstanding what some of the evidence we have heard what happened this long ago but one of the, I suppose, remarkable thing about this inquiry is that, to a considerable extent, the Tribunal has relied on a lot of Mr. O'Connell's extremely careful notes of various telephone conversations. And can I put it to you this way, that there are other documents which you have heard reference to already today, in which this whole question of ownership being a problem, a political football, a presentational problem, if you like, an optical problem. Now, if Mr. O'Connor O'Connell

had been told that you had an opinion on it, having been told that you were already looking for one, wouldn't that have been music to his ears and wouldn't you have expected him to record it?

A. This meeting took place, I think, on the 11th May, which is probably is the 11th the day after?

Q. I think I think you might be wrong in that but I'll check it. It's the 13th May?

A. So it's within a couple of days of us getting the opinion.

Q. Yes?

A. I am not sure at this remove whether we had fully formed our final conclusions in relation to it or not. I am fairly clear that we were tending towards final conclusions. So I don't know whether that was the appropriate time, if ever, was the appropriate time to have that kind of an exchange with Mr. O'Connell, and it's just too far back now for me to remember it.

Q. But trying to examine the documents, such as they are, wouldn't that seem to suggest and I am not I am canvassing the proposition with you on and the hypothesis wouldn't that seem to suggest that, if that is the case, that whoever had read the opinion Mr. Towey presumably was the first person to get it didn't find it to contain a clear, definite or acceptable statement or otherwise it would have been mentioned. It beggars belief, doesn't it, that it wouldn't have been mentioned?

A. Now I would come come at this from a totally different

perspective than from where you are coming at it, right?

The idea that the civil servants would have gotten a legal advice and have decided that it didn't answer the question and then decided to carry on regardless is so far outside of my sphere of contemplation that I can't just get my head around it. You are talking, in the case of the three witnesses you are having this week, you are talking about 70 years, at that time, of loyal service to the State where our integrity was never called into question. Yet the Tribunal legal team seems to be disposed to assume that we would conspire like that, which we didn't.

Q. We are ad idem up to this point, Mr. Brennan, in that I am asking you a question based on just such a proposition. I am suggesting that you didn't have a legal opinion that said this or at least you hadn't got it on the face of the document at that time. Because Mr. Towey surely, or you, or whoever else had read it or found out about it, would have said 'Look, we told you you were getting an opinion, we have got one, this is fine, this is not a problem. Now, presentation is another matter, but this is not a problem.

Can I put it this way let's not fall out about it but do you agree with me is that a reasonable question for me to ask why the matter wasn't referred to there? We'll go on to other meetings later on but maybe it's the same point?

A. I can see how, taken in isolation, the Tribunal legal team

could tend towards the conclusion that the opinion, on its face, in isolation, didn't answer the question. What I'm trying to get across is that there was a background context. There was ongoing discussions and, in my opinion, sufficient in paragraph 2, page 2 or whatever it was, of the opinion for us to say 'There is not an issue here'.

Q. Well, I am going to have to try, it's going to be very difficult to do, I appreciate that, to have to expect you to remember everything, to try to establish when that view may have crystallised, if I can put it this way. But, if what you are saying is right, and if what I am saying is right, that if you had this opinion you would have communicated it to Mr. O'Connell, it must follow that by the 15th that view hadn't crystallised?

A. Yes.

Q. 13th I am sorry that view hadn't crystallised?

A. I am not sure.

Q. All right?

A. I mean, it's clear that, for example, Mr. Nesbitt was in the Department on the 14th, so therefore, some legal discussions were still going on, you know.

Q. All right, okay.

A. I think the ultimate conveying of the fact that we were happy to run with the consortium as then before us is in our willingness to issue the licence.

Q. I accept that, of course, that's true, but the reason I am pursuing this matter is because I don't see the strong view

that you are expressing now and that Fintan Towey expressed and that I think Mr. Loughrey, to some extent, will express, I don't see that reflected in the exchanges between you and the other side of this issue who were presumably equally concerned about it. Look, we can come back to it again. Maybe if we look at all the documents you might have a better perspective on it. Again I don't want to be dealing with them one by one and suggesting that this was some kind of a trap here.

Can we go on to if you go to the next, I think it might be the second next document if you go on to document in Leaf Number 10. As you know from your earlier evidence, Messrs. William Fry's produced typed versions of these memoranda. The written memoranda is at the back of this particular tab, the printed one is at the front, and if you go to the third page, you come to a passage I want to draw to your attention, this is a note of, it looks like a meeting between you, Mr. Towey, Mr. Buggy and Mr. O'Connell, and you are aiming for, I think, Friday, as what looks like a launch date.

But on that page you'll see "MB" same"

or 'say', whichever

"Minister needs our help. Whether same project as one competition."

That seems to suggest that at that meeting once again this issue of compatibility and conformity was being raised.

And, again, my surprise is that nobody at that stage said

'it's not a problem'.

A. Now, what I see happening here is planning a PR event and identifying questions that will arise in the PR event.

That's not the same as saying that we still had doubts.

What we are saying is 'this question will inevitably arise and it will have to be answered and it's your baby'. 'It's your baby' as you said before.

Q. But isn't it surprising that you wouldn't have told the man who was, clearly, obviously worried about this?

A. If we were

Q. Wouldn't you have told him that you were quite clear in your mind and you had the benefit of an opinion from the Attorney General sorry, from counsel provided to you by the Attorney General?

A. My view is the fact that we were within 24 hours of issuing the licence and we were talking about issuing the licence, was the answer to that question, you know?

Q. You are aware from the evidence that we heard this morning that Mr. Towey informed Mr. O'Connell that you were getting legal advice on this?

A. I recall that, yeah.

Q. So, I take it there was no question of either an exercise of discretion or a lack of candour on your part, if you were telling him you were getting legal advice, you were presumably going to tell him you had got legal advice that it was all okay. I mean, is there any reason why you wouldn't tell him?

A. I just don't have an answer to that question. It's not something I have contemplated before now; why didn't we? Did we? I don't know.

Q. I am suggesting to you that any ordinary person in a situation like this, where you are dealing with either a presentational or a legal issue, would have told Mr. O'Connell; if you did have a clear legal opinion or a clear, definite and acceptable view on this, that you'd have told him about it?

A. Sometimes you don't have to say everything black and white. I mean, Mr. O'Connell was aware that we were getting legal advice. He was aware, because he was directly involved, that we were evaluating the financial horse power of IIU and its owner and so on. And I think he could have concluded that if we were still talking about issuing the licence, we'd got over all those hurdles and, therefore, I don't think it was critical one way or the other whether we had to verbalize that at the meeting.

Q. Could I ask you to jump much further forward for a moment to the 6th December 1996, in Leaf 13. This is a letter that I think you were involved in the drafting of for Mr. Alan Dukes as Minister as the then Minister for Transport, Energy and Communications to Mr. Robert Molloy. And it was a letter arising from controversy concerning ownership and investment in Esat Digifone. And in the letter, which I think you either drafted or you certainly participated in the drafting of it?

A. Absolutely, yes.

Q. 6th December, 1996.

"Dear Barry"

"There appears to be considerable confusion abroad about the precise situation regarding ownership and investment in Esat Digifone. I hope the following information will clarify the matter for you.

"The Esat Digifone application was on behalf of a consortium owned as to 50% each by Telenor Invest AS and Communicorp Group Limited (the holding company for Esat Telecom). The application disclosed that, if it was successful, 20% would be placed with financial investors.

A list of potential investors was submitted, all of whom are "blue chip" institutions. The Minister and Department are specifically precluded from naming these but there was no room for doubt as to either their bona fides or their financial capacity.

"I can, however, confirm that the names being speculated upon in the last few days were not on this list.

"At the licensing stage several months later, Esat Digifone was in a position to announce that it had placed the 20% with IIU Nominees Limited and it was certified to the Department at that time that Mr. Desmond was the sole beneficial owner of the 20%. Adequate evidence of his capacity was disclosed. Mr. Desmond is still the exclusive beneficiary of the IIU shareholding.

"On the 19th April when the Department had held a press

briefing, the fact that it was not in a position to give the final, definitive information on the placement of the 20% minority shareholding, may have reduced the clarity of the exchanges. My information is that when the licence was issued shortly thereafter the precise situation was clearly stated.

"If I can be of further assistance to you within the constraints of the binding confidentiality arrangements I would be delighted to do so."

Now, we have been over aspects of this letter before, I don't want to go over them again, but one of the features of that letter that I certainly wasn't aware of when that matter was last raised in evidence was that you believed at that time that you had a legal opinion that fully supported the restructuring of the ownership. And it strikes me as strange now that you never mentioned that when this matter was last canvassed in evidence, that there was absolutely no concern about this because you had a legal opinion from the Attorney General dealing with it from counsel provided by the Attorney General?

A. Are you suggesting that the existence of legal opinion didn't arise in my evidence back whenever it was, seven or six years ago?

Q. In dealing with this you never said 'sure, what was the problem? I had a legal opinion'?

A. I don't I can't I can't explain that now. I mean, that's a letter that I wrote seven months after the event.

Q. Yes.

A. To try and diffuse some of the political furore that was still going on.

Q. Yes?

A. And I was trying to be as accurate as I could, without disclosing information I wasn't entitled to disclose, and so on. And I don't see what your issue is, to be honest.

Q. I am surprised that you wouldn't have said, either in your evidence, said that the letter was representing a situation for which you had sound legal support. That's the first thing. And the second thing, I was surprised that the Minister wouldn't have said it, that you wouldn't have said is it here in your letter, 'there were restructuring but it was within the ambit of the rules and it was perfectly appropriate, legally, because we got an opinion to that effect'?

A. I don't know. I am confused a bit about where this is all going in the sense of, it's kind of you see, the whole line of inquiry now seems to be based on a kind of perfect world scenario, that everybody wrote a note of everything. And life wasn't like that when we were too busy, you know.

Q. I accept that. But what is being suggested now, if I can use that proposition, Mr. Brennan, is that at this time it was a perfect world, that you had an opinion?

A. I am talking about a perfect world in terms of having the time to document everything, to revisit historical documents and writing letters and so on. We were just very

busy people.

Q. Yes?

A. I mean, in December of 1996, I was over and back to Brussels with Mr. Lowry in early December, with Mr. Dukes in mid and late December right up to Christmas Eve, trying to negotiate a politically contentious postal directive and this was just something that had to be done in the same time-frame.

Q. This was a fairly serious, controversial issue in Ireland at the time and this was the new Minister who had taken over after another Minister had left in somewhat colourful circumstances; isn't that right?

A. Yeah.

Q. Wouldn't it have been a comfort to this Minister had he been able to say that you had a legal opinion supporting this proposition?

A. Well, all I can say about that now is that when Mr. Dukes arrived he sought to be briefed, and was briefed thoroughly, on the GSM process and on the controversy surrounding it. What level of detail that happened at, I don't recall now but I do know that he was interested in it from the day that he arrived, that Mr. Loughrey and I, and maybe others, had long discussions with him, I am not sure whether we had a written brief or not at this remove, but he was briefed as to blow by blow what happened in the GSM process. So whether we needed then to put that into a letter to Bobby Molloy or whether I should have thought to

remember to refer to it when I was giving evidence some years afterwards and so on, I just can't relate to that now.

Q. Let's just look at the opinion for a minute, I suppose to try to divine what part of the process you formed a clear view, as you said, at the end of. Now, I think the opinion is in Book 85, tab H, I think, the last one. I am just trying to turn up Mr. Towey's letter or minute, if you like, of the 24th April.

I now want to look at, just briefly, the letter of the 24th April 1996 from Mr. Towey to Messrs. McFadden and Gormley, and it's at Leaf 143?

A. I have a copy of it in front of me.

Q. 193 book great but just for the record anyway, it's at Leaf 193 of Book 40- 43. You are presumably very familiar with the letter, you have familiarised yourself with it recently. It seeks a number of different pieces of advice. It says:

"Further to our meetings of the 22nd and 23rd April I enclose the following:

a report on the Department's assessment of the compatibility of the conditions of the draft GSM licence and Directive 96/2" and

"A consolidated text of Section 11 of the"

I suppose that's 'Posts and Telegraphs'

" P&TSA"

A. 'Services Act'

Q. "Services Act of 1983 incorporating amendments contained in SI 45 of 1992 and amendments proposed in the transposition of Commission Directive 96/2."

"I have also, as requested, consulted internally on the question of consulting the European Commission in relation to the terms of the licence. The Department is of the view that apart from the time constraints, it may not be prudent to invite the Commission's scrutiny at this point. The question of compliance with the provisions of Directive 96/2 will no doubt fall to be examined in detail by the licensee in due course, possibly in consultation with the Commission."

So those are the first two matters which he draws to his attention in connection with the transposition of Directive 96/2.

Then he goes on to say, and this is the passage you have already alluded to in your Memorandum of Intended Evidence:

"I would also like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat Digifone (relevant papers were provided at our meeting on 22nd April). In particular, the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed. Before the ultimate award of the licence it is now considered that it would be preferable to seek warranties in relation both to

the beneficial ownership of Esat Digifone and the financing package for the project. This is considered prudent, given the nature of the concession being given to the company.

Perhaps you would advise, however, whether such a requirement could be challenged by Esat Digifone as an imposition not envisaged in the competition process or otherwise unreasonable on legal grounds."

So there seemed to be two questions there. One is what I call the 'conformance' or 'compatibility' issue and the other is whether Esat Digifone could be tied in relation to beneficial ownership in the licence; isn't that right?

A. Yeah.

Q. "Finally, I will provide a brief for counsel on the proposed disclosure procedure as soon as possible but would, as discussed, appreciate your early opinion on the question of whether debriefing should proceed in the shadow of a complaint to the Commission regarding the process."

We know that that latter matter was handled right away by advices that came the next day, I think, or something like that.

A. I don't think it was actually finalised in those advices.

Q. Oh, I appreciate that?

A. It was part of the ongoing dialogue.

Q. All right, okay. Well then, the response to the letter came in the form of an immediate response to part of it by a letter of the next day or thereabouts. And then you had the advices of the 9th May. And I want to turn to those

now:

In the opening paragraph sorry, sorry

A. I have the opinion.

Q. Sorry, the 'opinion' I called it the 'advices'.

The opening paragraph seems to be an introductory paragraph in which Mr. Nesbitt says

"I have now had the opportunity of considering the complicated issues which arise relating to the introduction of a Statutory Instrument to take into account the effects of Commission Directive 96/2/EC and to settling the terms of the draft Esat Digifone telecommunications licence which the Minister wishes to issue."

So he is dealing firstly, I suggest, with the introduction of a Statutory Instrument to take into account the effects of the directive that's the transposition question, I suggest and secondly, he is dealing with the terms of the Esat Digifone telecommunications licence. Now, speaking as somebody who read this document a long time ago and not again until recently, that seems to me the body of it may suggest a different view but that seems to me to set the agenda and the agenda is two matters at that stage. At that stage in any case, there are only two matters on the agenda, would you agree with that? I am looking at the face of the document, Mr. Brennan. I know that you have a wider view and I am going to invite you to provide your wider view. I am solely focused on the document for the moment, for the reasons I stated at the

outset. As I said I am not trying to trap anyone?

A. Okay, the first the first paragraph suggests that that's what he is about to opine on, yes.

Q. Now, he then deals, like a lot of barristers promising to deal with things in a certain order, and I am sure I am no better myself, he deals with the draft licence first as opposed to the transposition question, if you follow me?

A. It's interesting, by the way, that there is only one side heading in the entire opinion even though it covers more than one matter.

Q. Correct, correct. Mr. Nesbitt, I am sure, is a very busy man. The first item is the draft licence and what the opinion says is

"I have dealt with the draft licence by taking the draft of the 2nd of May 1996 and indicating where I think there should be amendments. The balance of the document can remain in its current form."

So what he is saying is 'where I suggest amendments I recommended changes, otherwise I leave it as it was in the draft of the 2nd May'. We are agreed on that.

"Attached to these advices are the amendments I suggest.

You should also include in the licence the subheadings that exist in the articles. I did not trouble to repeat them in the amendments I have suggested."

"The terms of the amendments I have suggested to Article 1, 2, 4 and 5 should be self-explanatory."

There'll be no more comment on that. He assumes that what

he has included by way of draft amendments would speak for itself. We are agreed on that?

A. Yeah.

Q. Then he says: "The amendments I suggested to Article 8 are more substantial."

So he is starting now to deal with amendments to an article that he believes are more substantial and I suggest that what he is referring to is that they do not speak for themselves and he is going to explain.

He says: "Article 8 imposes conditions material to the ownership of the licence and the management of the licence service, most particularly the ownership of the shares in the licensee company. I view these matters as being particularly sensitive and an area where the Minister's hand is substantially tied."

Now he is saying he is identifying the ambit of Article 8, and this applies I think we are both in agreement to the situation that will obtain after the licence is granted, the conditions under which ownership will be regulated during the lifetime of the licence?

A. I agree that that was the purpose of Article 8.

Q. Yes?

A. But I would have had a kind of a layman's view that there was some breakdown in logic if you applied a different regime the day before you issued the licence and a different regime the day after.

Q. I'll come to that?

A. And I think I said that a long time ago here.

Q. I'll come to that later. You would, I take it, agree with me that we were dealing with two situations here. Up to the day of the launch, you were dealing with conformity in the context of the RFP and the conditions imposed on the competitors who sought to be evaluated for the licence; isn't that right? That's one set of conditions?

A. Yes.

Q. Nothing to do with the EU. As long as the condition as long as the competition didn't fall foul of EU competition rules relating to GSM2 competitions and the like, that had nothing to do with Article 8, whatever the substantive point you mentioned a moment ago might have prompted you to opine? You say "I view these matters" -

Or he says, sorry

"I view these matters as being particularly sensitive as an area where the Minister's hand is substantially tied. The Minister agreed to give the licence in question prior to the introduction of the Commission Directive 96/2/EC.

However, as a matter of law I am forced to conclude that if the licence documentation"

"if the licence document includes terms and conditions which are not sustainable under the directive and licensee"

"the licensee, in my opinion, is free to apply to the courts to have such non-conforming provisions struck down."

So I think that up to this point he is saying that if you issue a licence at the moment, although you agree to issue

it, whether you did or not, the fact is you said 'We'll issue it to the fellow' or 'We'll negotiate with the fellow who wins the competition', between that date, the conclusion of the competition and this date, matters had been overtaken by an EU Directive, and I think what Mr. Nesbitt is saying, is that you were bound by this directive which is overtaken your activities.

A. Mmm.

Q. So your licence is going to have to conform to that. If you put in a condition in that that offends the directive, you are going to find yourself in trouble. We're agreed on that?

A. Yeah.

Q. He then goes on to say: "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."

Now, I suggest that what he is referring to there is that if there are changes of ownership to the licensee in the course of the operation of the licence he is in other words, referring to whatever regulation will be applied to the operation of the licence, that's my view of it

A. Well, I think it's clear that the Tribunal's legal team takes the view that this can only be read in a forward-looking way. But I am saying as a consequence of having discussions around this advice, it's not

unreasonable for us to have concluded that the first three sentences here can be taken to be retrospective as well as forward-looking.

Q. I see?

A. And it's also probably of interest to say that in his final short sentence "It is also a real issue in the mind of the public" - that's certainly not forward looking.

Q. I see.

A. So, that to me, is a clue that the advice was meant to be generic and not fixed in time one way or the other.

Q. Can we get back to the exercise I am trying to perform?

A. Yeah, sure.

Q. You are telling the Sole Member that I have a view but that it's not informed by the discussions and the other matters that inform your view. I want to explore that. I accept what you are saying. I am trying to distinguish between what the document, on its face, suggests, without the benefit of any discussions. You can tell me about the discussions later

A. No, just take - just taking the first sentence, Mr. Healy.

"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."

I cannot see how anybody could conclude that that could only be interpreted in the context of Article 8 because,

given the dialogue we were having, it wouldn't be unreasonable for us to conclude that, 'yes, that comes at the question we are asking'?

Q. I am going to approach that in two ways, Mr. Brennan. I want to bring you back to the start of the paragraph again, or, if you like the start of the previous it depends yeah, the start of the previous paragraph.

"The amendments I suggested to Article 8 are more substantial. Article 8 imposes conditions material to the ownership of the licence and the management of the licence service"

Now, what that is about is the ownership of a licence, who are the agents that own it and how are they running the service? And I think we agreed I don't mind if you want to disagree that what that dealt with was the regulation of the operation of the licence?

A. Yeah.

Q. And that that is to be distinguished from whatever rules, RFP or otherwise, affected the conduct of the competition.

That's my view of what that says in plain language. In plain language.

A. I think at this stage I know what your view is. My difficulty is I don't particularly agree with it. I mean, we were faced with, having asked a question

Q. Well, it's not as simple as that. Sorry, sorry, just a minute, it's not as simple as that.

MR. O'DONNELL: You're interrupting him now. Just let him

finish.

MR. HEALY: No, no. Listen, I don't want to be interrupted. I have made my position absolutely clear. I am not trying to trap anyone. I think you know exactly where I am going, Mr. Brennan. I want to stick with the plain words. Of course you want to tell me what it means to you in the context of the discussions you had. I want to separate the discussions out because it's the first time I ever heard of them is in this room or in documents we received in the last few weeks. I want to try see why, as I told you, this matter was never referred to before. Now, I made it absolutely clear where I am going. I am trying to examine the document on its face?

A. Yes, you are saying that the question of the existence of a legal opinion was never referred to before?

Q. No, no, no, not at all.

A. Okay.

Q. It was referred to repeatedly by the Tribunal on the basis that it didn't answer this question at all. Mr. Loughrey agreed in the witness box it didn't answer the question?

A. Well, I have a view on that.

Q. That's fine. We'll come to that. That's what I want to explore.

Following on from what I was saying a moment ago, the paragraph that I just opened to you,

"The amendments I have suggested to Article 8 are more substantial"

and I went on to the next sentence. In the next paragraph Mr. Nesbitt is explaining the principles behind what the future operation of the service under the licence should be regulated by. That is what he is doing in this paragraph, I suggest, on the plain words. These are the principles by which the Minister should be guided in addressing the question of ownership under Article 8. On the plain words?

A. That's - it's clear as I said already, that's a view you take and it's not one I share right now.

Q. All right?

A. And it's also of interest to me that I appreciate that various counsel around this room have their own agendas, if I might put it like that.

Q. Yes?

A. But I was very interested in the line of logic that was informing the questions being asked by Mr. O'Callaghan this morning.

Q. Yes?

A. He is equally, I believe, a senior counsel and he takes a different view to yours.

Q. Yes?

A. And at the end of day it's up to the Chairman to decide which is correct.

Q. Yes. I want to make it clear that what I am endeavouring to do - I made it absolutely clear to you - I don't have an agenda, I have told you what I am trying to do, I have told

you what I am trying to divine, and I suggest to you that

look, I think we may come back to it in the morning,

because I am not going to

A. well, the problem is you are trying

Q. I am not going to I am not going to I am not going

to belabour you with it now

A. well the problem is

Q. but look, I want you to understand where I am coming

from precisely.

A. But you are trying actually you are trying actually to

get me to agree to a proposition that there is only one way

of reading this paragraph and I am sorry, I just don't

agree.

Q. No. All right, okay. All right. Okay. I am suggesting

to you that as an intelligent man, Mr. Brennan, you could

not read those two paragraphs the way you are reading them

unless somebody else suggested to you and I am not

suggesting anybody unless the lawyer involved suggested

to you that's how they should be read?

MR. O'DONNELL: Is that being put now to this witness?

Because that wasn't put to either Mr. Fintan Towey or it's

never been suggested to anybody else. This is the first

time that it's now being suggested that the reason why Mr.

Towey and Mr. Brennan have expressed this view, he says the

lawyer who wrote the opinion has put this interpretation on

the opinion and has told these witnesses that that's what

it means. That's the first time this has been put. And I

well it is astonishing that in the three days that Mr.

Towey was giving evidence that it wasn't put to Mr. Towey and there is absolutely no evidence of it whatsoever. But we'll leave that aside.

MR. HEALY: Sorry, I just have to interject

MR. O'DONNELL: That proposition wasn't put to Mr. Towey and I am objecting it to being put

MR. HEALY: sorry, the opening remarks made by Mr. O'Donnell

CHAIRMAN: I think it was one accredited to you, Mr. O'Donnell, which was a different one.

MR. O'DONNELL: With respect, Chairman, it's the other way around, if I might say so and I regret having to address it in this way. But whenever I have tried to intervene to try to understand why a question is being repeatedly put to a witness, I have been told that I must allow the flow of the evidence to continue. When I have tried to intervene on a number of occasions, you have indicated that you found my interventions offensive. I regret that and I don't wish in any way to cause offence to you, Chairman, but I I have an obligation to protect my client. But what I am objecting to is that a point is being put to this witness that the reason only a personal who wasn't intelligent could take the view that this opinion says what Mr. Brennan and Mr. Towey says what it says, and also what is now being put to him is that the only reason he can say that it says this is because the lawyer who wrote it told it to him.

That casts a slur, not simply on Mr. Brennan and on Mr. Towey, but it is an extremely serious slur to cast on Mr. Nesbitt. And I think, obviously they'll get their chance to ask Mr. Nesbitt this question in direct evidence if the Tribunal sees fit to call him, which now appears to me, with the greatest of respect, inevitable, but I am objecting to the fact that Mr. Towey was in the witness box for three days and it wasn't put to him in any way that this was a thesis that the Tribunal had and now it appears to be a thesis

CHAIRMAN: But the whole please bear with me isn't the whole dimension that has been introduced by recent developments to the effect that on foot of discussions emanating from in or about March of this year, it is the view of the Department that the Tribunal should have regard not merely to the content of the dual opinion, but to occasions in which it may have been supplemented or clarified by oral dealings with Mr. Nesbitt?

MR. O'DONNELL: With the greatest of respect, Chairman, that's not actually correct. What we have said is that as a result of the adverse findings, and I am not going to go into the details of the findings, but there are certain findings that are adverse in some respects to the Department. As a result of that, it was clear that the view taken of the Tribunal in respect of the response to the opinion was such that it was important that the Department waive privilege in respect of the opinion and

the letter and the advices given, and that's what we did.

Now, as a result of that, the Tribunal has seen fit, quite properly, to call the three senior personnel from the civil service back to give evidence in relation to that. And the purpose of their evidence, as was said in the Opening Statement by Ms. O'Brien, is to explore what they thought the opinion meant and how they responded to that opinion as to what they thought it meant.

In their witness statements and in evidence so far, Mr. Towey and Mr. Brennan have both said that they thought that the opinion answered the question about the historical change of ownership; they have both said that. There is a dispute going on. Mr. Healy is trying to persuade Mr. Brennan that it couldn't have said that and Ms. O'Brien, I submit, in broadly the same terms, tried to do the same with Mr. Towey. They didn't agree and that's the way it is.

But what I am objecting to is a slightly different issue, which is not just simply about the meetings that may have taken place at around the time of the opinion in 1996.

What is now being suggested is that the reason Mr. Brennan is giving this evidence about his opinion is only - about the opinion - is only because he was told that that's what it meant by his counsel and that he would have to be an unintelligent man to have thought otherwise and that's

MR. HEALY: I think I should respond to that, sir, because I have no wish to cast any aspersion whatsoever on My

Learned Friend Mr. Nesbitt.

What I am endeavouring to suggest, in the light of facts opened to this Tribunal for the very first time by Mr. O'Donnell in the course of some remarks he made the day before yesterday, were that Mr. Towey, and I gather other witnesses, in the course of a discussion with Mr. Nesbitt, learned of discussions that they had had with Mr. Nesbitt much, much earlier contents of discussions they had had with Mr. Nesbitt much, much earlier in around the time of the opinion and that, as I understand it from this witness, the contents of those discussions are critical to informing his understanding of the opinion.

What I am seeking to suggest is that without those discussions or the contents of those discussions, the opinion couldn't mean what it said. That's all I am trying to do. I am trying to examine those two separate propositions. I am not suggesting for a moment, and I did not suggest that the reason this witness is saying this is because he was put up to it by somebody, I am saying what has informed his analysis, I am suggesting, can only be what was said; that on the face of the document you couldn't reach the conclusion he is reaching. And I am offering him an opportunity of commenting on that.

I am obviously not going to go on with it at this stage but I do want the witness to understand where I am coming from so he will see why I am seeking to distinguish between what's on the plain words on the page and what he believes

based on discussions he had. And what I will try to do

subsequently is I will try to examine those discussions.

That's all. Obviously I am not going to do it today now.

CHAIRMAN: That's surely the way we should proceed,

Mr. O'Donnell.

MR. O'DONNELL: I have no difficulty with that, Chairman

CHAIRMAN: And I can assure I am not trying to be

needlessly irascible with you.

MR. O'DONNELL: I don't want to be dogged about it unduly,

Judge, but I have a job to do. But what I am concerned

about is was concerned about is the suggestion, and

we'll reflect on it overnight, is the suggestion that

Mr. Brennan held one view of what the opinion said in 1996

and as a result of consultation with counsel he takes

MR. HEALY: No

CHAIRMAN: I don't think that's the case.

MR. O'DONNELL: Well, if the Tribunal if the Chairman

doesn't if the Tribunal lawyers say that's not what they

are suggesting, then that certainly ameliorates matters.

But maybe we can reflect on where Mr. Healy is coming from

and where we are all going to overnight.

CHAIRMAN: We'll see. It might make sense, with a view to

seeing if Mr. Brennan's evidence, who I do not anticipate

being as long because he wasn't as much involved in these

matters in the second half of the process, it seems to me a

half ten start might make some sense in trying to

MR. O'DONNELL: We will be hoping to conclude Mr. Brennan

tomorrow because he has difficulties next week.

CHAIRMAN: Well, I am conscious there is also a matter involving Mr. Loughrey, so that's why I propose half ten tomorrow. Is that acceptable to persons? Very good.

THE TRIBUNAL ADJOURNED UNTIL THE FOLLOWING DAY, FRIDAY, THE 12TH JUNE 2009 AT 10.30 A.M..