

THE TRIBUNAL RESUMED ON THE 16TH JUNE 2009 AS FOLLOWS:

MS. O'BRIEN: Mr. Callaghan John Loughrey, please.

JOHN LOUGHREY, PREVIOUSLY SWORN, WAS EXAMINED BY

MS. O'BRIEN AS FOLLOWS:

CHAIRMAN: Thank you for coming back, Mr. Loughrey, please sit down.

MS. O'BRIEN: Morning, Mr. Loughrey. Thank you very much.

A. Good morning Ms. O'Brien.

Q. I wonder do you have a copy of a memorandum of your intended evidence with you in the box?

A. I do. I have to fish it out of my bag; it may take a moment. Is it possible, rather than foostering here, Ms. O'Brien, that another copy could be provided?

Q. Yes, of course. No problem with that at all. I'll hand one in to you now. And just to let you know, Mr. Loughrey, I intend to follow the format that was previously followed when you gave evidence and I'll open your Memorandum of Intended Evidence to you, give you an opportunity to confirm its contents, and then there is just a very small number of matters that I propose to taking up with you then?

A. That sounds fine.

Q. Now, you have informed the Tribunal that "The then-Department of Transport, Energy and Communications had the sustained support of the Office of the Attorney General throughout the whole of the opening of the telecommunications market in Ireland and notably for

the introduction of competition into the mobile phone sector. The Attorney General's Office provided expert legal guidance on a range of legal matters from 1993 onwards and, in particular, from early 1995 on issues arising from the decisions of the Government to sponsor a competitive process to select a candidate to be granted exclusive negotiating right leading to a possible licence to compete with the incumbent monopoly, Eircell. Notably, among issues arising, was advice how to best avoid threatened possible infringement proceedings due to apparent incompatibility of the State's approach with EU competition policies and the related capping of the proposed licence fee."

You inform the Tribunal that

"After Esat Digifone was awarded exclusive negotiating rights, the Office of the Attorney General provided legal advice on new regulations, the draft licence and the Department's response to the challenge by the Persona consortium. In all instances, the advice furnished ensured that the Department was able to position itself correctly and prudently".

You have informed the Tribunal that

"The Attorney General's Office decided how best to handle any request for legal advice and, at its own discretion, commissioned advice from outside counsel. The Department, however, had no contractual or formal, institutional relationship with such counsel. Any formal legal clearance

came via the Attorney General's Office relying or not or outside counsel".

A. And Ms. O'Brien, not to stop the narrative, perhaps that's something we can return to?

Q. Yes, of course. You have informed the Tribunal that "In April 1996, ownership issues emerged in the context of the licence negotiation with Esat Digifone. While the Department had already determined that the allocation of percentage ownership as between the promoters of the Digifone consortium would revert to those percentages indicated in the original bid proposal, a written request was made to the Attorney General's Office seeking advice on the matter. Given the evident familiarity of the Attorney General's Office with the dossier and the involvement of the office in resolving, in a very efficient and professional way, so many of the outstanding licence issues, and their full awareness of the critical path leading to the formal award of the licence on the 16th May 1996, you would have presumed, on an implicit legal obstat on the ownership question."

You have informed the Tribunal that you now "Have had an opportunity to read and take on Board the reality of what was happening with the legal input on ownership issues from the 16th April 1996 to the 16th May 1996"

and you appreciate the opportunity to expand on this issue and give a more considered response.

While you had, indeed, access to the Departmental papers in 2003, you had, in reality, only opened a small fraction of the voluminous material and mainly those with which you yourself were directly involved.

In the context of giving evidence, you did summarily scan some of the papers around the issue of legal clearance.

You have informed the Tribunal that you were less than fully informed, which should have been apparent from your replies when counsel for the Tribunal first introduced the topic which you had not anticipated during your evidence on day 188. Counsel pursued the issue from question 209 to question 217 inclusive. In attempting to be as helpful as you possibly could to the Tribunal, you opined on the topic. You did, however, pepper your responses to Mr. Coughlan's questions with words and phrases that the redolent of a less-than-fully informed analysis and specifically a new quote. First question 209:

"Answer: I have no recollection of that meeting. I only read this for the first time when it was brought to my attention now for the Tribunal..."

and you had have emphasised the word "now" and you refer to it as your own emphasis.

Second, question 210:

Answer: "I am just interpreting this as I stand."

Third, question 214

Answer: "Once again is"

and you have noted there stet

"I don't believe I have ever seen this letter."

Finally the fourth quotation you refer to is your answer to question 215:

"In perusal of the papers, that appears to be the case."

And you had emphasised and noted that it was your own emphasis on the word 'appears'.

And you have informed the Tribunal that, clearly, your responses were, at best, a limited reaction on your feet

A. Ms. O'Brien, perhaps once again just to make two short points to deal with that.

Q. Yes?

A. First of all, there is no inference, Mr. Coughlan was fully entitled to pursue those questions, regardless of what my responses were and, secondly, perhaps we could come back to the actual replies at the time and how that part of what the Chairman once described as 'a very civilised discussion' between myself and Mr. Coughlan, how that terminated.

Q. Yes, I fully intend, Mr. Loughrey, you need have no concerns, I am going to open all of the transcripts to you and give you an opportunity to comment on the evidence that you gave back in February of 2003.

Now, you have informed the Tribunal very recently, the Chairman's ruling of the 20th February 2008 was brought to your attention. You were puzzled by the very measured view on page 5, that you testified that you were satisfied that an opinion on the matter had not been provided, given your

tentative and qualified responses. You have informed the

Tribunal

CHAIRMAN: And I think, just, Ms. O'Brien, at the end of

the various quotes, I think Mr. Loughrey proffered a

summary to the effect that your response was, at best, a

limited response, a reaction on your feet?

A. That's true, Chairman, thank you.

Q. MS. O'BRIEN: At paragraph 8 you informed the Tribunal that

counsel for the Tribunal subsequently appeared to give your

evidence on this matter unwarranted significance in

deciding not to pursue the topic with Mr. Towey on the 20th

May 2003, day 220. Mr. Towey requested the initial meeting

of the 22nd April 1996 on the ownership issues and wrote a

follow-up letter of the 24th April 1996.

A. Could I just once again if

Q. Yes indeed

A. Really, nothing may turn on that, but I was struck at

the time that, Chairman, you didn't issue a direction but

you did mention in the context that that would best be

handled, perhaps, when Mr. Towey comes along and that

was whether with guidance to counsel or not but in

the event that never seemed to happen. Now, I am not

saying anything turns on that but it did strike me at the

time as surprising.

Q. Again, I think that is referred to in the transcripts

Mr. Loughrey?

A. Yes

Q. And rest assured, we will look at all the transcripts.

A. Okay, fine.

Q. Now, you have informed the Tribunal at paragraph 9 that the issue arose again on the 27th February 2003, (day 191) when Mr. McGonigal, senior counsel, introduced the legal clearance element. In response to Mr. McGonigal, question 71, you responded:

"I had sight of that"

and in square brackets you refer to

"[Richard Law Nesbitt SC's advices of the 9th May 1996 very recently]."

You have informed the Tribunal at paragraph 10 of your memorandum that at that point in giving evidence you asked for the Chairman's guidance on an aspect of protocol but, more importantly in this context, John O'Donnell SC on behalf of the Department stated

"I don't think Mr. Loughrey would be able to add very much."

It should be noted that you did not demur with this assessment, as you did several times in your evidence, when counsel for the Department intervened on your behalf.

You have informed the Tribunal that in a direct follow-up Mr. Coughlan referred to the Attorney General's letter on the subject and the Chairman stated

"It is possibly more appropriate when Mr. Towey comes to give evidence."

I think that's

A. Apologies. I jumped the gun on my comment. You are right, you are right.

Q. You state further: "I am not sure that this happened subsequently and, indeed, there are witnesses, and witnesses not previously called, who participated directly in the meeting of the 22nd April 1996, and many of the subsequent interactions on the legal clearance issue right up to the 16th May 1996 namely; Regina Finn, Fintan Towey, Martin Brennan, John Gormley, Denis McFadden and Richard Nesbitt. None of those have been asked the questions you have been asked, the latter three, given the previous assertion of legal professional privilege.

You have informed the Tribunal that now that the State has granted a waiver of its privilege and the legal advices provided to the Department in May 1996 can now be adduced in evidence, certain issues arise for you personally.

While these advices were not clearly led in evidence in 2003 during relevant public hearings of the Tribunal, they were adverted to on several occasions. The circumstances and meetings which are the context in which the advices were understood were not dealt with in evidence. You now wish to avail of the opportunity to give a more considered response.

You have informed the Tribunal that your evidence is that in authorising the go-ahead for licence signature following your analysis of the financing by IIU Nominees Limited, which thereafter you refer to as 'IIU', of the critical

first year cash requirements, you had been aware, having been briefed orally on progress, that legal advice had been sought by the Department on ownership issues and that by the 16th May 1996, there were no obstacles to signature of the licence. While you were not briefed as to the content of senior counsel's advices of the 9th May 1996, or indeed the accompanying cover letter of the same date, you took decisions on the basis that no red flag had been raised.

In the event, there was no legal obstacle to the granting of the licence.

You have informed the Tribunal that you have now had the opportunity to analyse the professional input of

Mr. Nesbitt, both in his advice dated 9th May 1996 and the accompanying covering letter. These issues first arose in the questioning of Mr. Brennan on the 4th February 2003.

You accept fully, of course, the Chairman's assessment in his ruling of the 25th February 2008, that this was the "Sole reference to the contents of the opinion."

for ease of reference, the assessment of counsel for the Tribunal was, day 178, question 29:

"Although it doesn't seem that the opinion that was eventually obtained or pursued dealt with that issue, it seemed to deal mainly with Section 8, if you have seen the advice."

You have informed the Tribunal that Mr. Healy's assessment is one with which, on analysis, you can, in part, agree.

Mr. Nesbitt's advice dealt mainly, but not exclusively,

with the post signature ownership regime to apply and, notably, the introduction of prudent safeguards for Ministerial discretion. Mr. Nesbitt also covered other ownership dimensions which gave comfort in the granting of the licence.

You have informed the Tribunal that Mr. Nesbitt's letter of the 9th May 1996 was, in effect, a clear approval of early signature on the basis of the then consortium of 40% Telenor, 40% Esat, and 20% IIU. Mr. Nesbitt had a sustained involvement in the process and had been briefed by the Attorney General's Office on the issue arising from Mr. O'Connell's letter of the 17th April and Mr. Towey's letter of the 24th April 1996. Mr. Nesbitt's letter, together with the accompanying advices, was forwarded to the Department by the Office of the Attorney General with a covering letter dated 13th May 1996. This letter, in referring to Mr. Nesbitt's advices, indicated no apparent reservation and thus, clearly, gave the institutional approval of that office to those advices. Had you had sight of this letter, you would have taken from Mr. Nesbitt's response a clear approval of the consortium makeup before licence signature.

A. Ms. O'Brien, perhaps lest I forget it later, just a general point; in my career I have had a lot of dealings with the Office of the Attorney General and, indeed, where they commissioned outside counsel. Now, I have seen examples of all of the following: It's axiomatic that outside

counsel's opinion can be rejected by the Attorney General, and I have seen instances of this; I have seen instances of looking for a second opinion; I have seen instances where outside counsel's opinion can be partly accepted and, on a reiteration, accepted in full; and I have seen and it's more likely but I have seen, obviously by definition, the third category where outside counsel's advices are accepted without a quibble. But there is no automaticity about this and I took comfort from the fact that that letter indicated no reservation, no quibble whatsoever.

Q. Well, what we'll do, Mr. Loughrey, if you don't mind, is, in the course of your evidence, we'll look at that letter,

A. Okay.

Q. Because, in fact, I had noted carefully in reviewing your Memorandum of Intended Evidence that you had made that point so I thought it would be appropriate in the course of our further discussion that we actually refer to and look at that letter and you'll have every opportunity at that stage to explain that position further if you wish.

A. Thank you, Ms. O'Brien.

Q. Now, you have informed the Tribunal, just returning to paragraph 7 of your memorandum and taking it up from there that you clearly recognise that the advice dated the 9th May 1996 was addressing for the most part the Article 8 wording. However, you were firmly of the view that the first complete paragraph of page 2 of the advice provides retrospective cover for the general thrust of your own view

of the essential elements of the winning bid. It would also have provided, you believe, sufficient cover, had it been required, for the proposed 37.5:37.5:25 percent allocation on the basis of proportionality.

You have informed the Tribunal that this would have been clear this would have been, for you, a clear green light for the makeup of the consortium in general and the participation of IIU in particular. You also believe you would have taken sufficient comfort in the collateral cover on the essential core of the winning bid and the central idea that the Department retained a certain discretion on ownership so long as the delivery of services would not be compromised.

You have informed the Tribunal that, as Secretary of the Department at the time, your view was that you certainly did not need legal advice to insist, as you had already done, that the consortium reverted to 40%:40%:20%.

Equally, you did not require advice on the eligibility of IIU to participate as a third party investor and you had no difficulty in accepting IIU as such an investor. What you did require and sought was clear evidence that IIU could provide cash as and when required in the critical first year and thereby address the then-financial frailty of Esat. In other words, you wanted to be clear that the consortium could deliver the bid, which it did.

In conclusion, you have informed the Tribunal that the Department's granting of the licence was correct, and the

consortium awarded the licence was fully and demonstrably compatible with the winning bid.

And then, finally, you have also reaffirmed that Minister Michael Lowry exercised no influence of any kind in the substantive decisions on ownership in the period leading up to the granting of the licence. There was no hint this.

You have the professional and interpersonal antennae and experience which comes from a career in the civil service and the post of Secretary. Also, you knew, and know, the officials involved and, to assist the Tribunal, you can confirm without doubt that there was not, nor has there ever been, then or now, the slightest intimation of any sort from any source that there was such influence.

And that, I think, concludes your Memorandum of Intended Evidence. And I suppose I should ask you just to formally confirm that the contents of that are correct?

A. Yes, I do.

Q. Now, Mr. Loughrey, I think the Tribunal has noted from your Memorandum of Intended Evidence that what you are saying was that the evidence which you gave to the Tribunal regarding the legal advice furnished to the Tribunal in February of 2003 was, if you like, ill-considered evidence and that you hadn't had an opportunity to fully analyse the position and that it should have been apparent from your evidence that that was the case. And I think that, perhaps, summarises a little crudely what the thrust of your evidence is; would that be correct?

A. I believe you are being charitable, Ms. O'Brien. I believe, perhaps, I should have been better informed but as I wasn't as my evidence was, at all stages, that I had been briefed on what was happening but papers did not come across my desk is I perhaps should have anticipated the questions, as quite correctly Mr. Coughlan put to me, but I did not do so. But there is a subtlety here that, if we could go over that evidence, and I'd be pleased to explain something that I thought might have been, sort of, apparent from the run of evidence, but clearly may not have been picked up.

Q. Yes. Well, that's what I propose doing now, in fact. Firstly, Mr. Loughrey, is to refer you to the passages from the transcripts where the matter of this opinion and this issue of ownership conformity

A. Yes, that's fine

Q. Which, as we know, arose initially as a result of Mr. O'Connell's telephone call with Ms. Finn on the 16th April, and the letter from Mr. O'Connell which was received on the 17th April. And what I propose doing is referring you to each of those passages to give you an opportunity to comment.

Now, the first passage I want to refer you to,

Mr. Loughrey, was on day 188 of the public sittings, which was Friday the 21st February of 2003. And just to put that in context, you had, in fact, commenced your evidence on the previous Friday, the 14th February, so you were well

into your evidence at that stage?

A. Absolutely.

Q. Now, the extract commences on page 95 and it concludes on page 101. And again, just to put that evidence in context, what you had been referred to by Tribunal counsel before leading in to question 205 on page 95 was the press conference that had been arranged and had taken place with civil servants on the 19th April?

A. That's fine, and I don't believe we have to dwell on that today.

Q. Not at all, I don't need to, but I am just simply put it into context for you.

A. No, okay, that's fine.

Q. And it commences at question 205:

"Question: How, did you I should ask you this: What did you do next?

Answer: After the press conference?

Question: Yes.

Answer: I think what I would have almost certainly have done is sit down with Sean Fitzgerald, probably as the first port of call, but I have no direct recollection.

Certainly with, perhaps, Martin Brennan or Sean McMahon.

In other words, is, to make sure that whatever we did on the licence was now done in a very careful way. In other words, we would have had to say is how - where do we stand from, say, a legal standpoint? If it hadn't been done already it may well have been done already because all

the people were talking about from Mr. Towey to Mr. Brennan were people well able to act on their own initiative if it hadn't, I would have said 'let's clear our lines with the Attorney General's Office', for instance, in other words to see how we are fixed and to get advice on moving forward in such a way that we could regularise the situation, but that we wouldn't be open to challenge, either from the consortium for whatever reason, for instance, or ultimately, I suppose, to fireproof ourselves against possible litigation down the road. I would have had that in mind, surely.

Question: That seems perfectly logical as to did you turn your attention to the question of when this, what has been described by Mr. O'Connell as the change of ownership, occurred or when it dated from?

Answer: I didn't, and perhaps I should have, Mr. Coughlan, but I didn't I may have, and this is by sort of"

I think it means there rather than 'spatching'

"Snatching at two documents, also imagine that it was happening at that time because looking at Document Number 1,"

which I think was the Regina Finn note that she had prepared of her conversation with Mr. O'Connell

"It still seemed to be that things were happening, they had the diagram but the IIU role wasn't exactly nailed down, and then the certainty of Mr. O'Connell's letter, that may have perhaps given the impression it was happening around

that time but I have no recollection of saying 'Let's get to the bottom of this and find out what happened on the far side of the counter'. Perhaps I might have done that, but I didn't in the event.

Question: Okay?

Answer: I suppose, just a rider to that, in addition to that, obviously, once I read Mr. O'Connell's letter, it was clear that these were the facts we had to deal with so I suppose I was looking forward, in a sense, 'how do we plan to get around this problem?' Rather than looking backwards to how did it happen? I suppose, in the classic phrase I was saying "We are where we are, let's fix this problem now." But it might well have been a wise thing to do at the time to look back to see how it happened.

Question: There was a meeting with members of the Attorney General's Office, I think on the 22nd April, 1996. And you see the note. I think it is at Divider 192. There is a note of the meeting?

Answer: I have no recollection of that meeting. I am sure I was told about it at the time, you know, we have stuff underway with the AG's Office, but really, I only read this for the first time when it was brought to my attention now for the Tribunal.

Question: Yes. And really I think I can bring you straight to paragraph 5 of the note of the meeting. And it says: "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 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 that's Mr. Towey's note of the particular meeting, and that was copied to Mr. Brennan and Mr. McMahon and Ms. Finn?

Answer: I suppose paragraph 5, in the circumstances, might sound almost, almost a little neutral, but in fact I would say all the information I am just interpreting this now as I stand was being sent to the AG's Office and, no doubt, as they have been an intrinsic part of the whole process, would understand the significance of it, and I am sure they did."

A. Could I stop you, just - just in case we don't come back to that is

Q. Yes, indeed, of course

A. There I am beginning, perhaps, to rationalise but the nihil obstat even before the critical questions I am beginning to rationalise the nihil obstat which I gave subsequently in the same session.

Q. Yes, and in fact that's entirely consistent with all of the evidence you already gave in February 2003, Mr. Loughrey. There is no matter to be raised on that.

"Question: Of course the Attorney General's Office was not being told how all of this happened and what had occurred during the process, I am sure?

Answer: I am sure that's correct.

Question: Because?

Answer: Because we didn't know ourselves, we hadn't or, I suppose, just to repeat myself, our emphasis was on putting it right rather than to see how it happened in the first place.

Question: Yes. And that was the view of the Minister as well?

Answer: I am not sure how involved he was. Clearly, I would have said I would have expressed in no uncertain terms to him that I had thought what I had thought of the events and my determination. Let me put it this way; if he had opposed anything I was proposing to do, I would have recalled.

Question: And I suppose that's the answer on the 24th April, 1996 Mr. Towey wrote to the officials in the Attorney General's Office. And he refers to the meeting, their meetings, and he enclosed a report on the Department's assessment of the compatibility of the conditions of the draft GSM licence with Directive 96/2, and a consolidated text of Section 111 of the Post and Telecommunications Act of 1983, incorporating amendments contained in Section 145 of the 1992, and amendments proposed in the transposition of Commission Directive

96/2."

A. Ms. O'Brien, may I interrupt?

Q. Yes, of course?

A. Just in case, because I can't anticipate I can't recall exactly what but if this is going to be a recital of Mr. Towey's letter, I think we can take that for granted. I think I can recall Mr. Healy saying on I think it was Thursday afternoon, last Thursday afternoon that nobody doubts that Mr. Towey asked the right question.

Q. No?

A. So if we can skip over that part and get to the substance.

Q. Well, well, what I am quite prepared to do, Mr. Loughrey, is simply refer to the fact that the relevant portion of the letter of the 24th April was opened to you very fully?

A. Absolutely.

Q. In the course of your evidence?

A. No, I accept that totally.

Q. And before you were asked any questions about it; isn't that right?

A. Absolutely.

Q. And Tribunal counsel concluded question 214 by saying:

"That is the relevant portion of the letter?"

Answer: Once again is, I don't believe I have ever seen this letter. As I say, in the last two weeks or so, I was informed, obviously, that in tackling this problem, obviously, there would be an intrinsic part of it to make sure our lines were clearly legally, so to speak.

215. Question: Yes. Now, that particular issue was not addressed in any legal advice which was furnished to the Department?

Answer: It is clear, in perusal of the papers, actually, that that appears to be the case, Mr. Coughlan. However, at the time we took - or personally I took - the decision I was not so aware. Let me put it this way: Nobody had informed me that there was any problem on the legal side. I assumed, therefore, that I would have been let's say if a problem had arisen I would have been informed. So I am now aware, clearly from the papers here, that I don't see any evidence of that, actually, so that must be the case.

Question: Yes."

A. Ms. O'Brien, once again

Q. Sorry, can I finish speaking, Mr. Loughrey

A. By all means, no, by all means and I will go back

Q. Can I finish reading the transcript and then we'll take it up because I don't want to lose my spot.

A. Okay, that's fine, okay.

Q. "Question: Yes.

Answer: But having said that

Question: and I can assure you it is because the Attorney General himself has informed the Tribunal so.

Answer: Of course I would accept that.

Question: Just bear with me for a moment."

And that's where that passage concludes.

And what I just want to draw your attention to are some small elements of the exchange between you and Tribunal counsel, and particularly those in questions 215.

MR. O'DONNELL: I think he may have a comment to make.

A. Yes, just - just I had a general comment to make.

MS. O'BRIEN: Yes, of course.

A. With the focus the Tribunal, quite correctly, has on this GSM module, it does and it should this is the instructions you got from the Oireachtas, in effect, it does appear that my attention should have been focused on all these things. And I think I explained to Mr. Coughlan at the time is, I am not sure there is a full realisation and I don't say this in any sense of self-importance how large the Department was at the time. Its elements are split over three separate Government departments at present. Not only that is but ownership issues of like Telecom Eireann and Aer Lingus have all been privatised. But what's not apparent is huge sectoral regulatory organisations have been gouged out of the Department. In other words, the COMREG, the Commission for Energy, CER, the Irish the Aviation Regulator, the Taxi Regulator. This Department was a jumbo Department. My style would have been, and of necessity, not to take any files, not to take any significant folders of papers because, had I done so, because I was the clearing house for the Department, is the Department's work load would have run into bottlenecks. I tend to take one sheet of

paper, and people in the corridor knew this, or I was briefed orally. Now, it may seem extraordinary, and I noticed a newspaper reference last Sunday to this, that I hadn't seen the actual wording of Mr. Nesbitt's advices. I don't see anything extraordinary about that because my style in dealing with a huge range of problems at the time was to move rapidly, based on trusted officials and, if necessary, if there appeared to be a crisis, then I would look at paper.

Q. The Tribunal fully understands that, Mr. Loughrey, and I don't think there is any question but that you have given your evidence on that and the Tribunal knows that your evidence is that you did not see this opinion at the time.

There is no question of that.

A. Thank you.

Q. Now, just getting back to question 215, because, again, I just want to draw your attention to some elements on it so you can comment on it.

Now, what Tribunal counsel actually said in the question was: "Having referred to you - having referred you to the meeting of the 22nd April and having referred you to the extract from the letter of the 24th April when the opinion had been sought in the clearest of terms on the ownership conformity matter, what he said was: "Now, that particular issue was not addressed in any legal advice which was furnished to the Department."

And what I want to suggest to you, Mr. Loughrey, to enable

you to comment is that that question, and the view of the Tribunal in the terms in which it is put, could not have been made clearer by Tribunal counsel, I have to suggest that to you?

A. Ms. O'Brien, I am going to ask you for, just, clarity; could you put that to me again, because it seems to me to be a very pivotal question?

Q. Yes, yes. What I have said to you is that the terms in which the question is put, and again I'll quote them to you:

"Now, that particular issue was not addressed in any legal advice which was furnished to the Department."

And what I suggest to you is those terms made it crystal clear what the Tribunal's view was?

A. I accept fully your interpretation of events at the time. There is no question but from the very - and I think this bears a little teasing out - from the very first, day 162, December 12, John Coughlan, senior counsel, outlined the clear position and it was, obviously, a thoroughly researched, totally professional opinion that that was the case. Now, if - then we had the Sunday Business Post article three days later and, very efficiently the following morning, the Tribunal wrote, we now know, as a result, very belatedly of the State's waiver of privilege, and no fault attached to you, Chairman, because I remember being here in the box where you were always anxious that that would be the case, and we don't have to go into this,

when Mr. McGonigal was questioning me, but even now I am conscious of the fact that, because he had read the transcript, that Mr. Baron, on behalf of Mr. Desmond, at all stages you were open to, if I may say so, that there would be nothing that wasn't out in the open, if at all possible. So belatedly, very belatedly, the State lifted its waiver and Mr. O'Donnell put things into play for the first time last week. So but, of course, I accept, Ms. O'Brien, from Mr. Coughlan's Opening Statement till today, your interpretation of exactly where the position was, you put very firmly and very effectively last Thursday morning in response to Mr. O'Callaghan. So there is no doubt whatsoever about where the Tribunal stand, their interpretation of the events, I believe quite erroneously, I believe quite incorrectly and quite wrongly, but there is no doubting your professional stance on this. It has been made crystal clear and the Tribunal has been consistent right throughout the process right up till today. And I think it's no harm that we should, like, air our different interpretations civilly, Ms. O'Brien.

Q. Oh, absolutely, Mr. Loughrey, and I wouldn't, for one, suggest otherwise and I don't think there is any suggestion of that. Really what I was drawing your attention to is that in putting that question to you, you can have been labouring under no misunderstanding as to what the Tribunal's view was regarding that opinion on that occasion?

A. That's absolutely correct.

Q. That was all I was trying to clarify with you?

A. That's absolutely correct.

Q. Now, if I can just refer you to your answer. You say and I should add that it's a portion of this answer which you quoted in your Memorandum of Intended Evidence.

You say: "It is clear, in perusal of the papers actually, that that appears to be the case, Mr. Coughlan. However, at the time we took - or personally I took the decision - I was not so aware"

And the Tribunal knows that that is your position,

Mr. Loughrey.

"Let me put it this way: Nobody has informed me that there was any problem on the legal side."

And, again, the Tribunal knows that that is your evidence.

"I assumed, therefore, that I would have been - let's say if a problem had arisen, I would have been informed."

And the Tribunal knows that that's your evidence, that if there had been a problem, you would have expected that a red light would have gone on and that you would have been told that there was a problem?

A. Correct.

Q. You then go on and say:

"So I am now aware, clearly from the papers here, that I don't see any evidence of that, actually, so that must be the case."

And all I want to draw your attention to there,

Mr. Loughrey, is that, having initially answered

Mr. Coughlan, having explained that if there was no opinion, you would have expected that a red light would have gone on and that you would have been so informed, you go on to reiterate in the following terms what your response is. You say:

"So I am now aware, clearly, from the papers here, that I don't see any evidence of that actually, so that must be the case."

And in doing so, you reiterated the evidence that you had given earlier, and I just want to give you an opportunity to comment on that, Mr. Loughrey?

A. Ms. O'Brien, from - its evident from that reply that no matter how snatched and how tentative my evidence was, no matter how partial it was, how much I was reacting on my feet, actually, I did give, however tentatively, a certain level of comfort to the interpretation that the Tribunal puts and has maintained on Mr. Nesbitt's advices, yes.

Q. And I'd have to suggest to you further, Mr. Loughrey, that from that answer it's apparent that you based your evidence on an analysis and a perusal of the papers; isn't that right?

A. I think that's rather to flatter, 'an analysis'. It's quite clear from my reply I hadn't seen Mr. Towey's letters. 'An analysis' would be bordering on the exaggeration. It's absolutely crystal clear

Ms. O'Brien, it's clear from my evidence over twelve days

or whatever number of days, I don't do tentative. This is the only portion where I am saying, 'I am reacting on my feet', 'I am not sure'. But what you have done is you have skipped the critical part, Ms. O'Brien. You seem to be putting the papers away.

Q. No, no, Mr. Loughrey, I am not. Not at all

A. Well, the critical part - the critical part of that partial evidence

Q. Yes

A. Is not the evidence that Mr. Coughlan was putting to me.

And I think it's evident from the run of it. I - when I

say at 200 - I can't read it here - 216, I say

"Answer: But having said that..."

and I had already mentioned the I had already started to develop the nihil obstat - Mr. Coughlan cut me off in half sentence and he said wait for it

"And I can assure you it is because the Attorney General himself has informed the Tribunal so."

And my reply is instant. I said "Of course I would accept that."

Now, Ms. O'Brien, try and put your - and I am sure you will and already will have done so - into the mind of a senior civil servant. You weren't to know that I actually worked in the same building in the north block as the Attorney General's Office for years. But, having said that, I have no sense self-importance, it comes with the territory of Secretary General, I had worked closely with individual

Attorney General's. I held every one of them in the highest esteem. But that's not the issue. The real issue is, it's the Office of the Attorney General. If, Chairman, your lead counsel put to me

"I can assure you it's because the Attorney General himself has informed the Tribunal so"

- that was a show stopper. My concession was predicated on that information. Like all senior civil servants, I would be hardwired to accept that if the Attorney General said so in terms of a legal opinion, that was it. And subsequently on three or four occasions, and I say this with respect, great respect, to Mr. Coughlan, very adroitly, it was introduced, and I repeated it, of course I did, consistently, and that gave the Tribunal, I suppose, carte blanche to use my opinion - I repeated several times over the next few days that, 'of course, I accept it' but it was all predicated on this.

Now, of necessity even we were never we didn't know we were going to come back, quite clearly, so the very last five minutes of my sustained evidence, Mr. Coughlan returned to this once again and I freely admitted and I owned up to this concession, so to speak. But it was always predicated on the fact that Mr. Coughlan, on behalf of the Tribunal, played what I would call it 'the ace of trumps'. There was no answer to it. There was no answer to it whatsoever. It spoke for itself. Now, but unfortunately, and of necessity, Chairman, the card was

played face downwards. And that is of particular significance because what if, Ms. O'Brien, what if he turned up the cards? There were only two cards now, as we know: The letter of the 20th December and the letter of the 4th February; if he had turned up the latter, an ace of in card-playing terms it was totally irrelevant now this is not to criticise the Attorney General, he wrote a letter predicated on the - strictly on the extract out of the Sunday Business Post, nothing else. If they had turned up that particular card it wouldn't have merited the value of the deuce of spades. If he had turned up the letter of the 20th face upwards, of the 20th December, which you had, it would have shown a totally different picture. Do you think I would have conceded that had had he turned up the letter of the 20th December? No. In fairness to Mr. Coughlan he couldn't possibly do so and I fully admit that. In fairness to Mr. Coughlan, there was no intention to deceive because the Tribunal, at the outset, had convinced itself of the interpretation of the advices. Now, I accept that was done with great integrity, I accept it was done in a measured and professional way, I accept fully the basis on which, Ms. O'Brien, you presented it last Thursday morning, but I disagree fundamentally with that interpretation.

Q. I think the Tribunal realises, Mr. Loughrey, that you disagree with its interpretation, I think

A. I don't know how you came to that conclusion,

Ms. O'Brien.

Q. You have made your point. But could I just now draw your attention to two matters again. You say it was

Mr. Coughlan's reference to the Attorney General's letter that stopped you in your tracks and, in effect, put you in a position where you didn't proceed to give the evidence on the nihil obstat, is that it?

A. Which I did later.

Q. Which you did later.

A. But on - but on the day, that was, in a sense, as far as - argument over - it's game, set and match. If the Attorney General says it, of course I accept it.

Q. Can I just confirm with you again, I think you'll accept and we'll refer to it, you did have an opportunity to give your evidence on the nihil obstat; isn't that right?

A. Yes, I did.

Q. You did. In fact, you had it on the following Tuesday; isn't that right?

A. Yes, I did, and the - and the Chairman gave me every latitude to do so.

Q. Yes. And I'll refer you to that. But can I just draw your attention to one final matter, and what I want to draw your attention to is this: That the evidence that you gave in response to question 215, where you agreed with Mr. Coughlan that from a perusal of the papers, that it appeared to have been the case that the issue was not addressed in any advice, and your reiteration,

Mr. Loughrey, that you are now aware clearly from the papers here - and you don't see any evidence of that actually so that must be the case - that that evidence was given by you, Mr. Loughrey, before any reference was made by Mr. Coughlan to the letter from the Attorney General?

A. Oh, yes, that's evident.

Q. Yes. Now, that was the Friday, the 21st February and then you came back on the following Tuesday, the 25th February; isn't that right?

A. Correct.

Q. Now, I am going to refer you to two passages from the transcript for that day as well, again, just to let you comment on them, and the first passage commences on page 13 and just goes over the page to page 14. And before question 32 what Mr. Coughlan had been discussing with you was Mr. Arve Johansen's memorandum of the 4th May. You may remember that memorandum. It was referred to in some detail in your evidence. And at question 32:

"Question: You certainly set your face against anyone thinking that they could come in here and divvy up this licence on the 37.5:37.5:25 basis, you set your face against that instantly?

Answer: Absolutely instantly, yes.

Question: Instantly?

Answer: Yes.

Question: And that wasn't going to happen, that was not going to happen?

Answer: To the extent that I had control or influence that wasn't going to happen.

Question: Yes, but you were going to block that if you could; isn't that right?

Answer: Yes, that's correct.

Question: Now, you sought legal advice from the Attorney General's Office on the question of ownership?

Answer: Yes, I was informed that we were seeking legal advice.

Question: Yes, I appreciate that, but the Department was?

Answer: Yes, the Department had sought legal advice.

Question: Such advice was not received?

Answer: I now know that.

Question: Yes.

Answer: Yes.

Question: And I know the Department proceeded then and you are going to say, you know, sort of bringing Mr. Desmond in was a substitution for the institutional investors, but can we just be aware at the moment that you had sought legal advice about this, you hadn't received it - you hadn't received the legal advice - I just ask you to bear that in mind?

Answer: That's correct.

So, again, I think you have to difficulty in agreeing with me Mr. Loughrey, you confirmed twice that you agreed that no such advice had been given?

A. Of course, and I think I said a moment ago, actually, that

Mr. Coughlan had led me, effectively, to repeat that, I would say, at least four times, from memory. So I have no problem with that.

Q. Mr. Loughrey, I don't think there is any question that Mr. Coughlan was leading you to that. He was simply asking you a question, to which you answered ; isn't that right?

A. He was simply asking a question and each time it elicited the same response. I am not sure he had to ask me so, but only Mr. Coughlan could explain that, but it was apparent to me now, it's apparent to me in retrospect that when he returned it to what was going to be the last five minutes of my evidence after a fortnight, that it loomed large in his mind as being significant evidence.

Q. It certainly loomed large in the mind of the Tribunal, Mr. Loughrey?

A. And - yes - and it was put into play, if I may say so, in the most puzzling circumstances and if I did not have such great respect for the personnel of this Tribunal, and indeed - but by definition the Chairman actually - it was used in a way that almost bordered on the abuse.

Q. Now, Mr. Loughrey, we want to be very careful here. I think - I think you know that this was a very significant matter that the Tribunal was inquiring into, what happened between the 16th April and the 16th May; isn't that right?

A. Yes, of course.

Q. And I think you will agree with me, will you not, that this was a significant matter that the Tribunal was inquiring

into; isn't that right?

A. I think the Tribunal regards it as highly significant. I don't actually share that view myself but I accept what you are saying.

Q. Now, the second passage on Tuesday the 25th February that I want to refer you to is a short passage commencing on page 51 and then concluding at the end of page 52. And it commences at question 145:

"Question: On the very simple basis that you asked the Attorney General's Office for advice about it, your Department, and received no advice on it?

Answer: Mr. Coughlan, I am now conscious of that.

Question: Yes.

Answer: But even though, if I may put it this way, legal advice from the loftiest, I say this advisedly, the loftiest holder of legal office in the country, in the executive side of Government, the Attorney General, with, as a key advisor is - it would be advice. Now, it is clearly advice, clearly, that would always have been respected in any government department, but it still didn't prevent the Department in general, or me in particular, taking a judgement call at a particular time. Now, my impression at the time was - and perhaps as you raise this - my impression at the time was - and clearly I am relying on memory now - is I had been informed that ownership issues had gone to the Attorney General, had been referred to the Attorney General's Office. I don't believe

that I sought paper on this. I just took it as read. I take it as read. I don't believe I saw paper at the time, is, I suppose implicit in the decision taking process and what led up to it on the last three days, if I might put it that way is, as nobody had reported back to me that there was a problem I went ahead on that basis. Now, that's there is always a risk that is, that the papers that are now opened to me now, that I couldn't give that interpretation. I can't guarantee you that that was exactly my thought process at the time, but it mightn't have been unreasonable for me to take that view at the time, but that's the best I can do. I was conscious that we had sought advice from the Attorney General's Office on the ownership issue because I had been so informed and, I suppose, perhaps, I may have been, 'blonde' is a pejorative word, but the same contrast in the"

A. Ms. O'Brien, we don't have any light moments in this Tribunal but I don't know how 'blonde' kept into my evidence and I certainly wasn't directing my thoughts at you at the time.

Q. I am sure you weren't, if I was then blonde.

A. I think that may have been - I think that may have been blase, I think that may have been picked up incorrectly.

Q. And just continuing then at line 17:

"That is not criticism of anybody were an implicit part of the clearance system for the licence itself. Now, that doesn't mean we got explicit advice but implicit in the

signing off a licence due to be signed which they knew, because they were always working against a date, I suppose I somehow accepted that as a form of tacit approval. Now, you may well say, incorrectly on my part, but I suppose that, broadly speaking, is what I think I believe my thinking was at the time."

A. That requires some interpretation, doesn't it?

Q. Well, what I was going to suggest to you, Mr. Loughrey, is that on that occasion you did have an opportunity to assist the Tribunal by analysing what your views were in the light of the fact that you had accepted that no formal legal advice had, in fact, been obtained, and it seemed to me that what you were saying there were three things:

Firstly, that while you would respect the advice as being advice coming from the Attorney General, that it would still be advice and it wouldn't be something that would prevent you from issuing the licence if you believed it was the correct course to take?

A. I wouldn't go quite that far, Ms. O'Brien.

Q. Right.

A. You might well take that as one interpretation but I have never in my career dared to act outside explicit advice that might have been given by the Attorney General. I think what that was - was an explanation, back to the nihil obstat - and it was a rather rambling way of saying is - and notably the last two paragraphs there, to the extent that it is paragraphed, that we are back to nihil obstat -

but I don't think very much turns on that Ms. O'Brien to be honest.

Q. Sorry, Mr. Loughrey?

A. I don't think much turns on that particular.

Q. Well I am just drawing your attention to the fact that

A. No, no, I agreed with that.

Q. there are three matters you opined on in the course of that answer, and I suppose what I want to draw to your attention is you had every opportunity to give your views and your views and your thinking at the time on this whole issue of advice; isn't that right?

A. Yes, and that you are absolutely correct that Mr. Coughlan had given me that latitude and I took up, I took up his offer, so to speak.

Q. Yes indeed?

A. But equally, it was predicated on, if we go back to day 188, quite frankly, the haziest and most superficial knowledge, because I had no direct involvement. If we go back to the critical questions between 209 and 217, Day 108, it is quite clear I hadn't even seen Mr. Towey's letter. It is quite clear that, while the Tribunal is entitled to feel that they have elicited from me a response that's thorough, on analysis it really isn't, isn't it?

Q. It's a matter, I suppose, for the Sole Member to determine, Mr. Loughrey?

A. Yes, I would agree with that.

Q. But what I want to point out to you there is that you also

went on, further in your analysis, and you refer to the fact that you hadn't seen the opinion. You have explained what your management style is, and that's perfectly understandable with a Department that was as busy as it was, but that you would have expected to have a red light or a red flag up if there was any problem, and that you hadn't received it, and that you also proceeded on to give evidence in relation to the whole matter of nihil obstat and tacit approval from the Attorney General's Office?

A. That's a very fair summary of that was then. But this is now and we now know more, of course.

Q. Yes, of course we do and we'll come back to that Mr. Loughrey.

Now, finally, in terms of your evidence on this matter, dating from February, I want to refer you to what was your concluding day's evidence, which was the 27th February, 2003, which was a Thursday, and you were being cross-examined by Mr. Ian McGonigal on behalf of Denis O'Brien. If I refer to you page 25 of the transcript and the questioning starts at question 70.

"Question:"

Oh, sorry, that's not on the monitor yet. I'll just wait for them - page 25, Day 191. I think it's there now on the monitor, Mr. Loughrey.

A. Yes.

Q. Question 70;

"The other matter I just want to draw your attention to,

because it seems to me to be relevant as a line of inquiry, is the advices that were given to the Department, the Office of the Attorney General, by Richard Nesbitt, who was counsel for the Department, I know, but he was advising the Department at this time?

Answer: Correct.

Question: I don't know if you have a copy of it, it is dated the 9th May, 1996?

Answer: I have had sight of that very recently, but I don't have a copy in front of me right now, but if a copy could be provided

Question: Certainly.

Answer: There is one thing, Mr. Chairman, I just in case there is just in case there is, in a very, very outside chance there is I am quite happy to assist the Tribunal in any way but, in fact, as Mr. Nesbitt is a very valued member of the State's team and, by extension right now, a member of my team, there is nothing untoward in expressing an opinion?

Chairman: It is my understanding that Mr. McGonigal may have mentioned this to the other counsel in the case and would I be correct in summarising that, although it may not be an aspect over which you enthuse, that you accept that Mr. McGonigal is entitled to broach the matter?

Mr. O'Donnell: Mr. McGonigal raised this with me before. I don't think Mr. Loughrey will be able to add very much but certainly I am not objecting to the opinion.

Chairman: I don't think you should feel inhibited,

Mr. Loughrey.

Mr. McGonigal: Sorry, in fairness to Mr. Loughrey, My Lord - Mr. Chairman - I am not in the least bit trying to infiltrate in relation to Mr. Nesbitt's opinion or question it in any way. The document speaks for itself. But what I am suggesting is that there are aspects of the document which open lines of inquiry for the Tribunal, more so than Mr. Loughrey, but they give a flavour, insofar as Mr. Nesbitt was briefed, as to the concerns which were happening in the Department at that time and, insofar as that is relevant as a line of inquiry, it seems to me that it should be brought to the Tribunal's attention in public session. It is for no reason other than that.

Chairman: Yes, I accept that, Mr. McGonigal.

Mr. McGonigal: I am not trying to have Mr. Nesbitt change his seat for another seat or to leave us prematurely either.

Mr. Coughlan: I should perhaps just bring it to people's attention, I have mention it had on a number of occasions, I think My Friend, Mr. Healy the Attorney General has communicated directly with the Tribunal. It is a letter from the Attorney General himself. It's a document which I would suggest, that the best way to handle it, sir, would be in the first instance that counsel involved for the various interested parties before the Tribunal might have sight of a particular information which the Attorney

General - and the view the Attorney General has begin to the Tribunal.

Chairman: Yes, and if it arises, it is probably more appropriate when Mr. Towey comes to give evidence. Very good."

A. And that never happened, as far as I can see.

MS. O'BRIEN: I don't think it was taken up with Mr. Towey

A. Which I find extraordinary. I didn't have a direct hands-on role. Mr. Towey was in the engine room. He was the person to put the question to. Now, I have to say, Chairman, you he got every opportunity to do so in the last week but I was astounded that that didn't happen at the time and I am puzzled as to why that didn't happen at the time.

Q. Well, I suppose there are lines of inquiry, Mr. Loughrey, and lines of inquiry change and develop as the Tribunal's inquiry proceeds.

Now, at question 75,

"Mr. McGonigal: Mr. Loughrey, the only bits I want to draw your attention to is the second paragraph of the letter itself, where he explains aspects of what his advices are concerned with, and he says: "I am sending my views on the complaint made to the Commission under separate cover.

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. Formal draft letter has already been discussed with you. My reasoning in this regard is that the Minister is committed to grant the licence. He is now in between two competing interests. One, Esat, they say they are entitled to the licence and the other, Persona, are indicating that the licence should not issue. Delay in issuing the licence would clearly damage Esat. If Persona wish to stop Esat getting the licence they should be required to take appropriate legal action to restrain the issue. They will then be required to give undertakings to the parties affected, particularly Esat. This will concentrate their minds, particularly in circumstances where the Commission are likely to be making unsympathetic noises in relation to their complaint."

Now, that encapsulates, Mr. Loughrey, I would suggest, the concern in the Department in relation to the issue that had arisen arising out of the Persona complaint?

Answer: Yes, Mr. O'Donnell, I believe you are correct, but just to state is, I believe I got the thrust of that advice at the time, I don't believe that I actually saw Mr. Nesbitt's letter or the accompanying advice at the time, but I believe I was briefed on the thrust of the advice at the time.

Question: The other bit I want to draw your attention to is the advice itself. It is advices as opposed to an

opinion, I acknowledge that, on page 2 in particular, the second paragraph there. "If one analyses why the manufacture 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, a 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 licence, rather the licensee has been awarded the licence because its plans and proposals were the most meritorious and 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 then Mr. McGonigal continues

"In actual fact, I think that mirrors a lot of the views that you had yourself in relation to the licence and the consortia?"

Answer: Not quite, Mr. McGonigal. No, I I am afraid I couldn't go along entirely with that paragraph because in theory it's possible to decouple the licence in the form of the entity and of the so the business plan that the entity has put forward. In practice it is not possible, I think, certainly not in my mind, to decouple ownership entirely. Can I put it in a very practical way is, while I was I think I made quite clear I was quite relaxed about

the ownership of the financial investors, I didn't think that that amounted to any made any serious impact on the strategic or operational effect of rolling out competition in this area. I would have been extraordinarily loathe, and I wouldn't have found it acceptable that, if I may put it this way, that the pioneering umph of Esat and the leading edge and demonstrated capacity of Telenor would be assigned elsewhere. It may well be that Esat Digifone, as an entity, would adhere to the business plan but if, for instance, without being in any way derogatory, if, in fact, is Esat's 40 percent shareholding had been assigned, for instance, to some traditional utility like France Telecom or British Telecom whose standing would not be in question, I doubt if they would bring the same drive or hunger as background promoters as Esat would have. So, while I can agree, broadly speaking, with this paragraph, and notably where it applies to financial or other third-party investors, I don't, I think, if I am reading Mr. Nesbitt correctly, agree with the totality of the paragraph.

Question: The next paragraph simply deals with the exchanging of Article 8 which was, in fact, causing quite a lot of difficulties?

Answer: Could you repeat that again, Mr. McGonigal, pardon?

Question: The next paragraph deals with a change in Article 8 which related to ownership, I think?

Answer: Correct, yes.

Question: And that was causing significant difficulties in relation to getting it right, for different reasons?

Answer: Yes, it was."

Now, you see there, Mr. Loughrey, that Mr. McGonigal actually opened passages from Mr. Nesbitt's letter to you and opened passages from his opinion?

A. Yes.

Q. And what I just want to draw your attention to is that what he opened to you were, in fact, the very passages from the opinion, which you have now stated in evidence arising from paragraph 17 of your memorandum, are the passages which, as far as you are concerned, provide retrospective cover for the view that you had taken. And yet it doesn't seem to have occurred to you, when you were answering Mr. McGonigal, to say, 'Do you know the evidence I have given to the Tribunal over the last number of days is wrong and it's quite clear that in stating, as he did, in that paragraph of his opinion, that Mr. Nesbitt was addressing the ownership conformity issue'. And I just want to give you an opportunity to comment on that?

A. Ms. O'Brien, you may well say that and it may appear to be a reasonable interpretation but could we stand back from it a moment? For the last since last Tuesday, this room has been full of contentiousness - I mean legal contentiousness, obviously nothing more than that - in the interpretation of this paragraph. It was being put to me on my feet, hearing it for the first time. Now, to draw a

conclusion like that, Ms. O'Brien, would be, if I may say so, quite unfair.

Q. I see.

A. And I wouldn't accept it. Because, you yourself have been involved in argumentation about exactly what this paragraph meant and there's been an ebb and flow of, of - if I may say so - interpreting Mr. Nesbitt's nuances. Now, the ideas put to me, read out to me, and then you go definitive on it, I think is a bit unfair, don't you?

Q. Well, Mr. Loughrey, I just want to draw your attention to the following: I know that you probably weren't expecting, although there is some suggestion at lunchtime there may have been some discussion with Mr. O'Donnell that Mr. McGonigal intended to open the opinion to you, but it's quite clear in your responses to Mr. Coughlan on Friday the 21st February that you had read this opinion, isn't that fair enough to say?

A. I had read his opinion.

Q. Yes.

A. And do you think from one reading, Ms. O'Brien, that it's 'open sesame' and it's quite clear?

Q. So it wasn't clear to you from one reading that

A. I don't believe it's clear to - I don't believe it is even clear to you, Ms. O'Brien.

Q. Well it's not a matter of it being clear to me, Mr. Loughrey. What the Tribunal wants to try and understand is whether, and if so, why it's clear to

departmental officials now, some six years after their evidence was heard, that this opinion is directly on the point. And I would say

A. If I may say so Ms. O'Brien, the Tribunal, with all its intellectual fire power, have parsed and analysed this, I am sure, many times before coming to its interpretation . It's complex. It was read out to me on the day and you are expecting me to give a chapter and verse definitive opinion on it. I think that's expecting a bit much, frankly.

Q. Now, Mr. Nesbitt represented the Department throughout the Tribunal's inquiries; isn't that right?

A. Pardon, would you repeat that again, sorry?

Q. Mr. Nesbitt, Mr. Richard Nesbitt, who is the author of the opinion of the 9th May, he represented the Department throughout the Tribunal's inquiries; isn't that right?

A. Yes, yes he did. By the way, I never met Mr. Nesbitt in that capacity at any time.

Q. Sorry, Mr. Loughrey, I am not following you?

A. No, no, no, but you said he advised the Department all along.

Q. No, I said he represented the Department?

A. Of course he did, yes, I beg your pardon, I beg your pardon, of course he did.

Q. I am not going to 'infiltrate', as Mr. McGonigal put it, into the dealings that you may have had with Mr. Nesbitt at the time. But he did represent the Department at the time of the Tribunal's inquiries?

A. Yes, and I had a certain difficulty, as you noted there, in terms of protocol.

Q. So it seems.

A. Yes.

Q. But he did represent the Department; isn't that right?

A. Of course, yes.

Q. And he was aware of the evidence that you were giving; isn't that right?

A. Yes, he was.

Q. Yes, he was. And what the Tribunal finds surprising, Mr. Loughrey, and again I want you to have an opportunity to comment on it, is that Mr. Nesbitt never said to you "Hold on a moment, Mr. Loughrey. My opinion of the 9th May, in the context which it was given, addressed the ownership conformity issue." And I am just wondering why that was?

A. Is that - is that not an extraordinary question to come from you Ms. O'Brien?

Q. No, Mr. Loughrey?

A. Yes, I do believe it so. It was a privileged document. I don't think Mr. Nesbitt could possibly have stood up on his feet when the document was privileged.

Q. No, I am not suggesting he stood up on his feet, Mr. Loughrey, and, of course, the opinion had already been opened without objection on behalf of counsel for the Department by Mr. McGonigal. In fact, the very passages of the opinion to which you now draw such significance. What

I am wondering is why Mr. Nesbitt didn't say to you afterwards, or in the course of your evidence or after your evidence on Friday the 21st or Tuesday the 27th or after your exchanges with Mr. McGonigal "Hold on a moment, that - the Tribunal is wrong - that opinion does address the issue and now we must address the matter of privilege."

And that's what I am asking you.

A. I believe, Ms. O'Brien, your interpretation of privilege being waived at the time is incorrect. Privilege wasn't waived at the time, under any set of circumstances, and I believe that the Chairman's ruling of the 28th February, 2008 makes that crystal clear and I am amazed that you are putting that point to me.

Q. No, Mr. Loughrey, I am not suggesting that privilege was waived. And I want to be sure that you understand exactly the question I am putting to you?

A. Oh, I understand it very clearly. And it did not happen. You can put that to Mr. Nesbitt, if you so please, but my interpretation of it is, he had the utmost respect for privileged document and I think that's a perfectly reasonable position to hold.

Q. At the time at the time, Mr. Loughrey, what I am asking you is, why did you not correct your evidence?

A. At what time, Ms. O'Brien?

Q. At the time - when you gave your evidence on the 23rd, on the 27th and at the end of that week, why didn't you come back and correct your evidence? Are you telling the

Tribunal that nobody told you?

A. Nobody told me. And I am telling that to you quite clearly and I am surprised that this question arises at all,

Ms. O'Brien. I think it's a very speculative question and it has no basis in evidence, and I am amazed that you are asking me.

Q. Can I ask you when you learned that the evidence that you had given was not correct evidence?

A. The, as you know is, witnesses, is, we have another life other than the Tribunal.

Q. I can understand that, Mr. Loughrey.

A. I am sure you do, Ms. O'Brien. It was only in the context of the possibility of having another, so to speak, module, or another public sitting being opened that I was contacted by the Chief State Solicitors Office, and in the context of that it was brought to my attention, the Chairman's ruling of the 28th February, and it was then when I started to reflect, and only then. And we are talking obviously in the last what, six weeks?

Q. Yes.

A. Yeah.

Q. Now, can I just refer you to paragraph 16 of your Memorandum of Intended Evidence, because that was the matter of the Attorney General's letter. And I just wanted to clarify with you exactly what your evidence was.

In paragraph 16 you say "Mr. Nesbitt's letter of the 9th May 1996 was, in effect, a clear approval of early

signature on the basis of the then consortium of 40% Telenor, 40% Esat, and 20% IIU. Mr. Nesbitt had a sustained involvement in the process and had been briefed by the Attorney General's Office on the issues arising from Mr. Owen O'Connell's letter of the 17th April and Mr. Towey's letter of the 24th April 1996. Mr. Nesbitt's letter, together with the accompanying advices, was forwarded to the Department by the Office of the Attorney General with a covering letter dated 13th May 1996. This letter, in referring to Mr. Nesbitt's advices, indicated no apparent reservation and thus clearly gave the institutional approval of that office to those advices.

Had I had sight of this letter, I would have taken from Mr. Nesbitt's response a clear approval of the consortium makeup before licence signature."

That's the Attorney General's letter of the 13th May, isn't that the one you are referring to?

A. Yes, yes.

Q. Can I just refer you to that letter and I am just going to open it?

A. Of course.

Q. It will be on the monitor beside you. We can hand you up would you prefer a hard copy to look at?

A. No, no, no, that's fine.

Q. "Secretary Department of Transport, Energy and Communications,

Attention Fintan Towey

APO Communications Development and Corporate Affairs
Division.

"Re 1. Proposal of the Minister for Transport, Energy and
Communications to grant a licence to Esat Digifone Limited
to be the second provider and operator of a GSM mobile
telephony service in Ireland and

2. Stamped draft of regulations entitled "European
Communities (mobile and personal communications)
regulations 1996" to give effect to Commission Directive
90/388/EEC of 28th June 1990' "

I am very sorry, I hadn't realised as I was reading it
away, Mr. Loughrey, it wasn't on the monitor

A. No, Ms. O'Brien, no need to apologise. This is a letter
with which I have refreshed myself. I am quite familiar,
so there is no need for an apologies.

Q. Yes. I can hand you up a copy there.

A. Thanks for that.

Q. I was just reading out the references in the title to the
letter.

"1. Proposal of the Minister for Transport, Energy and
Communication to grant a licence to Esat Digifone Limited
to be the second provider and operator of a GSM mobile
telephony service in Ireland"

and

"2. Stamped draft of regulations entitled "European
Community (mobile and personal communications) regulations
1996" to give effect to Commission Directive

Number 90/388/EEC of 28th June 1990 and Commission Directive Number 96/2/EC of 16 January 1996" and "3. Stamped draft of licence to be granted under subsection (2) of Section 111 of the Postal and Telecommunications Act, 1983 (No. 24 of 1983) as amended by the above-mentioned regulations when made."

And it states:

"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, Esq., SC dated 9 May 1996 concerning same."

Then, over the page

"Commission Directive 96/2/EC, which was the first brought to the attention of this office last month, further complicates the already legally complex proposal to licence a second provider and operator of a GSM mobile telephony service in Ireland. A very large number of issues could be raised in relation to the exact meaning of that directive and directive No. 90/388/EEC of 28th June of 1990, which it amends. These issues have not been explored with the Commission and most likely will arise in the future and perhaps be the subject of litigation, the outcome of which cannot be predicted with any certainty. In this regard it is to be noted that the Commission have not had sight of

drafts of either the proposed regulations or licence to date.

"The preparation of the draft regulations and licence within the time-frame allowed has been an extremely difficult task, particularly because of the opaqueness of the directives."

"The Attorney General has asked that it be pointed out that in view of these factors there is the possibility that some of the terms of the licence proposed to be granted could be successfully challenged. Mr. Law Nesbitt in his advices has highlighted some terms which he considers could be subject to attack."

"The drafts now furnished represent, in our view, the best available solutions, bearing in mind the various constraints which applied."

"Finally, we would ask you to note that the regulations should be made prior to the licence being granted, and if both are made and granted on the same day, the time of the making and granting should be recorded to prove that the regulations were made prior to the granting of the licence."

And it's signed.

Now, I am not sure if the Tribunal understands what aspect of this letter would have given you so much comfort, and perhaps you could explain that, Mr. Loughrey?

A. I think it gets back to our opening discussion, Ms. O'Brien, where I accepted absolutely fully that the

explanation you gave on Thursday morning was - from your point of view was perfectly reasonable - that the Tribunal acted thoroughly, professionally and to come to the interpretation they came on the whole question of legal advice. But I believe myself that that was quite erroneous, and I'll come to it because this letter is pivotal, is at all stages you were focused on the wrong document. You were focused on Mr. Nesbitt's advices of the 9th May. Now, Mr. Nesbitt's advices of the 9th May, it wouldn't matter to a government department whether it was outside counsel's advice or not. If Mr. Nesbitt had sent that letter directly to me - it's addressed to me, this letter here - it, it wouldn't have been any use. It might have been nice, it might have given background comfort, perhaps.

Q. Yes -

A. But because we can only take legal clearance, legal approval from the Attorney General, and I believe, perhaps, it was a failure - I don't mean to use the word pejoratively - a failure on the Tribunal's part, a failure to understand really how the machinery of Government operates. It doesn't operate on the basis of outside counsel's opinion, however eminent the counsel may be. It operates on a clear approval from the Attorney General. Now, nothing could be clearer than that.

I believe that the Tribunal may have been become mesmerised by the nuances in Mr. Nesbitt's opinion and have convinced

themselves, quite honestly, that it didn't address the issues raised in Mr. Towey's letter. But really - but really - but really, isn't that an irrelevancy. The only thing that mattered was that we got a letter that says 'we are directed by the Attorney General' and those - I counted the number of words there - 50 those 50 words say it all. Had I, for instance, I can't recall whether it was Matthew Russell or James Hamilton, our esteemed DPP, who is head the Attorney General's Office who was there at the time at the time; had I picked up the phone at the receipt of that letter and said "Jim, could you give me a bit more? There are only 50 words here really covering the substance of this letter?" Now, both Mr. Russell and Mr. Hamilton are gentlemen of great erudition and utmost finesse and they would not have fallen into a common colloquialism. But they would have been quite entitled to say 'What part of a clear, legal clearance do you not understand?' And with every justification.

Q. So just to be clear then, Mr. Loughrey, am I correct in thinking that your evidence is that, in fact, as far as the Department was concerned, from an institutional point of view Mr. Nesbitt's opinion was an irrelevance, it was what was in the letter of the 13th May?

A. My evidence now is the only document that mattered was the letter of the 13th May and what I am saying this absolutely clearly. Now, I could, as an aside, say I also disagree with your interpretation of the covering letter of

the 9th May and with the advices. But let's park that.

Let's park Mr. Nesbitt.

Q. Yes, yes, yes.

A. Let's get to the essence. We had total clearance in those 50 words. Crystal clear clearance. And what astounds me is that in the introduction - not just by you, Ms. O'Brien, and I wouldn't dream of focusing on you - but throughout all of this - and I had the benefit of listening to the last two-and-a-half days of evidence at the back of the hall - the Attorney General's role, and we know how important that is, it seemed to be relegated into a post box; that that was almost a complement slip that came with Mr. Nesbitt's advices. Nothing could go further from the truth. The only document that mattered, the only legal approval, the only clear legal clearance was that letter. And it is crystal clear. And while I am at it, let me say is, we have spent endless time, in the last two-and-a-half days I have been listening in the back of the hall, is canvassing civil servants on a legal interpretation of Mr. an interpretation, not a legal interpretation an interpretation of Mr. Nesbitt's words. Civil servants don't have to interpret outside counsel's word. That's done already by the Attorney General's Office. And it is clear from this letter it was done. We don't have a legal expertise. That resides with the Attorney General and his staff. They had already cleared it legally without a quibble. Were we going to second-guess the Attorney

General? No, we weren't.

Q. I just want to be clear that that is your evidence, the absolute significant document was the letter of the 13th May?

A. Absolutely.

Q. Now, Mr. Loughrey, in looking at all these matters afresh in the context of the waiver of privilege that the State have furnished in relation to Mr. Nesbitt's opinion, the Tribunal has had an opportunity to refocus somewhat on the documentation which was available, and I now just want to draw your attention again to the events that were occurring within the Department between the 16th April and the 16th May, very briefly I won't keep you long doing it.

A. That's fine.

Q. Now, we know that this information regarding the altered share structure of Esat Digifone came to the Department by means of communications of Mr. Owen O'Connell on the 16th May and the 17th?

A. Correct.

Q. Isn't that right?

A. Correct.

Q. I don't need to put Regina Finn's document up or Mr. O'Connell's letter, we have all been through this before ?

A. No, no, no, you don't.

Q. And Mr. O'Connell's letter, I think you said in your evidence, I think I quoted it, in fact, it was in the some

of the passages I quoted this morning, it made it perfectly clear what was position was; isn't that right?

A. Yes.

Q. And what he was telling me was that the it was being proposed that there would be two alterations. Firstly, an alteration in the share structure of the proposed licensee, Esat Digifone Limited; isn't that right?

A. That's correct.

Q. Both in terms of the capital configuration which had been 40:40:20 and would now be, and in fact was, now 37.5:37.5:25?

A. 25, yeah.

Q. And also by the substitution of Mr. Dermot Desmond rather than the financial institutions; isn't that right?

A. The latter, I think - I don't want to dwell on this but this gets to the heart of the structure - is Mr. Desmond, at that stage, was a third party investor. It was for real. The others were never for real. They were never, ever for real. And this gets to the heart of this ownership problem, is, I think we can be agreed on this is that at the very outset it was a 50:50 ownership and nothing could be clearer. Mr. O'Brien complicated the issue. I mean to say, if we can get our heads in Mr. O'Brien's head, a very astute businessman - this will only take 60 seconds. He knew he had the legs of all opposition in terms of winning this licence locally. He demonstrated that already. He lined up the best - pound

for pound the best GSM mobile phone company in the world.

He knew what his strengths were. But he was also highly conscious, being strategically very aware as a businessman, that he had, you know, a fragile financial flank. He went to cover it and he gave us some presentational wall paper.

He assembled what might have been a dream team to impress people but, in reality, there was nothing behind it. He

put in the two he put in the commanding heights of the Irish financial establishment: Bank of Ireland Group and

AIB. Then he put in patient long-term capital Standard Life, a household name, and for the cognoscenti, the

financial journalists and others, he put in a hard nosed private equity company, the dream team with no substance

whatsoever. Condition 3 of the RFP is quite clear; it's about ownership. I was amazed for the last two-and-a-half

days how different concepts like memberships, application, consortia, all seemed to be confused. There is no

confusion about ownership. It's quite clear 50:50 at the

outset, and there was note standing, I think, Chairman, you agreed with me, I was going on a bit about this, how

meaningless these letters of, so called letters of intent

were, meaningless was the word. And you summarised, very eloquently for me, you said on the basis of my corporate

financial investment banking experience, effectively what I was saying is these letters were unenforceable. I couldn't

have put it better myself. That's exactly what they were.

There was a suggestion somehow that these guys were jocked

off. They were never jockeyed off, Ms. O'Brien. They were never on in the first place. They never had any entitlement of any kind to ownership. So at the 4th August, when the white flag was raised is, it was a 50:50 ownership, and when the announcement was made on the 25th October, it was still a 50:50 ownership. And all this agonising about the restructuring - pretty pointless frankly.

Q. Just getting back to the letter, then, of the 17th. There was that element of what you were told about the share configuration and the ownership of Esat Digifone; isn't that right?

A. Correct.

Q. And the second matter you were told is that Mr. O'Brien wanted to restructure or had restructured his interests, his radio and his telecommunications interests. He intended to leave the radio interests in Communicorp and he intended to put the telecommunications interests into Esat Telecom Holdings, and in that way decouple the two interests, and that was all of course with a view to the placement that he was going to make on the US market sometime later?

A. Credit Swiss First Boston, correct.

Q. Now, I think it was your evidence that you were furnished with copies of these two documents, isn't that right?

A. Yes, I was, and I had a clear everybody seems to remember Ms. Finn's diagram which was extraordinarily

gave a great clarity to what could have been put in pages and pages without the same clarity.

Q. Yes, absolutely.

A. I did see it at the time.

Q. And of course it was Ms. Finn who asked Mr. O'Connell to clarify matters after her telephone conference?

A. No doubt about that.

Q. And that's how all that came about. We have heard your evidence on it, and as you said in evidence, you weren't best pleased by this, isn't that right?

A. Frankly I believed it was a try-on, yes.

Q. And secondly, I think you said that you weren't in the least bit impressed about the explanation of the allocation of the 25% shareholding to IIU; I think that was Mr. O'Connell's explanation that it was the 20% that had been assigned

A. And a down payment from the IPO. That was totally contrived, didn't impress me in the slightest.

Q. Yes. Now, that was on the Wednesday of the week. Now, on the Friday of that week there was the civil servants' press conference, isn't that right?

A. Correct.

Q. The 19th. And I think, as I said, that was both your focus and Mr. Brennan and Mr. Towey's focus in the latter part of that week, isn't that right?

A. Given the range of stuff that came into my office, it would have been a partial focus. But given the size of the

Department and there were fires to be put out everyday, it wouldn't have been my total focus clearly.

Q. It was of course an unprecedented event, wasn't it?

A. The press conference?

Q. Yes.

A. Oh yes, it was.

Q. Now, I think your evidence was that on, if you like the first working day after the civil servants' press conference that was the 22nd April, the Monday the 22nd April, I think we quoted that evidence this morning that you would have sat down with Mr. Fitzgerald and possibly Mr. Brennan and that you'd have decided that you were going to approach this very carefully, isn't that right, and that you were going to ensure that you had confirmation that you were all right on the legal front, isn't that right?

A. Correct.

Q. Now, the 22nd April, which was the Monday, was the same day that Ms. Finn and Mr. Towey met with Mr. Gormley and Mr. McFadden in the Attorney General's Office, and we know the careful note dated the 24th April that Mr. Towey kept of that meeting?

A. Yes, I believe that I am aware of it, but I don't think there is any point in opening it.

Q. No, I have no intention of opening it. I am just referring you to it. And we know as well that Mr. Towey furnished the Attorney General's Office with an extract from the Esat Digifone management section of its application setting out

its proposed ownership profile, and we know that he also provided the Office of the Attorney General with a copy of Mr. O'Connell's letter of the 17th April and a copy of Ms. Regina Finn's note, isn't that right?

A. Correct.

Q. And that was on the Monday. And we know that the following day now, although we didn't know in 2003 but we now know now from the note that's become available, because Mr. Towey had no recollection of it, but we know that Mr. Towey attended a meeting with Mr. Nesbitt on the 23rd April, the Tuesday, isn't that right?

A. I believe so.

Q. And we know also from what Mr. O'Donnell has put to Mr. Towey, that Mr. Nesbitt has no recollection or did not in fact give any advice on that occasion

MR. O'DONNELL: He does have a recollection but he said he didn't give advice.

MS. O'BRIEN: Exactly, but that it was a briefing meeting, isn't that right?

A. Yes, I take all this for granted and I think we can move on.

Q. Oh I intend to move on, Mr. Loughrey. Then on the 24th April, Mr. Towey wrote very carefully to the Office of the Attorney General setting out exactly and reiterating the opinion that the Department required, isn't that right?

A. And I think there is general agreement that he wrote the right letter. I don't think anybody contests that.

Q. Now, on the 29th April, Mr. Loughrey, we know that Mr. Towey had contact with Mr. Owen O'Connell, isn't that right?

A. I wasn't so aware.

Q. You weren't so aware, but I think you would accept

A. No, I accept all of this, yes.

Q. And we know that that was the first contact that the Department had with Mr. O'Connell in response to his letter of the 17th April, you accept that, do you?

A. That makes perfect sense.

Q. And we know from the note that Mr. O'Connell kept of his record of his conversation with Mr. Towey that what Mr. Towey was doing, and Mr. Towey accepted it in his evidence last week, was that he was conveying information to Mr. O'Connell concerning the Department's response to the letter of the 17th April. Would you accept that?

A. I would accept that.

Q. And he was covering both aspects of the information that had been brought to the Department's attention in the letter of the 17th April. Firstly, the restructuring of Esat Digifone and secondly, Mr. O'Brien's intention to restructure his own interests, isn't that right?

A. That's correct, yes. When I say that's correct, nobody is contesting it.

Q. You don't know it because obviously you weren't there listening into the telephone conversation?

A. I wasn't.

Q. But you accept that that's what happened.

A. And that's gracious of you to say so, but no, no. But what might be of interest in all of this is that people expect, perhaps in retrospect, to have clean management lines of communication, but I think we have seen in evidence is that Sean Fitzgerald was almost fully occupied with the Strategic Alliance which ultimately was far more important to the State than the GSM licence, clearly. Is, Mr. Brennan was already part and parcel of the planning for the presidency and was at least twice in Brussels during this critical phase on the postal directive. My attention would have been over a huge range of things at the time and it is possible that Mr. Towey did not get the benefit of clear communication I am puzzled by some of the evidence of Mr. Towey, not that it wasn't given in strict honesty, but it points up to a fault on my part that I might not have clearly communicated, and it hadn't cascaded down the line sufficiently, that there was no question of 25 and 37.5, that wasn't an issue for counsel, I had already taken that. We didn't need advice on that. So, in other words, if Mr. Towey appears to be keeping both questions going, it's perhaps poor communications on my part rather than from Mr. Towey rather than giving it the significance now that it didn't really have.

Q. But you do accept that, as you say, Mr. Towey is responding to the letter of the 17th April, and that it's making it clear to Mr. O'Connell that no decision has been made by

the Department. And that was the position, isn't that right?

A. No, it's not the position.

Q. It's not the position?

A. No. I had already taken the decision straightaway that the 25:37 and 37[sic] was going to be a non-runner and I think I had already communicated that and discussed it with Sean Fitzgerald, and given my day to day relationship with the Minister, I'd be astounded if I hadn't told him about my determination long before the 29th April.

Q. That, in any event, I think you accept was the Department's initial response to Mr. O'Connell, and what Mr. O'Connell had recorded is "Haven't reached decision as to whether there is any difficulty or anything they want done differently". And I think also Mr. Towey made it clear to Mr. O'Connell that the Department had sought legal advice on the question of "whether the company to be licensed is the same as the company that applied. Has to be assured from a legal perspective." You see that?

A. I accept that, and not only was it his viewpoint, but it's clearly reflected in his letter of the 24th April. So there is no contest there.

Q. It's not a question of contest. You accept that that was the position?

A. I do of course, yeah.

Q. Now, Mr. Towey then wrote he prepared a letter that was signed by Mr. Brennan and this letter was sent to the

Attorney General's Office on the 30th April for legal clearance, and he wrote to Mr. O'Connell on the 1st May, isn't that right?

A. Correct.

Q. And in that letter the Department sought information in relation to the IIU involvement, isn't that right?

A. Correct. And I think it's evident from my evidence in 2003 that I wasn't involved in the nuts and bolts of this whatsoever. This is not to sound, once again, self important, but in the nature of things I had a hugely competent and talented team, that I allowed them to get on on their own initiative.

Q. I accept that absolutely, Mr. Loughrey. I am just trying to retrace what happened with you on the basis of the documents the Tribunal has and on the basis of all of the evidence that the Tribunal has heard.

A. Absolutely.

Q. So that you know.

A. Yeah.

Q. Now, I think when you gave evidence in 2003, you pointed out that you would not have seen the letter at the time but you also indicated that as far as you were concerned what that letter did was set out in very clear terms what the inquiry trail was, isn't that right?

A. Yeah.

Q. So that was the 1st May?

A. Yeah.

Q. Now, we know on the 3rd May that Mr. Brennan, Mr. Towey, Ms. Finn and I think a fourth departmental official met with representatives of Esat Digifone, isn't that right?

A. Once again, I have an awareness of this but I accept entirely what you are saying, yes.

Q. You accept that. And we have Mr. O'Connell's note of that meeting, and that was opened to you before, and I think you accept that Mr. Brennan was reiterating the Department's requirement for information regarding IIU, the change in institutional investment, replacement of Advent International and Davys by IIU and the need for detailed information, quality about IIU. And they also wanted the information regarding the identity of each shareholder, legal and beneficial ownership, Esat Digifone changes relative to bid.

So that was clearly put there?

A. I don't have to go on and on, the word 'replacement' is clearly wrong. They were never in place in the first place, so replacement didn't arise, but we'll let it go.

Q. That was Mr. O'Connell's wording?

A. Exactly, yes.

Q. So that was the 3rd May. And at that stage the Department had still not received the information or hadn't received the information it was looking for; it was looking for information. We have also seen the to-do list which Mr. O'Connell had prepared at the time of the steps that he needed to take arising from that meeting, and that included

detailed information on IIU?

A. Correct. When I say 'correct', I had no idea, but

Q. I know you had no idea but you accept the evidence

A. Of course I accept, Ms. O'Brien, of course.

Q. Now, Mr. Loughrey, we then go to the 7th May, which is

Mr. O'Connell's record of his telephone conversation with

Mr. Towey. You see that? And I want to you look at that

on the monitor there.

"To: File

From: OOC

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 and outline in writing."

And what I have to suggest to you there, arising out of

that document, Mr. Loughrey, is that that which was being

communicated by Mr. Towey to Mr. O'Connell was the full and

complete departmental answer to the letter of the 17th

April and the information which had been provided both in

relation to the 40:40:20, IIU and Esat Holdings?

A. That's a heroic assumption, Ms. O'Brien.

Q. Is it?

A. Very much so. That could fit literally on a Dublin Bus

ticket. That you would take so much from that I am

astounded. Let's take it bit by bit, shall we?

Q. Absolutely.

A. Minister accept a v strong preference 40:40:20." Nothing could be further from the truth. This Minister never ever intervened in such a way. He never expressed such a preference. And let me explain how that might arise. And I think Mr. Towey touched on it on last Thursday is, when a civil servant moves up the chain, so to speak, they use they tend to use the personal pronoun. So by the time one becomes a Secretary General is, you can afford to use the term "I" because it seems to carry influence, it seems to carry weight at meetings. When I was at Mr. Towey's level, an AP in the Department of Finance, I never used the personal pronoun "I". I always cited 'the Minister' because we all worked for the Minister, and in terms of cooperation soul, that is the legal position, as you know well. So Mr. Towey would undoubtedly have used that. He had no basis for saying that whatsoever. Minister Lowry never ever expressed a preference from start to finish to this whole process. Never.

Of course, while I am here. He always acted in his relationships with the Department in a correct ministerial and honourable way. Now, lest this sounds like I am about to beatify him or canonise him in certain ways. Did he have an agenda? Of course he had an agenda; he had a political agenda and he had a personal agenda. And I suppose that was formed by his basis as a successful businessman. He always, from the word go, made it quite clear to me sort of the burden of regulation, the burden

the competitive problems that business has. He always wanted to mitigate, whether it was farmers right up to business. He had a particular passion that we would introduce, and perhaps because he was in the service industry himself, competition into them for consumers' sake, into the mobile phone licence. So did he have an agenda? Yes, to get this over the line as quickly as possible. Did he ever act in a non-discriminatory way in a discriminatory way? Never. Did he ever express any preference to any particular outcome? Never. And what I am saying is, this seems to fly in the face of what I am saying now. Mr. Towey is quite incorrect. His use of the word 'Minister' could only be explained by how I have explained middle ranking civil servants wouldn't feel they carried the full majesterium, if I may say so, at a middle ranking level and tend to use the word 'Minister'. Did the Minister, by the way, have a political agenda? Of course he had a political agenda. He also wanted, quite correctly for his Government and for himself, the kudos that went for an early breakthrough in the GSM process. But the idea that he had expressed a preference at that time is quite incorrect.

CHAIRMAN: Mr. Loughrey, a few minutes ago you were mentioning your own appraisal of the issue of the majority share in the principal two shareholders in Esat of the divergence between 40 and 37.5% and you took an extremely robust and strong view yourself that this couldn't be

countenanced. And I think you mentioned that you discussed it with Sean McMahon[sic] and you felt you may you probably would have discussed it with the Minister in the course of what undoubtedly were your regular meetings?

A. Yes. I agree entirely what you say. It would have been Sean Fitzgerald rather than Sean McMahon; the other Sean. But, no, no, I can understand the confusion. That is correct, yeah.

MS. O'BRIEN: Right.

Q. Now, just looking at this note of the 7th May. So Fintan Towe is saying that it has to go back to 40:40:20, isn't that right?

A. Yes.

Q. And then he is saying that "The Minister understands the need for flexibility afterwards." Whether he is conveying a view he had or whether he is bringing into play the emphasis that would arise from referring to the Minister, that's what he is saying, isn't that right - "Understands needs for flexibility"?

A. Absolutely, yeah.

Q. Then he says "Will take Esat Holdings subject to no substantive difference and outline in writing." And what I suggest to you he is saying, and what he accepted he was saying, was that the Department would accept the restructuring of Esat Telecom Holdings, isn't that right?

A. Well that to me appears to be, once again, a step too far from what's written there. I can understand how you would

take that inference, but it's not crystal clear that one

could do so.

Q. Right. It's not crystal clear to you?

A. Certainly not.

Q. Well what I have to suggest to you, and again I want you to

have an opportunity to comment on it, is that it is clear

from that document and it is clear from the record

Mr. O'Connell made, and bearing in mind that Mr. O'Connell

is a meticulous taker of notes, that the information he was

receiving there was the Department's full and complete

response to the information contained in the letter of the

17th April, and that as and from the 7th April 7th May,

I apologise the 7th May, the line on that issue had been

drawn?

A. Which would have been quite incorrect obviously. I mean to

say, whether the licence were to go ahead was in the

balance right up to the 16th. And notably because the

Minister had given me discretion on determining whether IIU

would be in or out, and that was for real. So, to say that

a line is drawn in the sand on the 7th May is quite

incorrect.

Q. Now, Mr. Loughrey, we know from your previous evidence, and

I think you have confirmed it again here today, that you

kept the Minister briefed in relation to these matters,

isn't that right?

A. That's correct. Not only on this matter but, you know,

quite correctly, the Minister is the member in Cabinet, the

Minister decides policy, he takes the decisions. But he would have relied, quite correctly, there is no other way the system could work, that implementation, execution could be effected through me, so we had a day-to-day relationship.

Q. I think you met him on a Tuesday to Friday pretty well every week?

A. That was typical. In fact if there were ministerial meetings in Brussels or anything like that, clearly it wasn't a given, but it was a typical pattern, yes.

Q. I think you did attend a meeting with him in Brussels on the 8th May, isn't that right, a meeting with Commissioner van Miert?

A. Both the Minister and I went to see Karel van Miert, the Commissioner, yes we did.

Q. Again I want to explore with you why reference to the documentary trail, and I should add its by reference to the documentary trail, is what the Minister's mindset appears to have been in the light of this information which came to your attention on the 17th April, and I just want to let you know that what I want to do is refer you to three documents. In doing so, I am going to refer you also to the evidence that you gave in February 2003 in relation to those three documents. And then arising from that, if you would with permit me, I am going to put a proposition to you to enable you to comment on it; just so that you know where we are going?

A. That sounds fair enough.

Q. Now, if I can start off, Mr. Loughrey, by referring you to the document at Book 44, Divider 212, and that is the record which was entitled "Informal Government Decision" and you were informed at the time you gave evidence, Sile de Burca had confirmed to the Tribunal that that Government decision was made on the 23rd April. Now, what it records:

"The Minister for Transport, Energy and Communications referred to the official press conference arranged by his Department on Friday 19 April, which had gone very well. The terms of the proposed contract had been agreed about Esat Digifone. Legal clearance was awaited from the Attorney General's Office.

"As regards the question of disclosure of information to the unsuccessful bidders, the Attorney General's advice had been sought as to what might be disclosed without breaching confidentiality undertakings. The Minister indicated that he was fully satisfied that the competition which had taken place would withstand any scrutiny whether in court or elsewhere."

Now, your evidence in relation to that was in fact recorded in the first four pages of the transcript for Day 189, that was the Tuesday the 25th February, and that will be on the monitor.

"Question: Mr. Coughlan: Morning Mr. Loughrey.

Mr. Loughrey I think we were just coming to the "

A. This I would need to see because I don't recall it

obviously.

Q. "Question: Morning, Mr. Loughrey. Mr. Loughrey, I think we were just coming to the, I think to the 3rd May, 1996, on Friday afternoon when we adjourned to today. Well, could I just ask you about one document just prior to that because I tell you, it's in Book 44, it is at Divider 212, and I will it is headed "Informal Government decision GSM licence" and it is signed by per Sile de Burca, Government Secretariat.

Answer: Yes, I have that now.

Question: Do you see that?

Answer: Yes.

Question: 'The Minister for Transport, Energy and Communications referred to the official press conference arranged by his Department on Friday the 19th April which had gone very well. In terms of the proposed contract had been agreed with Esat Digifone. Legal clearance was awaited from the Attorney General's Office.

'As regards the question of disclosure of information to the unsuccessful bidders, the Attorney General's advice had been sought as to what might be disclosed without breaching confidentiality undertakings. The Minister indicated that he was fully satisfied that the competition which had taken place would withstand any scrutiny, whether in court or elsewhere.'

"We have been advised by Ms. De Burca of the Government Secretariat that that informal Government decision was made

at a meeting of the Government on the 23rd April

Answer: Mm-hmm

Question of 1996. First of all, could I just ask you, we have searched all the documents in the Department around this period and we can't see any note going to Government.

We can't see a speaking note for the Minister either?

Answer: Yes, Mr. Coughlan, I am rather puzzled. The Government Secretariat is invariably correct in these things, I am almost puzzled by Government decision because it is clearly no decision there.

Question: Perhaps you could assist us, it doesn't even look like a decision.

Answer: This is something which I believe Mr. Lowry, I mean he is quite entitled to do so, would have raised himself under AOB effectively, under any other business "

A. I am sorry to disturb you, I don't think they skipped a page there.

Q. I am very sorry?

A. Could we just retrace where we were, with "we were puzzled"?

Q. Yes.

A. Go back to page 2.

Q. I wonder Mr. Loughrey, would you prefer to have a hard copy of the transcript?

A. Yes, I think it probably would be better. Thank you for that. If you don't have a hard copy, I can read it here.

Q. I don't think maybe there is a spare one here but perhaps

we can arrange to get one?

A. Don't go to any trouble, I can still read it here.

Q. And then question 4:

"Answer: Yes, Mr. Coughlan, I am rather puzzled. The Government Secretariat is invariably correct in these things" I think we have a hard copy coming up to you now. We have located a hard copy in the room, Mr. Loughrey, and it's coming up to you now. It might be easier for you.

A. Thank you.

Q. Just page 2.

A. Yes, I have that.

Q. Question 4:

"Question: First of all, could I just ask you, we have searched all the documents in the Department around this period and we can't see any note going to Government. We can't see a speaking note for the Minister either?

Answer: Yes, Mr. Coughlan. I am rather puzzled. The Government Secretariat is invariably correct in this these things, I am almost puzzled by Government decision because it is clearly no decision there.

Question: Perhaps you could assist us, it doesn't seem look like a decision.

Answer: This is something which I believe that Mr. Lowry, and he was quite entitled to do so, would have raised himself under AOB effectively, under any other business. I certainly wouldn't have briefed him, particularly the first

paragraph, because first of all, I wouldn't have wanted him to utter those words. There is a touch of self congratulatory dimension to them which certainly I wouldn't have wanted to get across. I had even some mixed feelings even at the time of the particular press conference, so certainly the first paragraph.

"The second paragraph was one where I suppose he was informing his Cabinet colleagues actually that following, for instance, obviously press reports and the Dail debate, I think it was just on a debate on the adjournment on the 16th April, so it was topical and he was giving comfort or reassurance presumably to his colleagues, that it is under control, 'it is all right, I have it under control', but this is a note which I think would be quintessential Mr. Lowry. I don't think there is anything of the Department, and certainly I wouldn't have briefed him on that basis.

Question: Well, would you agree the impression we have, just looking at the documents, it doesn't seem to have been a promotion of the Department at least anyway, we can't see any document either a speaking note or a briefing note or

Answer: Certainly not. There again, as I said at the outset, all ministers actually have an absolute right to brief their colleagues as they see fit.

Question: Of course, I suppose, just bear with me for a moment just looking at it, as you say in the first

paragraph 'The terms of the proposed contract had been agreed with Esat Digifone.' Of course you wouldn't have briefed the Minister along these lines at all?

Answer: No.

Question: Yes.

Answer: There may have been an element of wishful thinking in Mr. Lowry's mind at the time, because clearly we were far from that at the time.

Question: I know, and you have explained because as at this time you certainly had definite views yourself.

Now I think if we it seems to have been copied to you, Mr. Fitzgerald, Mr. McCrea and Mr. Brennan. Do you have any memory or recollection of receiving it?

Answer: No, I don't, Mr. Coughlan, I am sorry."

And that, Mr. Loughrey, was your evidence in relation to the record headed "Informal Government Decision" and which appears to have been made or recorded on the 23rd April of 1993, do you see that?

A. I have seen that. And I am just seeing this now, I don't believe I have seen this since 2003 obviously. I wouldn't change a word of it except perhaps there may be a slightly difference explanation to. I mean to say, the Attorney General attends Mr. Gleeson would have been at that Government meeting, and it's very easy to substitute 'licence' and 'contract'. In a lay person's terms, they are totally substitutable. They'd be substitutable in my mind as well and there may be some confusion, there may not

have been total clarity on the draft licence rather than a contract. And I would offer that as an explanation. But certainly there is nothing untoward here.

Q. What I want to draw your attention to is the fact that you made it quite clear in your evidence that you hadn't briefed Mr. Lowry in relation to this information that he was bringing to his Cabinet colleagues on the 23rd April, isn't that right?

A. You see, the way informal, the so called 'pink slips' are recorded at Government meetings, this is where they are not formal Government decisions, there are notes taken by the then Secretary of the Government, and clearly in quick informal discussion on the margin of a Government meeting, you know, absolute clarity would be impossible because issues for which there are no notice whatsoever would come up under AOB. And I think myself is, what I put to you now is probably the logical explanation; that Mr. Gleeson would have been, as Attorney General, would have been aware actually of the work being done on the licence and I think 'licence' and 'contract' would be, to a business person and to a normal lay person, would have been interchangeable, and I think that's probably the explanation.

Q. All right. Now, the next document I want to draw to your attention is the official record of the exchange in the Dail on the 30th April of 1996?

A. And that's document number?

Q. That's Document Number 202 in the same Book 44.

A. I have that now.

CHAIRMAN: I think, Ms. O'Brien, we won't go beyond you putting this and I think you mentioned a third document.

MS. O'BRIEN: I think I might be quite some time dealing with this, sir.

A. Chairman, thank you for your consideration, but I am happy to go on till one o'clock if it's all right by you, I have no problem going on till one o'clock.

CHAIRMAN: We'll try to make a little further progress, but I'd rather you didn't have to be too lengthy a sitting. I think minus Mr. Fitzsimons and Mr. McGonigal, I think you and I are the elder lemons.

A. No, I put my hands up straightaway to that, thank you,

MS. O'BRIEN: Now, we know that on the 30th April Mr. Lowry made an important speech to the Dail about the entire evaluation process, isn't that right?

A. You would have to remind me now, because I haven't focused this for six years, you'll have to remind me was this a specific debate or?

Q. No, it was a prepared speech by the civil servants with, I believe, and certainly the evidence would suggest that there was input politically as well, and you may recall that it was the preparation of this speech which gave rise to some comment by Mr. Brennan of the pressure

A. Yes, he felt the pressure, it comes back to me now. It was a formal statement made to the house by Mr. Lowry. Sorry, I am sorry, I am trying to refresh myself as we go along.

Q. Yes, absolutely, it was a formal statement and it was followed by some exchanges between members of the opposition and Mr. Lowry?

A. Yes.

Q. Now, what I want to refer you to is not the speech itself, Mr. Loughrey, but the exchanges. And just to put those exchanges into context, I am only actually going to refer you to one or two of them, but if I could refer you to page 11 of the report?

A. The page numbers are so faint here, I can't what are the words at the top of page 11?

Q. "... in mind, namely to ensure that by way of competition, we could reduce the price of telecom hardware..."; it's the fourth last page.

A. I have it.

Q. And the query was in fact attributed and made by the late Mr. Seamus Brennan. It's the third complete entry on that page.

A. Yes, I have that.

Q. "Mr. S. Brennan: Why were names not disclosed on 22nd November when letters were submitted before the Minister made the award? Did he know who owned the 20 per cent before awarding the licence? Did he mislead the Dail on this issue? Will he tell the House who are the beneficial owners of the remaining 20 per cent of the winning consortium?"

And you then below there, Mr. Robert Molloy interjected.

"25 percent." You remember that extract?

A. I do.

Q. Then if I can take you onto the second-last page of the report.

A. I have that, yes.

Q. And I'll refer you to the fifth last complete entry on that page which was a question raised by Mr. O'Keeffe.

"Mr. B O'Keeffe: Why, when the Tanaiste was having discussions with one of the groups the day before the announcement was made, did he indicate that this decision would not be announced for a month? Given the Taoiseach's espousal of openness and transparency and the fact that this was the sale of a public asset, why did he not insist that matters pertaining to ownership would be in the public view? Will the Minister accept that perhaps it was a mistake given that we now have press speculation that 20 per cent could be owned by people such as Mr. Desmond and others? The confidentiality has now led to speculation throughout the press. Will the Minister make public the full ownership of Esat Digifone before the licence is signed?"

Then there was an interjection by Mr. Hogan. There was a response by Mr. Lowry: "I will not speculate on what the Tanaiste said" and then Mrs. Geoghegan Quinn interjects.

And then finally Mr. Lowry:

"The Deputy has missed the point. I stated clearly that all five of the participants in this competition had

various ways and means of raising funds to fund the project. I will not speculate at this stage or cast aspersions on the credibility of others. The Deputy mentioned Mr. Desmond. If Mr. Desmond or any other company is in a position to fund this project and is acceptable to Esat Digifone and if it means that this project is up and running, so be it that is their business. It is not my business to determine who should participate in a consortium of this kind. My only priority is to ensure that the necessary funds are in place to fund the project and get it to roll out on time. It is very simple."

You see the Minister's answer to that?

A. Yes.

Q. Now, your evidence in relation to that, Mr. Loughrey, was on Day 188, which was the same Friday 21st February, and it commences at the very foot of page 113, where Tribunal counsel, having referred to this exchange stated:

A. Ms. O'Brien, it's page?

Q. Page 113, Mr. Loughrey.

A. I have it.

Q. And Tribunal counsel, having referred you to the selfsame exchange that I have opened to you, asked you:

"Question: Now it does not appear that any draft of that nature was prepared for the Minister, but you can see that Mr. O'Keeffe has raised the issue of Mr. Desmond here?

Answer: Yes.

Question: It was known to the Minister about Mr. Desmond's involvement at this time?

Answer: Yes.

Question: And of course it was entirely the Minister's business and not Esat Digifone's business to be sure of who he was granting the, awarding the licence to, isn't that right?

Answer: You are absolutely right, yes."

A. That's a question that I think both of us, in retrospect, Mr. Coughlan and I, would like to rephrase, because basically Esat Digifone was the legal entity, but let's not quibble on it. "Of course it was entirely the Minister's business and not Esat Digifone's business to be sure of who was granting awarding the licence." Esat Digifone was the legal entity to which the yes, but we won't quibble on it.

Q. 260.

"Question. Now, Mr. Brennan has referred to us, has told us about that when any Minister has spoken in the Dail, the Blacks come back are reviewed in the Department to see if anything has to be done or if one needs to correct matters or matters of that nature?

Answer: I remember doing that, I don't want to sound that I am very old but I haven't looked at Blacks, I would say for 30 years. Lately, yes, but that is that is the process.

Question: Do you remember any discussion with the Minister

after this statement?

Answer: No, I don't. No, I don't, and you did point out just there that Mr. Molloy seemed very well informed.

Question: Yes.

Answer: I don't believe that I was informed of that or picked it up or anybody informed me at the time. Now I may be wrong, but I have no recollection but seeing it there is Mr. Molloy was either by chance or remarkably well informed."

And that was just your evidence in relation to that matter at the time.

A. But in retrospect, was he particularly well informed in the sense that that's not to infer anything against

Mr. Molloy, but we know that John McManus wrote an article on the 28th February which was very well informed.

Q. Yes indeed it was, Mr. Loughrey.

A. And I have no doubt that Mr. Molloy is a reader of the Irish paper of record.

Q. I have no doubt he was. And you are quite right, that's presumably where Mr. Molloy picked it up.

A. Yes.

Q. Now, the final document that I want to refer you to is at Divider 211.

A. I have that, yes.

Q. And it's a record of a press statement made by Mr. Loughrey after the meeting Mr. Lowry, I do apologise after the meeting that you attended with him in Brussels with

Commissioner van Miert in relation to the Persona

complaint, you remember that?

A. Yes, I do.

Q. And it's headed "Lowry To Issue Second GSM Licence

Following Meeting in Brussels With Commissioner Van Miert."

"In line with my policy of maintaining an open and

constructive relationship with the Commission, I met

Commissioner van Miert to inform him of my intention to

issue a second mobile phone licence in the very near

future,' says Mr. Michael Lowry, TD, Minister for

Transport, Energy and Communications in a statement issued

in Brussels today, Wednesday May 8.

"Minister Lowry added:

'I also made a presentation to Commissioner van Miert on

the background to the GSM competition. I briefed him on

the procedures observed, on the method pursued and the

basis for arriving at a decision in favour of Esat

Digifone. I referred to the recent complaint to the

Commission on the award of the licence.'

"Concluding, Minister Lowry said:

'I also indicated that should Commissioner van Miert

require any further' I can't quite make that word out

it's being suggested it may be 'clarifications or

information in the course of his review of the matter I

would be pleased to cooperate fully.'

"In his response, Commissioner van Miert indicated that he

was obliged to consider all complaints to him. However, as

a result of certain clarifications, the Commissioner indicated that he would be notifying Persona that he saw no justification for acceding to their request for any interim measures of an injunctive character."

And your evidence in relation to that document,

Mr. Loughrey, just to remind you of it, was again on Tuesday the 25th February, and it's page 32 to 24 of the transcript. Do you have that?

A. Unfortunately I have just returned Book 189 to Mr. Brady. If I could borrow it again.

Q. We will certainly see if we can return it to you.

A. That page again?

Q. Page 32. And about halfway down that page, Tribunal counsel concluded opening that press statement, and he said:

"You can see there that the, I suppose two things that perhaps arise out of it: The Minister is indicating he is going to award the licence soon?

Answer: Yes, he is, yes.

Question: That he intends to do that in the near future, and he is also, as is his right and his duty, making certain representations or submissions to Commissioner van Miert about a complaint which has been received.

Of course there will be no question of him alerting Commissioner van Miert in the course of his, Commissioner van Miert's consideration of the complaint, that things were hotting up in Mr. Lowry's own Department over the

whole ownership issue and whether the people who were now positioning themselves to receive the licence had been the people who in fact had bid for it. That wasn't explained to the Commissioner?

Answer: Even though I don't have a detailed recall of the meeting, if my memory serves me correctly, I was at the meeting but the focus was on is, the specific Persona complaint at the time.

Question: Yes.

Answer: And not so such issue as the ones you have described were, arose or were brought up

Question: Yes.

Answer: by either side clearly.

Question: Now, of course, as we know from the evidence you are giving at the moment and from the documentation and from Mr. Brennan's evidence, that the issue, the issue of ownership and the financial capacity issues hadn't been tied down, isn't that right, as far as the Department was concerned?

Answer: I hadn't, at that stage, involved myself personally. Either Sean Fitzgerald or Martin Brennan would have kept me in the picture, that's probable to the extent of certain. So I knew, broadly speaking, what was happening and would have briefed the Minister accordingly.

It is inconceivable that I wouldn't have so briefed the Minister. But once again, could I Mr. Lowry would forgive me if I were to say, he was a Minister always

looking for results sooner rather than later so that if I were involved in the I wouldn't have drafted this, but if I were involved in the approval or the vetting of this press release, it might have only, we are talking about perhaps a 20 second or a one minute vetting of it.

Q. Question: Yes.

Answer: It is possible that in the very near future with a compromise of me saying 'Minister, don't give any hostages to fortune' and he saying 'Look, we have to get this licence out one way or the other' and I it is possible I am just giving that interpretation."

And that's the end of the extract in relation to that document.

A. And that's totally in line with the description I gave about 20 minutes ago.

Q. I see.

Now, Mr. Loughrey, arising out of the three documents and the documentary trail which I have opened to you, what I have to suggest to you, Mr. Loughrey

A. This is the proposition?

Q. This is the proposition, Mr. Loughrey.

A. Okay.

Q. What I have to suggest to you, Mr. Loughrey, is that it was the Minister and not the Department that was dictating the response to the information received in the letter of the 17th April. And in that regard, I want to draw your attention specifically to the documents. Firstly, the

informal Government decision which, as you said, was something of a misnomer because it isn't a decision, it's Mr. Lowry bringing information to his Cabinet colleagues, as of course he was entirely entitled to do, in which he is informing his colleagues that the terms of the licence have been agreed and he is awaiting legal clearance. That was on the 23rd April, Mr. Loughrey. On the 22nd April, Mr. Towey had had his meeting with the Attorney General's Office. On the 23rd April, he had met with Mr. Nesbitt, and it was on the 24th April that he had formulated his request for advice on behalf of the Department. And it is clear, Mr. Loughrey, I have to suggest to you, from the evidence that you gave in 2003, that in conveying that information to his Cabinet colleagues, Mr. Lowry had not been briefed by you and that you agreed that it was not a departmental promotion.

MR. O'DONNELL: Chairman, just before Mr. Loughrey answers that, I am not objecting to the question, but could I just make this observation, Chairman. This is a clear question that the Minister not the Department were dictating the response to the letter of the 17th April, but it wasn't a question that was put to Mr. Towey and it wasn't a question that was put to Mr. Brennan. And it is somewhat unfair that it wasn't put to them if that's really what the Tribunal legal team are thinking. I am sure they would have denied it, but I am just concerned that a thesis, which Ms. O'Brien is entitled to develop, wasn't put to my

witnesses in fairly bald terms. And it's just regrettable that didn't happen.

CHAIRMAN: I suppose we better get a response.

MR. O'DONNELL: I am not objecting to the question.

CHAIRMAN: I don't envisage troubling the two pivotal witnesses again but, as I will in the other matters still to be addressed I will have regard to that.

MR. O'DONNELL: Will you note my concerns in relation to it?

MR. FANNING: I want to echo that concern. I'd like it to be pointed out where in the transcript that was put to Mr. Lowry when he gave evidence.

CHAIRMAN: Well, we'll address that if needs be, but this is the last thing anyway before lunch.

A. Chairman, I am happy to respond to it obviously.

CHAIRMAN: Would you rather pause?

A. No, I am happy to respond to it on the spot.

MS. O'BRIEN: I am not actually finished yet, Mr. Loughrey.

A. Good.

Q. Because I want to take you on to what the Minister said in the Dail on the 30th April, and before I quote what the Minister said, I actually want to put that in context for you.

Now, on the 30th April, it was the day after Mr. Fintan Towe had gone back to Mr. O'Connell and said "This matter is being referred for legal advice. What the Department has to look at is whether the information now being given

is consistent with the information that was given and which was evaluated, and the Department is not yet clear on what, if anything, it will require."

On the, it was the day before the 1st May when Mr. Towey prepared and Mr. Brennan signed the Department's official response to the information that had been furnished and which, as Mr. Towey stated in evidence, was the Department looking for information to enable it to evaluate the issue.

So the Department had no information at that stage to evaluate the issue and, number two, it clearly had no legal advice indeed, be it by way of opinion or otherwise. And what Mr. Lowry said to the house that day was:

"The Deputy has missed the point. I stated clearly that all five of the participants in this competition had various ways and means of raising funds to fund the project. I will not speculate at this stage or cast aspersions on the credibility of others. The Deputy mentioned Mr. Desmond. If Mr. Desmond or any other company is in a position to fund this project and is acceptable to Esat Digifone and if it means that this project is up and running, so be it that is their business. It is not my business to determine who should participate in a consortium of this kind. My only priority is to ensure that the necessary funds are in place to fund the project and to get it to roll out on time. It is very simple."

And what's quite clear, Mr. Loughrey, is that that was not any part of the speech that had been prepared for Mr. Lowry

to deliver in the House, and that in expressing that view, Mr. Lowry was expressing his own views. And what I have to suggest to you, Mr. Loughrey, is that when Mr. Lowry went into the House on the 30th April and he made this statement, the matter was a done deal, it was a fait accompli. He had said 'I have no difficulty with Mr. Dermot Desmond'. And in making that statement, Mr. Loughrey, I also have to suggest to you that he was effectively pulling the rug from under any inquiries that were being made by the Department whether in order to evaluate this information or from a legal perspective.

A. There are two dimensions to your proposition. One involves civil servants; the other involves the Minister. Perhaps we could take them one at a time. Okay.

Minister first is, you will have seen all in evidence that I had said I hadn't read Blacks in 30 years. Let's take my dimension first of all, or the civil servants, is: I think you'll agree with me it was quite an impressive reply by Minister Lowry on his feet and it had two dimensions to it as you have read it out now, because I haven't seen this in six years or considered it, but as you read it out, it had two dimensions. One is the generic dimension, the first two sentences from memory now I don't have it in front of me and the other is what you would regard as specific but I believe it's also generic as well. To react like that on his feet was quite impressive and I believe I could agree with everything he said but without, without coming

to this deduction you have, this far-fetched thesis. It just doesn't stand up whatsoever. This is the 30th April. I have a day-to-day relationship with the Minister. Of course I would have put him in the picture. I may well have said now he is well capable of forming any opinion himself, but I may well have said to him is, 'look' and you have commented on this already, Chairman you have been very patient with me over a fort night when I must have used every cliché in the book to say what was important was the strategical operational. I almost went capriciously 'who cares about the 20 per cent so long as they have the cash?' It is not up to civil servants to decide whose cash is better than anybody else's cash. So this was the significance. I may well have said to, and we did have day-to-day interchanges, have said to the Minister, quite capable of coming up with it on his own initiative, but I may well have said to him 'listen, we are not in the business of second guessing businessmen. If somebody can come along with the cash and it stands up, good for them.'

So, I see nothing in this statement but an admirable agility by a minister to answer on his feet and fair play to Mr. Lowry.

MS. O'BRIEN: Thank you very much, Mr. Loughrey.

A. Could I just say is there, I understood that I have come to this element of the Tribunal with a problem, Chairman. I am the only witness that this Tribunal has used, both in

terms of your ruling, it gave my evidence a significance in this part of this module. I also came and heard Ms. O'Brien, in her very measured statement of Thursday morning, only refer to, the only witness she referred to was me in the context of the Attorney General's letters. I understood from you, Ms. O'Brien, that you were going to be open and follow these things. I said this is something I wanted to come back to later. And my recollection of it is you said 'fine'. I believe I have a full entitlement now, with your permission obviously, Chairman, is to go back on what I call on the show stopper, when Mr. Coughlan put it to me, and he put to me very firmly, 'we have an opinion from the Attorney General that says no such advices existed.' It stopped me in my tracks. You have heard my explanation and I said this is something I want to come back to. Now, I want to come back to this. This will be uncomfortable for the Tribunal

Q. No, Mr. Loughrey, there is no difficulty at all from the Tribunal's point of view. I thought that in discussing it in the context of the transcript, where Tribunal counsel had referred to the letter that you had actually made your views known. I wasn't seeking to cut you off at all. It must be a misunderstanding

A. Excellent. So long as I can be assured, Chairman, I am not being guillotined, because I am the only witness that has being cited in each case, the only witness cited by Mr. Coughlan not to pursue it with Mr. Towey. The only

witness cited Chairman, I don't want to sound contentious, but you had a dilemma in your ruling of the 28th February, you had a major dilemma: How could you get it across that without breaking, and as I said to your eternal credit, you always wanted this out in the open, but how could you get around this dilemma of getting it across is that the Tribunal's interpretation of the Attorney General's letters was the correct one? You relied on two sources, you had two pillars to your argument: First was the Attorney General's letter itself and your interpretation of it, nothing ignoble about your interpretation, I fully understand it. Then you cited, and this is dizzyingly flattering to me, you cited, without saying which was more important but gave them equal billing, my evidence.

Now, my evidence was based on four questions where each time I put in a saver that I was only reacting on my feet, and it came to the point is where it ultimately was predicated on the Attorney, on Mr. Coughlan putting it to me that the Attorney General had effectively killed off the argument. Now, I had started this process, this discussion with you Ms. O'Brien, when I said the what if questions, the what if questions is, if Mr. Coughlan, and in fairness he acted impeccably, but if he had the card placed face downwards you had two cards to play. If he had turned up, if he had permission to turn up those two cards, what would they have said? The letter of the 4th February said

nothing. And we can go through it line by line; it said absolutely nothing. However, the letter of the 20th December was effectively a neutron bomb. I don't believe that since the foundation of this State there has ever been, and we know how important this Tribunal is, we don't have to remind ourselves, this is probably the most important tribunal that gets to the heart of the way Government does business, and it was quite correctly entrusted to Mr. Moriarty whose record is obviously unimpeachable, but we had you had, on record, a letter from the Attorney General where there was no legal rule of any kind. It referred specifically to Mr. Towey's letter. It referred specifically to restructuring and said the matter would be dealt with. My, how you must have agonised when you got this letter. I reckon this is the first time since the foundation of the State that the chief law officer of this State, the Attorney General, whose duties are constitutional and set out in Article 30, I don't have to remind anybody in this room how solemn they are is, in his statement himself to the Tribunal on a matter of substance which you had led the previous week where you had set out your stall, which completely contradicted your Opening Statement, and that matter was never resolved, ever, ever resolved. It was a time bomb that's still ticking until today. It was never resolved, Ms. O'Brien, and what's more, of course you could reconcile it. Now, I have to admit, and I admit this freely, that you had

an interpretation, I don't agree with the interpretation, but it was honestly and professionally held. But, you reconciled it in pectore; you never shared your conviction with the Attorney General. That letter was lying on your file unresolved, and I believe it gets to the heart of this matter and it must be addressed.

Now, all I can say is, I would with welcome to go through both letters line by line, and this may be, and I don't mean to be in any sense to put you into a zone of discomfort, Ms. O'Brien

Q. You are not putting me to any zone of discomfort at all, Mr. Loughrey.

A. But your analysis, other than I know that every member of your team actually is, always approaches these questions from an absolute professional point of view, the two paragraphs where you analyse those letters, if I didn't know you, Ms. O'Brien, I'd say they were self-serving and they certainly didn't give the clarification. Mr.

O'Callaghan asked for a clarification. He got a response, as he said, but not a clarification. And I think it is essential that you and I go line by line through those two letters.

Q. I have absolutely no difficulty in doing that, Mr. Loughrey, and we will do that.

A. Excellent.

Q. No difficulty at all.

CHAIRMAN: A quarter past two.

THE TRIBUNAL ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF MR. LOUGHREY BY MS. O'BRIEN:

CHAIRMAN: Thank you, Mr. Loughrey.

MR. LOUGHREY: Thank you, Chairman

MS. O'BRIEN: Thank you Mr. Loughrey. Now, just before we

rose for lunch, Mr. Loughrey, you indicated that you wished

to give further evidence in relation to the interpretation

which the Tribunal had put on the correspondence from the

Attorney General. I just put that

A. Yes, I did and I think it's important, lest I forget,

because sometimes there could let me put it this way,

Chairman, this session could end quite abruptly and I

mightn't be able to put on record. This morning I used an

inappropriate term. I was searching for a mot juste and

you might have - I looked, perhaps, a little exercised and

inappropriately I picked the word 'abuse' and it was quite

wrong. What I intended to get across was the concept of, I

suppose, asymmetry between the Tribunal's knowledge and an

witness's knowledge. By definition, because of your role,

because of the mandate given to you by the Oireachtas and

the assiduousness, clearly, of your team they would have

opened and absorbed endless documentation which I wouldn't

have seen - or any other witness for that matter. And with

that asymmetry of knowledge comes responsibility and I

believe is, perhaps that I perhaps misinterpreted this,

but I believe that in 99% of cases that responsibility was

demonstrable, the exercise of that responsibility by the Tribunal counsel. I was, as I said, a little bit puzzled by the evidence and the interpretation of it that I gave on day 188 and I certainly picked the inappropriate word and I'd like to withdraw that, if I might.

CHAIRMAN: Thank you Mr. Loughrey.

MS. O'BRIEN: Thank you, Mr. Loughrey, for that clarification.

Now, you referred to an application that Mr. O'Callaghan had made on the Wednesday evening of last week in which he had sought clarification and which he asserted on the basis that he asserted that references that the Tribunal had made to this correspondence from the Attorney General were not, in his submission, borne out by the contents of the correspondence. That was on Wednesday evening. Now, on Thursday morning, you will recall, I think you were here and you referred to it, that I responded on behalf of the Tribunal to Mr. O'Callaghan's submissions

A. YES

Q. and I explained the interpretation and the basis on which the Tribunal had arrived on that interpretation.

Now, I want to give you an opportunity to comment on this, but I do want to open the correspondence again,

Mr. Loughrey, if you'd bear with me -

A. Sure

Q. Because I don't want there to be any confusion at all on what the exchanges consisted of.

A. That sounds very fair.

Q. Good. Now, firstly what I want to do is to just put up on the overhead projector a copy of an article which appeared in the Sunday Business Post newspaper in the edition for the 15th December of 2002. And I think that was either towards the end of, or perhaps immediately following, the completion of delivery of a very lengthy Opening Statement on behalf of the Tribunal.

A. That's correct, yes.

Q. And it was what was stated it was a comment piece but it was what was stated in the third last column on the second page of that article which gave rise to the inquiry, the Tribunal's initial inquiry of the Attorney General.

And it stated.

"The Tribunal is expected to hear that just hours before the announcement was made awarding the licence to Esat Digifone, senior civil servants sought advice from the Office of the Attorney General on whether consortia should be permitted to alter the makeup of their investors. The advice they received was that consortia could, but only for shareholdings of 20% or less.

Legal sources believe this advice may become a source of contention at the inquiry. However, it is understood that in recent months the State has been examining the basis on which the advice was given in order to establish whether it will stand up to close scrutiny. The matter is known to be causing considerable anxiety in Government circles."

And it was that portion of the article, Mr. Loughrey, that gave rise to the Tribunal's correspondence to the Attorney General because, as I had indicated on Thursday morning last in responding to Mr. O'Callaghan, the Tribunal was surprised when it read what was in the newspaper because it had seen the letter of the 24th April. It was clear to the Tribunal that a request had been made for an opinion and it had seen Mr. Nesbitt's opinion and letter of the 9th May of 1996 and the Tribunal had formed the view at that time that advices and that letter did not address the request. So what the Tribunal was concerned about at that point was that there may have been some other advice of which there was no documentary trail or documentary record?

A. I accept what you say exactly and I believe the Tribunal, predictably, acted immediately to make inquiries.

Q. Yes?

A. So we don't have a problem with that so far.

Q. Now, the letter of request was dated the 16th December of 2002 and it's addressed to "Mr. Rory Brady, SC, Attorney General, re Tribunals of inquiry."

"Dear Attorney General,

"I am writing to you in my capacity as Solicitor to the Tribunal of Inquiry appointed by the above order of the Oireachtas.

"I enclose herewith a copy extract from an article which appeared on page 11 of yesterday's edition of the Sunday Business Post."

A. And we can skip the next part, obviously.

Q. Yes

"The relevant portion of the article read's as follows"

and that's what I have just quoted.

"The Tribunal wishes to know whether the above extract is

correct. In particular, the Tribunal wishes to establish

whether the following statements of fact are correct.

1. That "Just hours before the announcement was made

awarding the licence to Esat Digifone, senior civil

servants sought advice from the Office of the Attorney

General on whether the consortia should be permitted to

alter the makeup of their investors."

2. That "The advice they received was that consortia

could, but only for shareholdings of 20% or less."

3. That "In recent months, the State has been examining

the basis on which advice was given."

and it continues

"If the above statements (or any one or more of them) are

correct, the Tribunal would be anxious to obtain a

narrative account setting out all the information available

regarding these matters and in particular:

A) the identity of the civil servants who sought advice

from the office the Attorney General;

B) precisely when the advice was sought and in what

circumstances;

C) the identity of the officials (or counsel retained by

the Attorney General) who provided such advice;

D) whether such advice was furnished orally or in writing;

E) the basis on which the advice was given;

F) all of the informs made available to the Attorney

General in connection with such request for advice, if any.

"The Tribunal would also be very much obliged if you could provide the Tribunal with copies of all documents in your power, possession or procurement which touch or concern these matters, insofar as it is confirmed that they are factually correct."

And it continues that the request for assistance was made in the course of the private investigative phase of the Tribunal's work and that it was

A. I would say that was a fully comprehensive inquiry related to the press statement.

Q. Yes. Yes. Now I am going to open we then received a holding letter from the Attorney General dated 17th December indicating that the matter was under consideration and then the Attorney General's response of the 20th December 2002.

"Dear Mr. Davis.

"Thank you for your letter of the 16th instant and its enclosure.

"Messrs. Gormley and McFadden of this office. (Legal assistants here at the relevant time) have read the extract from the article which appeared in the Sunday Business Post and refers to advice being given by the Attorney General

"Just hours before the announcement was made awarding the

licence to Esat Digifone." It is understood that the announcement was made on the 25th October 1995. After an examination of the office's file they have reported to me in the following terms:

1. They have no recollection of furnishing the advice referred to in the said extract or receiving a request for same and do not believe that they gave such advice.
2. There is no copy on this office's file of any advice of the type mentioned in the extract or any note of same having been given by the Attorney General or any other person in his office.
3. 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 9th 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."

And then it goes on:

"For my own part I wish to state that there has been no examination by me or by my office of the alleged advice mentioned in the extract. (And referred to as statement of fact Number 3 in your letter) Nor have I been aware nor have I been made aware of such examination being carried out by any other State authority.

"Finally, I should point out that neither I nor my office has made contact with Dermot Gleeson Esquire SC in relation to the content of your letter.

"If I can be of any further assistance to the Tribunal in relation to this matter please let me know."

And that's signed by the then-Attorney General.

Now, on foot of that, the Tribunal took the matter up further with the Attorney General. I just wanted to be clear that there was absolutely no confusion on anybody's part or that any possible advice that might have been given could have been overlooked. And on the 9th January, 2003 the Tribunal again wrote to the Attorney General.

"Dear Attorney General,

"Thank you for your letter of the 20th December last in response to mine of the 16th December. The Tribunal is grateful for your prompt response to its inquiries.

"Having given further consideration to the wording of the article which appeared in the Sunday Business Post on the 15th December, 2002, the Tribunal is of the view that the reference to advice given by the Attorney General "Just hours before the announcement was made awarding the licence to Esat Digifone" may refer to the actual grant of the second mobile phone licence to Esat Digifone rather than the announcement of the result of the competition process.

While the announcement of the competition result was indeed made on the 25th October, 1999 1995 the announcement of the actual awarding of the licence to Esat Digifone was

not made until 16th May, 1996.

In the light of such interpretation, the Tribunal would be very much obliged if you could kindly reconsider the Tribunal's request by reference to the announcement of the actual award of the licence on 16th May, 1996."

And then there is the attorney's final response, which is dated the 4th February, 2002. "Dear Mr." oh, sorry it is yes, it's dated 2002, but there was an error in the dating, it's 2003.

"Dear Mr. Davis,

"Thank you for your letter dated 9th January, 2003.

"Messrs. Gormley and McFadden of this office have again read, in the context of your recent letter, the extract from the article which appeared in the Sunday Business Post. There has been a further review of this office's files in relation to the Esat licence and I now set out further information on the basis that the article in question related to the date of the announcement of the actual awarding of the second mobile phone licence to Esat Digifone Limited i.e. 16 May 1996. In addition, this office has sought and recently received clarification from counsel (Richard law Nesbitt SC) and Mr. Fintan Towey on the issues raised in your letters.

"On the basis of the information of which I have now been apprised the following is the position:

1. On the 14 May 1996 there was a consultation with counsel (and others) attended by Mr. McFadden and

Mr. Gormley of this office. Mr. McFadden kept a note of that meeting.

2. On the 15 May 1996, Mr. Fintan Towey of the Department sought advice from this office regarding the content of a draft letter which the Minister proposed to send to the Chief Executive of Esat Digifone Limited concerning the consent required under Article 8 of the licence in relation to the issue of shares by the licensee and to the transfer of shares in the licensee in specified circumstances and under certain conditions. Messrs. Gormley and McFadden regarded the draft letter as merely relating to the then-ongoing process of negotiating the terms of the licence in particular Article 8.

3. On receipt of the draft letter this office (Denis McFadden/John Gormley) sent it to counsel for his general advices.

4. On the afternoon of 15 May 1996, counsel furnished his written advices wherein inter alia he advised certain amendments to the draft letter.

5. Counsel's advice was forwarded (John Gormley) to the Department at 6.25 p.m. approximately on the 15th May 1996.

6. Subsequent to counsel furnishing his written advice, he was requested to attend at the Department during the closing stage of the licence issuing process. Counsel has informed this office that, while he was there, he furnished oral advice in relation to the licence condition regarding ownership changes and, in particular, he was asked whether

such condition was solely "Forward looking." Counsel advised that that was the case.

"No officials from this office or the Chief State Solicitor's Office attended this meeting. Mr. Owen O'Connell of William Fry was present at the meeting. Other officials from the Department may have been present but this has not been confirmed at this stage. So far as this office is aware there is no note of attendance of this meeting.

"Copies of documents from this office's file concerning the events listed at points 1 to 5 above are enclosed herewith.

I am informed that Mr. Towey's letter of the 15th May 1996 and that counsel's opinion of 15th May 1996 were previously furnished to the Tribunal by the Department. I also enclose other documents from this office's files which may be relevant.

"If I can be of any further assistance to the Tribunal in relation to this matter please let me know."

And that marked the completion of the exchange of correspondence with the Attorney General's Office and, as I indicated to you already, Mr. Loughrey, on behalf of the Tribunal, I explained on Thursday morning the Tribunal's interpretation of that correspondence and now I want to give you an opportunity because I understand you don't agree with that I want to give you an opportunity to comment on it.

A. Thank you and that's more than fair and thank you for

opening the letters.

I think if you look at the totality of this correspondence, first of all what strikes one is that there are two playing pitches here. One of the very obvious one; that was the Sunday Business Post article; and there was another one; that you can pick out as much by style and syntax more than anything else. We don't have to go into the topping and tailing, the politesse of the letters, you know. Let's - it's the three indents that we'll take on the letter of the 20th December. Can I say, and I see it straightaway, you see, the letter of the 16th December that elicited this reply was a perfect letter, I would have had no problem whatsoever. I think it was total and comprehensive, so I have no problem, so we can move on.

Q. We are in agreement on that?

A. We have agreed on that.

The three indents here, it's funny when you read them and not to criticise the Attorney General's style it might have been a help to you, I think, to the Tribunal recollect the Tribunal, if 3 had a "However" in it. Because it's quite clear is, 1 and 2 are clearly playing on the Sunday Business Post pitch, in other words is the Messrs. Gormley and McFadden have no recollection of furnishing an advice referred to. Everything is all qualified "In the said extract"

Q. Yes?

A. And that's one again in the article in the paper.

"Receiving request for same and do not believe they gave such advice." Now once again is, that is governed in said extract, playing on the newspaper pitch, so to speak.

"2. There is no copy on this office's files of any advice of the type mentioned in the extract."

Now, once again is, is the Attorney General is being absolutely clear and where he confirms there is no advice of the type on file it is clearly linked to the paper.

Now, 3 might have benefited from a "However".

'There was, however' because it might have benefited in terms of, now, I don't say 'clarity' because I believe it's a stand-alone clause, it's quite clear, but in terms of the flow, it might have benefited from a 'comma however'.

"There was a request for advice containing the Department's minute of the 24th April concerning the restructuring of the ownership of Esat Digifone since the date of the application and the Attorney General's response thereto."

Now, that can I say so there is no doubting that the Attorney General's letter is clearly he is seeing it, the Attorney General's Office, but more to the point the Attorney General himself is seeing it clearly in the context of response to Mr. Towey's letter. And it said

"Mr. Nesbitt's opinion of 9 May 1996"

and wait for the, what I call is the 'convincing clause'

"Which was released to the Department"

and this is the critical one

"With the sanction of the then Attorney General."

There is no doubting that

"With the sanction of the then Attorney General on the 13th
May dealt with the matter."

Now, this comes back to the point I was making earlier this morning is, if an Attorney General, in all his majesterium, is referring back, and refers back to a predecessor and says "With his sanction this was issued," I think there is no doubting what that means and this was why I was puzzled in the interpretation because when we move to the second letter in a moment, it is supplementary. It doesn't in any way contradict, qualify or anything that's said in those two sentences. So that's why I had a puzzle with the interpretation. Now, can I just preface this by way -

Q. Yes

A. I haven't the slightest doubt that the, what I call the 'righteousness' of the Tribunal's position on this, that they had convinced themselves that that is that their interpretation is correct. Now, I may not agree with it but I can understand the reasons why you did so. But I would suggest that it is extremely difficult to depart from item 3 there in the letter of the 20th, and just let's go to the what puzzled me, Ms. O'Brien, you have been, you know, fair and considerate to me all day and I am not in any sense going to play this theatrically or make a cheap debating point, but what puzzled me, because I was down the

hall.

On, day 361, and I think it was the afternoon of Wednesday, you were quite correctly pursuing Mr. Towey, and on the bottom of page 73, I couldn't have put it better myself.

You put the question:

"You never went to the Attorney General's Office and said "We need more clarification on this opinion" did you?"

Now, please believe me, I am not making a debating point on this, but I am just saying is, that's what puzzled me.

Because when you got back to the AG's Office, you confined it to the playing on the Sunday Business Post pitch. Now,

I can understand the reasons for that. But it wasn't going

to the response to be elicited by your letter wasn't

going to be give you any help, I suggest, or any explicit

help on Clause 3 of the original letter. And that - that's

what puzzled me. Because when we read the letter of the

4th February is, I don't think we have to go back into it

but could I refer you to the second sentence. no, first

effective sentence. "Messrs. Gormley and McFadden of this

office again read"

now wait for it

"In the context of your recent letter the extract from the

article which appeared in the Sunday Business Post."

we are playing on the Sunday Business Post pitch.

Now, "I now set out"

- and my emphasis -

"Further information on the basis of that the article in

question related to the date of the announcement etc."

He is admitting, obviously, there was a slight slip up in the original letter. But nothing turned on that.

And you say

"In addition the office has received clarification from counsel"

and we'll come to that in a moment

"And Mr. Fintan Towey."

And can I say is, I have no problem with any of the indents, any of the indents whatsoever. Frankly, I don't believe they give you any comfort in terms of the original letter, but I have no problem. The only problem I have is with 6. And this goes the first paragraph only.

"Subsequent to counsel furnishing his written advice"

Now, let's pause on that a moment the counsel clearly is Richard Law Nesbitt, senior counsel, and it's

"Subsequent". It's definitely saying he had already furnished it, right?

Q. Yes.

A. "He was requested to attend the Department during the closing stage of the licence issuing process."

That speaks for itself.

"Counsel has informed this office that while he was there, he furnished oral advice" now it's the definite article that's important here "oral advice in relation to the licence condition."

And that's critical in this paragraph

"regarding ownership changes, and in particular he was asked whether such condition"

that refers to the condition, the definite article

"was solely forward looking."

I put you, Ms. O'Brien, what else could he have said?

There was no other explanation. It had to be forward looking. So there is if I may say so, there is nothing to rescue you on that point either. And that's why I keep being puzzled. There is one other point before, because I have gone on a bit about this.

Look what the Attorney General, look at the sequencing of the letter. The sequencing of the letters, I think, to follow the sequence is, I believe, very important, because in his letter, his second letter, the Attorney General doesn't pick it up hours, he doesn't pick it up the 16th only, he doesn't pick it up the 15th. He starts on the 14th. Now, there is two explanations for that. Either it's random and I am finding it hard to believe that letters from solemn letters from the Attorney General to a tribunal, a very important Tribunal set up by the Oireachtas, I doubt if there are too many random statements in it. It's either random or deliberate. I suggest it's the latter. It's deliberate because he believed, and perhaps those who made the original draft for him, but it's the Attorney General's responsibility, clearly believed that matters up to the 13th April, which was the sanction, the clear go ahead legal clearance of the Attorney General,

had been dealt with in the original letter. And that's why they started from the 14th onwards. And the 14th onwards the die was already cast. The Attorney General had already given his approval. So what I am saying is; looking at the totality of that and clearly understanding the interpretation, and the interpretation that you and the Tribunal had put on the original letter, and I clearly recognise that before the Opening Statement, before Mr. Coughlan's Opening Statement you had already come to the conclusion that the matter hadn't been dealt with, is, I recognise that's a validly held opinion, I still find it puzzling on two on two because a close reading of these letters kind of flies in the face of that interpretation and secondly, and I don't mean to go into a zone that's uncomfortable, is, I am kind of surprised that while you had reconciled it in your own mind, the Attorney General didn't know of this reconciliation and that's what still puzzles me, Ms. O'Brien.

Q. Very good, Mr. Loughrey.

There is just one final matter then before the end that I want to come back to, because it was suggested to me that, perhaps, you hadn't been clear on the line of questioning that I was pursuing with you earlier this morning. And you will remember that I referred you to all of the extracts in which this opinion had been raised in the course of your evidence in 2003. And there was day I think 189 188, 189 and 191. And 191 was the cross-examination by

Mr. McGonigal on behalf of Mr. O'Brien who was, as you know inadvertently Mr. O'Brien had been furnished with a copy of this opinion and advices. And he had raised with you portions and he had opened passages from the covering letter and the opinion of Mr. Nesbitt. You remember that.

And when we completed analysing your exchange and your responses to Mr. McGonigal I had brought to your attention that Mr. Nesbitt, who was the author of the opinion on which you had already given your evidence, was part of the departmental legal team and that he was representing the Department all the way through its dealings with the Tribunal on these inquiries and all the way through the currency of the Tribunal's public sittings; isn't that right?

A. That's right.

Q. And I had suggested you, perhaps foolishly, that it was surprising that when you had given that evidence that Mr. Nesbitt didn't get up and say "Hold on a minute, that's quite wrong. I furnished this opinion and I know what's in it." And that was perhaps foolish of me.

But what I want to ask you is this, and bring to your attention is this: The Tribunal knew what was in Mr. Nesbitt's opinion and advices because it had been furnished to the Tribunal by the Department on terms, on terms that it wouldn't be referred to in the course of public sittings unless the Department had an opportunity to challenge and raise the issue of privilege if they wished.

So to that extent, the Department had agreed a very limited form of waiver. It was for the Tribunal's eyes only; isn't that right?

A. Yes.

Q. Now, the Department also had that opinion; isn't that right?

A. Correct.

Q. And of course we know, inadvertently, that Mr. O'Brien had that opinion?

A. Correct.

Q. Now, the privilege attaching to that opinion was a privilege against disclosure to anybody else; isn't that right?

A. Correct.

Q. But there was absolutely nothing to stop the Department, either the officials themselves who knew what was in the opinion or the Department's legal team or the Department's legal representatives or anybody in the Department, discussing that opinion, isn't that right, amongst themselves amongst themselves?

A. There was nothing that among themselves, of course.

Q. Amongst themselves amongst themselves?

A. But just could I of course I accept that could I remind because it's sometimes forgotten about, that we took the Chairman of the Tribunal's strictures very important.

When I gave my original intended evidence I didn't speak to any of my former colleagues. I know they all respected

that. And by definition you got, it's almost what I call 'the authenticity of the four gospels'. There is different emphasis and it adds to the authenticity. In fact, if you had got all exactly similar with no such flaws the last time I think twelve officials might have was during one of the Stalin's show trials in the 1930s

Q. Of course

A. So I want to emphasise that, is that there was no no connection between any of the witnesses until after the original 2003 examination.

Q. I should just, just put on the record, however,

Mr. Loughrey, that the Tribunal didn't place any restriction on officials communicating with each other prior to them giving evidence?

A. Well we for whatever reason, it lost in translation, that's how I picked it up and I didn't speak to anybody else.

Q. That's fair enough. But, in fact, it appears what I really want to suggest to you is this, Mr. Loughrey, that there was nothing to stop Mr. Nesbitt, either directly, or the Chief State Solicitor's Office, coming to the Tribunal at that stage after you had given your evidence and saying "Hold on a moment here, the Tribunal has the wrong view of this opinion" and I just want to bring it to your attention that that wasn't done?

A. Well, if you say so, I accept that. But of course they would have to answer it for themselves. But I accept what

you are saying, of course.

Q. Thank you Mr. Loughrey.

MR. FANNING: Chairman, I have spoken to Mr. Hogan and Mr.

O'Callaghan and they were, subject to you, Chairman, prepared to indulge a difficulty that I have in allowing me to alter the sequence and proceed at this stage. Now, I don't think I'll be much longer than 10 minutes.

THE WITNESS WAS EXAMINED BY MR. FANNING AS FOLLOWS:

Q. MR. FANNING: Mr. Loughrey, what's central to your evidence, I think, from the perspective of the Tribunal is the relationship that you had with your Minister at the time, Mr. Lowry, in April and May of 1996, at least insofar as the aspects of evidence that you have been recalled to deal with are concerned. And you dealt with the nature of your relationship with Mr. Lowry and your perspective on his discharge of his Ministerial office on day 189 at page 53. And we might just have that passage up. In fact, you have my copy of the transcript that was handed in this morning. It's day 189, page

A. And Mr. Brady has it, I am afraid.

Q. I see. If we could just have that page up. It may, in fact, be underneath the black folder that's on the table beside you.

A. Oh, I can use this one, of course. Yes, thank you, thank you. And which page is it again, Mr. Fanning?

Q. It's page 53?

A. 53. I have that.

Q. And it's, in fact, the passage right at the top of the page. I beg your pardon, I think Mr. McCullough had the right page.

"He didn't, to my recall, now it is easy to recall when a Minister imposes civil service advice on something that is significant, I have no recall whatsoever of any involvement other than saying almost what I might call his preoccupation with results: "Can we not sort this out as quickly as possible" but never interfering on how it might be sorted out. Let me put it that way."

that's a passage from your evidence back in 2003. And I think in fairness you may have said something similar this morning. Does that encapsulate your view of Mr. Lowry's role coming up towards the 16th May 1996?

A. Totally. He always had the big picture outcomes in mind but, how to get there, he left to his Department.

Q. And Mr. Lowry's position, Mr. Loughrey, is that coming up to the 16th May 1996, he abdicated to the Department officials, and abdicated to you, in particular, as the ultimate conduit between the Department and himself for advice, on how matters should proceed. Would you accept that as a fair summation of what transpired?

A. I would.

Q. And Mr. Lowry never read the legal advice obtained from Mr. Nesbitt and from the Attorney General's Office and he relied your telling him that legal advice had been received, which was?

A. Well, I am not sure his confidence was well placed because he was in good company. I hadn't read it myself.

Q. Indeed. So it was becoming Chinese whispers from the perspective of Mr. Lowry because all he was receiving was your understanding based on advice that had been received and read by subordinate officials to you, that the legal advice received was, in effect, a green light in terms of the issues of the licence?

A. Absolutely. And just to underline the point; the confidence that senior management in any government department but, in particular, once again not out of any sense of self-importance, where a Secretary General must, by definition can't micromanage under any set of circumstances and I relied on Martin Brennan, through Sean Fitzgerald and, yes, that - that that's how it evolved. So Mr. Lowry would not would have relied entirely and, I believe, from memory, over two years working with him, it was only when I was out of town, so to speak, or away from my desk, that he would operate through others. Now, that's not to say that he wouldn't, exceptionally, operate through a senior assistant secretary or something like that, but he tended to operate through me.

Q. Yes?

A. And sometimes I just wonder, standing back, I think I explained to the Chairman, at the time when this came up that I had attack of shingles in August 1995 and I took my

annual leave immediately afterwards, and what happened in September 1995 is the Minister hadn't Sean Fitzgerald or myself there and dipped down into the Department. Now, it is my absolute belief that he would never have done that had I been there.

Q. And just returning then to April/May of 1996, Mr. Lowry gave evidence, I don't think we need to have it on the screen, on Day 311 at page 159 of the transcript, that he had no concern or motivation at this time other than simply issuing the licence to fulfil a Government announcement that had been made six months previously. Would you accept that?

A. I'd accept that entirely. And there was another thing he was conscious of at the time; that we already, at this stage, we were at the bottom of the European league in terms of penetration, in terms of mobile phone penetration and it was an embarrassment to the IDA and there were other pressures coming on us 'For God's sake, get this licence out'.

Q. Yes. Well, in light of those answers, Mr. Loughrey, I want to return to a proposition that Ms. O'Brien put to you as what appeared to be some form of crescendo at the end of a number of passages of transcript. She put to you the proposition before lunch that it was the Minister and not the Department that was dictating the response to the information received in the letter of the 17th April. Now, I understand you rejected that proposition that Ms. O'Brien

put to you?

A. And I I think Ms. O'Brien and myself, we understand one another and I can say this within brackets of politesse, I just found that extraordinary because it flew in the face of all the evidence. It was at variance with all the evidence. She put it forward as a proposition. But it was what it was was bundling inferences together which had no evidential basis whatsoever.

Q. Yes. And you'd believe that any such view, were it to be held by anybody, would portray a fundamental misunderstanding then of the roles that were actually played by the Department and the Minister in May of 1996?

A. I believe you are quite correct in that.

Q. And dealing then with some minutiae. We looked this morning on the screen at Mr. O'Connell's memorandum of the 7/5/1996 and that's the memorandum of a conversation with Mr. Towey. We don't need to see it again?

A. Yes, I recall that. I recall it.

Q. I think you said it was so short it could be written on the back of a bus ticket and 'the Minister very strong on' or 'Minister wants 40:40:20'. Your view on that was that the use of the word "Minister" by Mr. Towey was more likely to be invoked to give him some to give his own statement a sense of imprimatur that it mightn't have otherwise attracted?

A. And I think that's common to if if all career civil servants look back they would find a pattern of of, let

me say, citing the Minister when they are at middle-ranking level but having the authority of position when they are promoted.

Q. But the 40:40:20 issue, and if I can put it this, the ultimate conviction that at the time the licence was issued it was to be issued on a 40:40:20 basis and not a 37.5:37.5:25 basis, the genesis of that conviction was in the Department and not on the part of Mr. Lowry, is that a fair comment?

A. I can be more specific than that. It was I who said at the very outset 'it's not going to be a runner, it's not going to happen'. We weren't there to facilitate Mr. O'Brien on that or any other occasion.

Q. So, as a consequence of that, Mr. Loughrey, there is no reality whatsoever to any view that it was Mr. Lowry who insisted, as a matter of some personal discretion, perhaps, that it be 40:40:20. He simply followed your lead on that issue?

A. It was a done deal, in effect, when I informed him but he may well have had that view himself but he didn't demur at anything I did at that stage.

Q. Yes. Yes, and as far as you are concerned, therefore, may I take it that the ultimate decision to issue the licence to Esat was a decision that was entirely recommended by your Department and by you as Secretary General to Minister Lowry?

A. That's absolutely correct. And as I have mentioned this

morning the pivotal issue was did IIU have the cash in the form in the liquidity I was looking for in the critical first year. And that was not a foregone conclusion. It required several iterations before I was satisfied but it was my judgement call and not the Minister's.

Q. Yes. And from your perspective, by May of 1996 when you were advising Minister Lowry to proceed and make the decision you were satisfied at that stage on the basis of what was reported to you by your officials that the Department had taken the appropriate precaution in seeking legal advice at that time?

A. Oh, absolutely, I was quite aware of that, yes.

Q. Yes. And therefore by the middle of May of 1996 any decision of the Minister to reject the advice of the Department officials which was being relayed through you to the Minister, as Minister, would have been a decision that would have amounted to a controversial and even irrational solo run on the part of the Minister in the teeth of the advice that he was receiving?

A. And it would have created, if I may say so, huge tensions between myself and the Minister. Because the Minister, quite clearly, was the political head of the Department and member of Government. I in turn had a different I had a relationship, obviously, being responsible of the Department to the counting officer but that in turn meant that I had a relationship of reporting directly to the Public Accounts Committee. Now, I had long experience of

controversy, starting in 1988 over the sale of Tara, which went it became so controversial it went to the floor and I think, uniquely in the State, it went to the floor of the house itself. Now, I won't count I won't go through all the occasions where I was involved in controversy where there was tension, where my role of accounting officer in making sure in accounting for public monies or the opportunity costs that might arise in the mispositioning of, say, licences, in one case, actually, it revolved around a mining licence. Now, I was totally aware and if Mr. Lowry now, there is no question request of this happening but had he attempted to do so it would have created huge tension between himself and myself and that would not have been confined, presumably, to the two of us and we would still be talking about it now, I suggest, had it arisen.

Q. Indeed. And for a different reason too, because looking back now in retrospect with the benefit of hindsight, even confining our wisdom to the benefit of Mr. Nesbitt's advices, both in his opinion and in his letter of the 9th May of 1996, isn't it plain that any decision on the part of Minister Lowry to reject the advice being given to him by you in the Department would have had the self-evident potential to expose the Department to ruinous legal action on the part of Esat?

A. Oh, absolutely, yes.

Q. So in reality then, Mr. Loughrey, from your vast experience

as a distinguished civil servant, whilst all Ministers theoretically exercise a degree of discretion in making a decision, from your perspective would it be fair to characterise this decision as one in which Minister Lowry had no real wriggle room at all?

A. Let me qualify that, is, he had no in theory, he could have he had every entitlement to involve himself at the negotiation phase.

Q. But distinguishing between theory and practice?

A. Yes, exactly. He didn't choose to do so. He chose to operate in his normal way of allowing implementation. So could you put that question to me again so that I make sure I have answered it fully?

Q. What I am saying is that whatever the theoretical degree of discretion that a Minister has in making or not making a particular decision?

A. Yes.

Q. That is recommended to him by his departmental officials, in reality when one analyses the full context of the decision that was reached to issue the licence on the 16th May, I am suggesting that, with the benefit of your vast experience of the civil service, this was really a decision that you'd say the Minister had very little wriggle room or margin for discretion on?

A. Absolutely. That is not to infer that this Minister or any other Minister is emasculated but, given the context of this competition and the subsequent negotiation, your

thesis is correct.

Q. Yes. Yes. And therefore, any suggestion, were it be to be made by anybody, that by issuing the licence to Esat in May of 1996 Mr. Lowry in some way sought to confer a benefit on Mr. O'Brien or the Esat consortium would can I take it in your view be entirely without foundation and entirely untenable as a proposition?

A. On both counts I agree totally with you.

Q. From your perspective, 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 so?

A. Absolutely.

Q. And Mr. Lowry sitting here, as he has been sitting here I don't think he is here now but he was here this morning and he was here for a portion of the hearings last week is, in effect, bewildered as to how anybody could criticise his actions as Minister in circumstances where all he did around the time of the issuing of the licence was to follow the advice of his civil servants. Would you share that bewilderment, Mr. Loughrey?

A. I would indeed.

Q. Thank you.

THE WITNESS WAS EXAMINED BY MR. HOGAN AS FOLLOWS:

MR. HOGAN: Mr. Loughrey, I think you had said this morning that you didn't see the opinion of Mr. Nesbitt in 1996?

A. Correct.

Q. And in fact the persons in your Department who were dealing with this issue were principally Mr. Towey and Mr. Brennan?

A. Correct.

Q. And I think you also said that you had perused in some way the opinion, prior to giving evidence in 2003; isn't that correct?

A. In retrospect I regret had I looked, checked in the dictionary what 'perusal' really meant I would have regretted using it because what I did was in, what I would call the night before examination, I scanned endless documents and they were part of that scanning. I didn't hit them all. I hit a portion of them.

Q. And it wasn't as if that you had given those advices, how shall I put it, deep thought or deep consideration in 2003?

A. Mr. Hogan, nothing could be further from the truth and I believe that in an excess of goodwill I allowed myself and it was quite correct of Mr. Coughlan to put these questions to me I allowed myself to opine beyond my knowledge.

Q. Well, Mr. Loughrey, we'll come to that excess of goodwill, which seems to be a very characteristic feature of all your demeanour in evidence just in one moment. But so far as the opinion is concerned, looking at it now, looking at all the documents with which we are now familiar, can you say whether it is your opinion that, from a civil servant's perspective, that those advices taken collectively could be understood as giving the nihil obstat, as you put it, so

far as IIU is concerned?

A. Well clearly, if I understand your question correctly,

Mr. Hogan, it's my receiving antennae, it's not your delivery is, a nihil obstat captured my viewpoint at the time but now, clearly, I have moved on. The letter of the Attorney General, the clear approval of the Attorney General of the 13th April is no longer a nihil obstat.

It's a clear imprimatur.

Q. This is the 13th May?

A. 13th of May, should I say, I beg your pardon, you are quite correct.

Q. And that is the letter which, effectively, in the light of the previous request from Mr. Towey, the release of the advices of Mr. Nesbitt and then the letter dealing with the effectively the attorney has sanctioned this release, all of that, so far as you were concerned, gave the imprimatur?

A. There is even more than that, Mr. Hogan. There is the fact that this was being shepherded by two very experienced legal assistants who had an 18-month history in dealing with this dossier from start to finish. They were the people who played Cassandra at every turn. They advised caution. Not even drafts were to emerge of documentation until all the ducks were in a row. They knew quite well, actually, in issuing that letter, that the licence was about to be signed. They were part an intrinsic part of the process, is now, we don't the wording of the

letter is sufficient, but to understand the context is, when these two experienced lawyers put their name to that and with the clear the clear indication that it had been approved by the Attorney General, given where they were coming from, it would have left no doubt whatsoever. Now the words themselves convey that but I just wanted to give you additional context.

Q. Now, could I just ask you to take a look at the actual advices briefly of Mr. Nesbitt themselves, if you just have that in front of you?

A. I don't right now, Mr. Hogan, but I am sure I can put my hand on it.

Q. This is page 2 to which you allude at paragraph 17 of your statement.

A. Now, Mr. Hogan, is this the covering letter or the advices testify?

Q. No, this is the advices itself.

A. Okay.

Q. You will recall that you were asked this morning by Ms. O'Brien about this because you had said in your statement for this segment of the Tribunal, as you recall, that at page 17, at paragraph 17 of your statement you say that "I clearly recognise that the advice dated the 9th May was addressing for the most part the Article 8 wording."

A. Yes.

Q. But then you go on to say "However I am firmly of the view

that the first complete paragraph of paragraph 2 of the advice provides retrospective cover for the general thrust of my own view of the essential elements of the winning bid. It would also provide, I believe, sufficient cover, had it been required, for the proposed 37.5:37.5:25 percent allocation on the basis of proportionality."

Now, I just want to ask you a number of questions about that and I appreciate that one of the questions put by Ms. O'Brien this morning related to evidence that you gave about this particular paragraph in 2003, I think in response to a question from Mr. McGonigal. I'll come to that presently.

But just looking at this now and leaving aside anything that you said, for a moment, in 2003, the passage in question 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 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 licence has been awarded the licensee has been awarded because of the parties who own the licence. Rather the licensee has been awarded because its plans and proposals were the most meritorious and provided a funding plan by looked feasible. There is no reason why any of these matters have to be compromised by a change of 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."

Now, why forgive me asking such an obvious question, Mr. Loughrey but why do you say at paragraph 17 that you interpret that paragraph as giving, as you put it, retrospective cover for the general thrust of your own view of the essential elements of the winning bid?

A. The reason, Mr. Hogan, is there are two elements to that. In fact, you could divide that paragraph in three. There is generic advice. There is generic advice in it. There is very specific advice; it has particular meaning. And then there is what I call 'comment' at the end. And if we could go through those bit by bit is the generic advice is quite clear because, clearly, Mr. Nesbitt is putting out prudently exactly how, in the context of the Minister could not have total control over ownership. We have been down that path before, I think Mr. Towey mentioned, on mining licences. And there is sound generic advice. But when he gets into the third, or is it the second sentence: "I do not think it is tenable to suggest that the licence has been"

the licence, definite article "Has been" past tense" "awarded the license because the parties who own the licence."

we have into the specific straightaway. Now, I think with penetrating logic your colleague, Mr. Shipsey, pointed that out the other day and, to some extent, perhaps stole my thunder I don't in a sense, because I was going to

make the same point is, if you move on, past tense again,

"rather the licence has been awarded"

"Has been awarded the licence because of its plans"

"Because of its plans the licence its plans

"Were most meritorious."

I mean to say, that's not in a vacuum. That's clearly

applying to the GSM competition. And

"It provided a funding plan which looked feasible."

And, once again, all all funding plans at the outset

looked feasible. Because, even though now in terms of

public procurement, you have always now, under EU

directives, a prequalification stage, the chapeau, the so

called chapeau stage in the GSM was a de facto

prequalification. They all got through so, by definition,

they all had funding plans which looked feasible.

"There is no reason"

next sentence

"Why any of these matters have to be compromised by a

change of ownership."

Now, if you look at the run of those three sentences; they

run past tense, they are particular, there could only be

one meaning is, that it is looking retrospectively at what

happened.

Now, Mr. Nesbitt won't thank me is, but it would have added

to the clarity if he had a strap heading on top of that

paragraph and we would have all seen it a little sooner.

But there is no doubt in my mind that that clearly was,

clearly, not implicit, explicit cover for our, if I may say so, our interpretation, I mean the Department's interpretation, what would have been. And don't forget that Mr. Towey and Mr. Brennan, looking back 13 years ago actually, were palpably honest, they couldn't remember everything, but they remember quite clearly, on reading the evidence, that they had the composite view that this was cleared by and I have no doubt that that paragraph actually was the central element in so persuading them.

Q. And I take it you'd agree with me that whereas other parts of that opinion are directed towards Article 8 and which, by definition, would only come into play once the licence was signed, this particular paragraph was expressly referable and could only be referable to the present situation involving IIU?

A. I believe that summarises it perfectly.

Q. Thank you. Now, Mr. Loughrey, I think and I'll come to this in one moment, about what you said in 2003 I think the evidence you actually gave is that you cavilled slightly in 2003 when this particular paragraph was put to you about change of ownership?

A. Yes.

Q. And I'll come to that in a moment. But may I ask you, so far as IIU was concerned in April and May 1996, you had to be concerned, did you not, that they had the ability to put up the cash?

A. Absolutely. And that was paramount in my mind. I think I

have said and it's not new, it's not new evidence I had no problem with the identity of IIU whatsoever. I had no problem that they should be the third party investor. I saw no change whatsoever because I had made it plain, I think, from whatever day it was, 184 or 185 at the very outset, that from my own experience in investment banking, that it was palpably obvious that Mr. O'Brien, in what I call his 'presentational genius', had put forward a dream team to impress the natives, so to speak. And that has caused some confusion ever since. But in terms of commercial ownership it had no standing whatsoever. So when when we were first informed, and perhaps we might have picked it up earlier from newspaper reports, but that was then, this is now when it was brought to our attention by Mr. O'Connell, I had no problem with the identity of IIU. But I did know that they were, what I would call, at the 'pioneering stage of developing', and it wasn't quite clear at the time whether they were a corporate finance boutique, whether they were genuine totally private equity house, whether they were an investment vehicle. Because I had known Michael Walsh; he had many skill sets. I had known Dermot Desmond as a deal maker. But it wasn't quite clear to me in what capacity they were really coming. They weren't sitting on a pile of institutional funds. So whatever the skill set they had, I still had an obligation to establish not only did they have the cash I think you will recall if you look at the

transcripts I wasn't a bit impressed by the fact that they had assets because either assets are not liquid, even if they are totally unencumbered they are not liquid. I needed to see the full liquidity and that they could back up their underwriting portion right in the first critical year. I mean, it was a no-brainer that Denis O'Brien was going to be funded after he got his licence but I still needed to be persuaded there could have been hiccups, many hiccups in the capital markets, so I wanted to see it for a full year before I was so persuaded.

Q. Now, you have already given that evidence in 2003. I am just simply asking you to confirm it and I think already this morning you have said that the letters that were presented at an earlier stage in respect of Bank of Ireland and AIB, they were the standard types of letters that you see at early stages of these so called 'beauty competitions'; isn't that correct?

A. Absolutely. And it a lawyer out in its first year, he or she, out of Kings Inns, if they had followed what I call the badge of identity, corporate finance, if they followed corporate governance, if they had gone to Telenor AS or if they had gone to Denis or if they had gone to Communicorp, would they have seen minutes of decisions? Yes, they would. Would they have seen a joint venture agreement? Yes, they would. If they had asked the directors of either company 'Are you part of a bidding consortium for a licence?' Yes, they would. Had they gone to the Bank of

Ireland or AIB at that time and said 'Are you part of an equity participation, you are bidding for a licence?' They would have been astounded. If they had asked for minutes of a decision in corporate governance at any level of those banks, even into minor credit committee, they would have found no such commitment because, clearly, banking institutions would have to bank liabilities. So, in other words, there would have been no paper trail, no paper trail existed because no ownership existed and no ownership entitlement existed.

Q. Yes. So in reality, and you have said this previously before in 2003 and again this morning, you'd agree with me that it wasn't IIU were replacing anybody, in fact?

A. Absolutely. They were the first, genuine, third party investor to appear on the scene.

Q. And you were absolutely satisfied, in 1996, that IIU had the capacity to put up the cash?

A. It took until, I recall, either late night 15th or early morning of the 16th for I frankly, it was quite exacting for me to be so persuaded.

Q. Yes but you saw the letters from Farrell Grant Sparks?

A. Oh, I did, of course, but I had to I had to probe beyond that letter.

Q. Oh, of course but in the end, having prudently done so and having taken such steps as you considered appropriate, you were so satisfied, isn't that so?

A. Oh, absolutely.

Q. Yes. Now I mentioned that because isn't that a context, I suggest to you, so far as that paragraph 2 of Mr. Nesbitt's letter is concerned, because on questions of ownership it is, to some extent, a question of degree because IIU had really nothing to offer so far as the backbone architecture of, say, the of a mobile telephony network or that type of engineering or radio telephony expertise. They weren't dealing with that aspect of things?

A. We weren't looking for any identikit from the providers of funds. In fact, I might have been a little alarmed because the there was a perfect complementarity between Denis O'Brien and Telenor. And if somebody in the business, in the operating business were to come in, it would have created another dynamic. I wasn't looking for an identikit. I was just looking for cash.

Q. And so far as that element is concerned, it was cash in cash and that was the simple question?

A. That's all that's all there was, Mr. Hogan.

Q. And and therefore, if you apply that, so far as paragraph 2 is concerned, does that of that letter does that give you any further comfort with regard to the advice that Mr. Nesbitt gave?

A. Well, could you point me in the direction? Because I mean to say, I took full comfort from the paragraph, per se, but I am not quite certain where you are leading.

Q. Well, the point I think that what I am coming to is this, rather than being oblique about it, Mr. Loughrey, is

that I think in 2003 you had you had entered in one caveat to this particular paragraph, in that you said, for example, if France Telecom had replaced Telenor or Esat Digifone

A. Oh, I see. No, no

Q. That you would have been concerned that they wouldn't have had the same hunger and enthusiasm to penetrate the market, for example?

A. Oh, absolutely, absolutely. The reason is that is that people in a situation like this are often impressed by large balance sheet aggregates, for instance. But when it comes down to the nitty-gritty of competing with an incumbent utility you need agility, not a large balance sheet. In fact, it often is an encumbrance because what it is, it has an embedded management culture, utility culture, which I would have had said would have been a disaster. This is with all due respects to France Telecom and British Telecom. What we needed was the can-do and the agility and the positioning and the sheer gung-ho entrepreneurship that was clearly coming through in the consortium in Digifone that had won exclusive negotiating rights negotiating rights and even though prima facie British Telecom might have seen to give solidity to the bid, in practice it would not have suited my agenda or that of the Department.

Q. And of course these advices were, therefore, given in the context of a request to bring IIU into the picture who were going to be solely concerned with funding, isn't that so?

A. Correct.

Q. And isn't that, I suggest to you that that even gives further comfort, if comfort was needed, in response to in respect of what Mr. Nesbitt has said "I do not think it tenable to suggest that the licensee has been awarded the licence because of the parties who own the licence. Rather the licensee has been awarded"

it says "the licence"

"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."

A. Effectively, even though it's something I mentioned a few moments ago is that we now have a streamlined public procurements, even under the utilities directive from the European Community, that we all have to comply with, the 2004 regulations. And everybody knows the sort of the choresequence, the choreography that goes with public procurement of this kind and prequalification now has different connotations and there is case law in Europe and all that goes with it. It was much more common sense and rough and ready in those days. But there was a de facto prequalification and that prequalification meant that you didn't have to have huge balance sheet aggregates. You just had to have sufficient. Now, just to make sure I am answering your question totally, Mr. Hogan I lost the run of myself there, could you just

Q. What I am suggesting to you is this, is that because

this request from Mr. Towey was in the context of bringing in IJU as equity partner?

A. Oh yes.

Q. I have to suggest to you that that context, and where you were only concerned with cash, further underscores and gives comfort, if such was necessary, in respect that have particular paragraph?

A. Absolutely, absolutely. And I noted, obviously, that Ms. O'Brien indeed said it, and indeed the Chairman included it in his ruling of 28th February, 2008, of course I did qualify Mr. McGonigal's interpretation. But it was only an aside. I wasn't disagreeing with the main thrust of paragraph 2.

Q. Yes, and this is what I am getting to; I have to suggest to you that your qualification, such as it was, was purely for the sake of what I might term, without any disrespect, 'theoretical completeness'?

A. Absolutely. I had a preoccupation and that preoccupation was to let, you know, the core engine of this bid do its business, and that's the only that was my preoccupation and perhaps it spilled over in that reply.

Q. Yes. Yes, and if, for example, the request had been to replace Mr. O'Brien or had to be to replace Telenor with, say, France Telecom, if this had been the situation in April, 1996 and Mr. Nesbitt had stated this without any further qualification, you might have had an issue with that?

A. Of course I would have had an issue. I wouldn't have allowed in in effect, the decision I took not even to entertain any change from 40:40:20 is just the other side of that coin. I wouldn't have entertained any change to the strategic and the operating partners.

Q. So I have to suggest to you that that, again, simply confirms the understanding of the Department that this particular paragraph addressed this particular change in that particular context?

A. Correct.

Q. And therefore, when you entered that qualification, such as it was, in answer to Mr. McGonigal, it was, of course, perfectly proper, but it was purely theoretical, as far as the events of April and May 1996 were concerned?

A. Purely theoretical.

Q. Now the, you were also asked back in February, 2003, we can get it up on the screen if needs be, I think the first extract, I think it was question 215 and I am afraid I don't have the date with me, but the very first transcript that was put by Ms. O'Brien this morning where, at all events you were asked I am paraphrasing here, Mr. Loughrey, and if I am in error I am sure I'll be corrected but in February 2003 you were asked by Mr. Coughlan whether you agreed that the ownership issue was not addressed in Mr. Nesbitt's legal opinion. And I think you agreed with that at the time?

A. I did because I was less informed.

Q. Yes?

A. In fact is, my probably my real knowledge of any of the opinion as it was, or the advice as it was at the time, was at best skin deep. I said it at the time. I am reacting on my feet.

Q. Yes. And I think that you had said, indeed, in February, 2003 that in response to that question when it was put to you on your feet by Mr. Coughlan 'that appears to be the case'?

A. I believe so.

Q. Now, having had the opportunity to reflect on the matter and to consider the opinion in some detail, would you reconsider the answer that you gave in February 2003?

A. Absolutely. And I think implicit in, I suppose, the plaintiveness of which I made my case this morning, I think that's clearly the case. I should have been better informed. I wasn't. But looking at it now is, I believe that there is absolute clarity in that particular paragraph of Mr. Nesbitt's advices. And I believe that that clarity would have come through very strongly in Mr. Brennan's and Mr. Towey's assessment of the advices when it came in.

Q. And I think, again indeed on that very day back in February 2003, you went on to say, or you were about to say words such as "Having said that" and then there was a further exchange I think in which the advice from the Attorney General was then mentioned, isn't that so?

A. Yes, I think we discussed that this morning actually and I

believe that's been been thoroughly discussed. It was something that, in retrospect, I was disconcerted with but I think we have a full understanding of it now.

Q. Yes indeed. But without going into, venturing in that territory again, could I ask you just to confirm, Mr. Loughrey, that it was of you were of the view then, and you are certainly of the view now, that the opinion did, in fact, address the ownership question?

A. Oh, I am quite convinced now that it did. It did for those in, in at the time in on the 13th May when they received those advices it must have been crystal clear to anybody who read this carefully. Now, I hadn't read it at the time. I have now had the opportunity to read it and I believe that it is absolutely clear that this could only apply retrospectively to one particular situation and I think that's, as I say, crystal clear.

Q. We have been over that. Yes, thank you, Mr. Loughrey. Can I just ask you one other a few other matters. We have been speaking up to now about the 2003 and your views now in 2009. Can I just ask you to confirm that in, in May of sorry May, 1996 you had understood, without perhaps addressing your mind to the finer detail of it you had understood that a clearance had been given to IIU on foot of legal advice that had been requested by the Department

A. Yes. That is the case though, in my own mind, let me qualify that is, I never saw that IIU was going to be a

problem in any event, but you are quite correct in your assessment.

Q. Yes, yes. And it was so understood by the Department and that the sequence of events from Mr. Towey's letter to the AG's office right up to the 13th, 14th, 15th and 16th of May, and we could take out the various dates as appropriate, that that all led to a situation where the Department had understood that this issue was raised expressly with the attorney, that outside counsel's advice had been obtained and, as a result of that, you had understood that there was no legal impediment to IIU?

A. Correct.

Q. And again, could I just ask you to confirm, just for the sake of the record, that so far as you are concerned this was an entirely transparent process and there was nothing untoward or no improper action on part of anybody?

A. It may seem strange now, Mr. Hogan, but I was actually very proud of the process. I think it was a model of its kind at the time.

Q. Thank you very much, Mr. Loughrey.

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

MR. O'CALLAGHAN: Good afternoon, Mr. Loughrey. Mr. Loughrey, I appear on behalf of Denis O'Brien. I just have a few short questions for you. Mr. Loughrey, would you agree with me that throughout the GSM process your Department regularly sought and received advice from the Attorney General's Office?

A. That's correct.

Q. And I think you said in your evidence when you were here previously that the Attorney General's Office was an intrinsic part of the whole GSM process; is that correct?

A. Yes, it was.

Q. And can I take it from that, Mr. Loughrey, that the reason you sought and required legal advice from the Attorney General's Office, was because there are a number of important legal obstacles and legal questions that had to be dealt with by that office?

A. Quite correct.

Q. And am I correct also in stating that, potentially, for the Department and the State, the award of this licence, and indeed the competition, could be a legal minefield in respect of which losing competitors might Institute proceedings?

A. I think we were always conscious of that. We were always sort of, I suppose not consciously, every day working backwards from a Judicial Review or any other litigation, but, yes, we would have been conscious of that.

Q. And can I ask you, as Secretary of the Department, was it the policy of the Department to follow legal advice that you received from the Attorney General?

A. That goes without saying.

Q. And I think you said in your evidence that you never went outside the advice that was received from the attorney, is that correct?

A. Correct.

Q. And one thing that is clear in respect of what we are looking at here, Mr. Loughrey, is that your Department certainly sought advice on the ownership conformity issue; isn't that correct?

A. Well, I think, thanks to it was made very clear in the last couple of sitting days, thanks to your own choreography in putting the documents together in an admirable sequence, I think you made that point both with Mr. Brennan and with Mr. Towey crystal clear.

Q. And there are at least I think I don't need to open them now but there are at least four written documents which record that the Department, and indeed Mr. Towey, were seeking legal advice on the ownership conformity issue, isn't that so?

A. That's so.

Q. And if your Department had sought legal advice is it likely that you would have proceeded with a decision in the absence of receiving that legal advice?

A. I think that would be out of the question.

Q. And from your experience of being an experienced civil servant can you recall any time when your Department or civil servants you are aware of, whilst they were awaiting legal advice from the Attorney General's Office, they simply proceeded and made a decision in the absence of receiving that advice?

A. I can think of no such instance.

Q. And I think you had the benefit or rather your Department had the benefit of Mr. Nesbitt's advices throughout the GSM process, is that so?

A. I was unaware that that was the case but, clearly, that was the case.

Q. And can I just now ask you to look at the ownership issue. Were you directly involved in it, Mr. Loughrey, the ownership conformity issue, or were you really just brought in at the very end?

A. I think it's clear from the paper trail that I was only brought in at the very end. I did have there was a corner of the ownership that may have arisen in the context when I accompanied Minister Lowry to see the Competition Commissioner, Karel van Miert, but I really only became hands on in the last three days.

Q. And we know that your Department certainly sought advice from the Attorney General's Office. If the Attorney General's Office had a problem with the ownership conformity issue, would you agree with me that that office would have expressly stated it?

A. Oh, very much so. And they weren't slow to express their, if I may say so, their opinion successfully, and we have seen that opened in evidence, Sean McMahon's notes, letters etc. They were extremely cautious, extremely conservative, extremely prudent - by the way and correctly so, obviously is - but of course we would have. They would never have let's take one instance. This, the issue of

that licence was the culmination of nearly two years work.

They knew it was due to be signed. It would be unthinkable to think that they would forward a stamped version of the licence for signature unless they had entirely satisfied that all outstanding issues were resolved.

Q. And would you agree with me that one further issue upon which everyone in this room must agree with is that there is no advice recorded from the Attorney General telling your Department that you cannot go ahead with the grant of the licence because of the ownership conformity issue?

A. Not only that and I don't want to stray into elements that we have already dealt with but the Attorney General, obviously, in December 2002, is the ultimate endorsement of that opinion.

Q. Now, I think you fairly stated that the last time you were here you hadn't really appraised yourself fully of the detail contained within the papers when you were asked questions by counsel to the Tribunal, isn't that so?

A. Yes, that is so and perhaps I have been, perhaps, a little hard on myself for the simple reason is, I wasn't a front line player in the what I might call this, the issue that arose on the 16 April, 1996 and continued until 16 May. I hadn't been a front line player. And in, if I may say so, refreshing my mind on events before I made an appearance at the Tribunal, I really didn't put that high up on, if I may say so, my marked card because I didn't think it would arise for me, frankly.

Q. And, of course, at the time you gave evidence it must have been the case that you didn't realise you were going to be relied upon as one of the foundations of fact that was the basis of the Tribunal's ruling of the 25th February, 2008, is that so?

A. I found that both puzzling and let me stop at 'puzzling' because I still can't fully fathom how people could have made that leap, so to speak. But that's what happened.

Q. Mr. Loughrey, I don't know if you have beside you Meaghar's solicitors' book which is a large book that I handed up and I went through it with the other witnesses.

A. I can get a copy, obviously.

Q. We'll ask Mr. O'Donnell just to turn to Tab 46 of that. Or if I could ask you to turn to Tab 46?

A. Yes, I have it.

Q. And could I ask you to turn to page 5 please, Mr. Loughrey?

A. Yes.

Q. And we note from the top of page 5 that the Tribunal is of the, certainly was of the strong view on the 25th February 2008, that the advices of Mr. Nesbitt

A. Just in case, this is 'Tribunal re opinion dated 9 May'?

Q. Correct.

A. Okay. And what page are we working from?

Q. Page 5.

A. Page 5. Yes, I have that now. Paragraph 8 you were saying?

Q. Yes. Maybe in fairness to the Tribunal ruling I should

just read out the first sentence at paragraph 8.

"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 the 24th April, 1996, had been provided and that, in particular, the opinion of 9 May 1996 did not deal with the matter on which advice had been sought."

So that's the clear statement of the Tribunal as of 25th February 2008. You are aware of that, Mr. Loughrey?

A. I am quite aware of that.

Q. And in paragraph 9 what the Tribunal does is it explains how it came to that conclusion on two foundations of fact, isn't that so?

A. Correct.

Q. And the first foundation of fact is stated in paragraph 9 as seven lines down where it says

"The latter was achieved by obtaining from the then Attorney General a letter stating that the advice actually sought had not been provided."

So that's the first island of fact, isn't that so, but then you are relied upon as the second foundation; isn't that correct?

A. Yes, and what puzzles me is the two pillars really merge into one because, in my mind I had only acceded, when Mr. Coughlan canvassed me for an opinion, so to speak, I only acceded because he stated that the Attorney General had provided an opinion and, naturally, I conceded

straightaway. But to some extent, if you take it, mine is only a subset of the first pillar. So effectively, they really merge into one.

Q. Because your confirmation is that you are agreeing, as of the previous time you gave evidence, that the advices don't deal with the question. That's what's contained within

A. Can I qualify my previous answer, just in case? The thing is in my mind they merged into one. But I could see from the words that I uttered at the Tribunal in 2003, where the Chairman could quite clearly rely on those as twin pillars. So, in other words, I just want to say is, the fact that I I now assess that they merge, effectively, into one, it's because of I am certain in my mind why I ceded to Mr. Coughlan. But the Chairman, in his ruling, wasn't to know that. So I just want to perhaps retract a little on what I stated in previous reply.

Q. Now, sorry, could I ask you to look at page 11 of the ruling that's in front of you?

A. Sure.

Q. And this is at the top of the page there, counsel to the Tribunal refers you to the fact that the Attorney General himself has informed the Tribunal that the advices of Mr. Nesbitt don't deal with the ownership conformity issue.

Can I ask you, obviously when that was said to you by counsel to the Tribunal, you believed counsel to the Tribunal; isn't that correct?

A. I believed him then and I believe him today because clearly

Mr. Coughlan was professionally and honestly convinced that that was the case.

Q. And you relied upon that statement when you gave your answer, isn't that so?

A. I did. Now, clearly, let me say, of course that's not my assessment but I certainly respect Mr. Coughlan's assessment.

Q. And now you have had of the benefit, which you didn't have at the time, of being able to see the Attorney General's correspondence; isn't that correct?

A. As I said, the analogy I gave, the cards were placed face downwards. There was no way well, there was no way I could have seen them or known them, but equally there was no way that Mr. Coughlan could have turned up the cards.

Q. And if the cards had been turned up, in what way would your answer have differed?

A. I think it's clear from my interaction and my discussion with Ms. O'Brien that I regard the letter of the 4th February as addressing quite clearly the events after the 13th May. Now, in that context they added absolutely nothing. They didn't subtract one iota from the clarity that we got in indent 3 on the letter of the 20th December. In other words, is, to my mind, the Attorney General had quite clearly stated what his view was and that was in stark contrast to what the opinion and the opinion of the Tribunal had formed themselves as of, as to Mr. Nesbitt's advices. So, of course there was that stark contrast and,

as I put it, I believe it has never been resolved.

Q. Mr. Loughrey, at paragraph 11 of your Memorandum of Intended Evidence, you identify a number of witnesses who were not previously called and I think you are indicating that they may have relevant evidence to give to the Tribunal. Am I interpreting paragraph 11 correctly?

A. I think you are.

Q. In particular you identify Mr. Nesbitt, and you know there is an application that the Chairman will consider presently, for Mr. Nesbitt to be called. Do you believe that Mr. Nesbitt would have valuable evidence to give to this Tribunal in respect of advices furnished on the ownership conformity issue?

A. Well, my only knowledge of that would be is what Mr. O'Donnell put into play, I think two sitting days ago. But in the light of that, what Mr. O'Donnell said in, I think last Thursday it was, I think of course Mr. Nesbitt will bring very valuable, not only very valuable insights but very decisive insights into this question.

Q. Mr. Loughrey, we have been concentrating primarily upon the advices of Mr. Nesbitt for the purpose of assuring ourselves that the Department was given the green flag to go ahead. But you, interestingly, have placed more emphasis upon the correspondence at Tab 38 of my book. And if I could ask you, please, to open that, please. And this is the letter from the Attorney General's Office dated the 13th of May, 1996, to you, but it's for the attention of

Mr. Towey, isn't that so?

A. Yes, yes. Formally this all opinions would probably come to the Secretary or the Secretary General, depending on the timing.

Q. And am I to interpret your evidence correctly as you stating that once this letter came to you on the 13th of May, in which it refers to the advices of Mr. Nesbitt and it identifies the number of issues contained within it, that this was the legal green flag for the Department to proceed to grant the licence?

A. Absolutely. And it wouldn't have needed the erudition of Mr. Nesbitt's advices to enhance it whatsoever. That letter alone was sufficient cover. And it was obviously the critical part of it is "We have been directed by the Attorney General..."

There is no getting away from that.

Q. And we now seek to see ambiguities where there probably were no ambiguities before. But can you confirm that at the time your Department received this letter there was no ambiguity about the ownership conformity issue and as far as the Department were concerned it was given the legal green flag to proceed with the grant of the licence?

A. I believe that that sums up the clear evidence of both Mr. Brennan and Mr. Towey.

Q. And the only outstanding issue for you and your Department after that date and before the grant of the licence was to appraise and ensure the financial strength of IIU; isn't

that correct?

A. That's correct and, paradoxically, I think we put Mr. Desmond through a much more rigorous assessment than the Project Team had in terms of the so-called 'nominal investors' that were and I am finding it hard I think what struck me were the words Owen O'Connell used, is 'that were mentioned' I think that's the evidence he gave, 'that were mentioned in the original application'. Because it didn't warrant more than a mention. And I believe, if anything, IIU were put through the wringer in a much more rigorous way. So they didn't get under the radar screen, they didn't escape assessment and, obviously, we had to be and particularly myself had to be entirely satisfied that it wasn't just a matter of balance sheet aggregates. It wasn't just a matter of 'yes, these are large corporations'. This was a root and branch, that the money would be there in the form it was needed when it was needed. And I that sort of rigour was never applied to the others.

Q. And the only evaluation for the 20% financial investor was its financial strength; isn't that correct?

A. Correct.

Q. And if you look at Tab 40 of the book I have handed up you, you will see that information was provided by Farrell Grant Sparks in respect of IIU, isn't that so, and in particular Mr. Desmond as its principal?

A. Correct.

Q. And at Tab 41, there is the memorandum prepared by Mr. Buggy which is addressed you, Mr. Loughrey; is that correct?

A. Correct, yes.

Q. And is that your handwritten note?

A. It is yes. I had a fairly telegraphic style. It just says "Thanks" and my and my initial, yes.

Q. And there is no doubt if I can take you to the last page of that memorandum there is no doubt as to what the conclusion is because what it says is that Esat Digifone is financed in line with the expectations; isn't that correct?

A. Correct.

Q. So it was a financially solvent and secure bid notwithstanding the newness of IIU; isn't that correct?

A. It wouldn't have gone ahead if we weren't so satisfied.

Q. And would there have been any reason for you to exclude IIU other than a basis on its financial solvency?

A. Absolutely none.

Q. You mentioned in your concluding remarks, I think, to Mr. Hogan that you were quite proud of this process. And obviously this is a competition and a licence that has become marred in controversy. But do you think the State was well served by the competition and the ultimate award of the licence?

A. It's almost impossible to answer that question without appearing to be blowing the Departmental trumpet and I am loath to do that. But it was. It was a competition and it

was a process that was run impeccably by a team of very talented civil servants and who worked long hours, sometimes through weekends, if you examine the files, and what they produced was an outcome that changed Ireland in terms of mobile telephony from being the Cinderella to get right up into the top of the averages. Because Eircell had to pick up its socks and Mr. O'Brien drove, if I may say so, competition in such an imaginative way is that penetration levels in Ireland soon passed out the average and the ultimate endorsement was BT paying two-and-a-half billion three years later. I can't think of a better assessment than a market assessment three years later.

Q. And in your assessment, did the best bid win the competition?

A. From my discussions with Sean Fitzgerald and Martin, if I may say so, after the event, because if you will recall is, all I wanted was a clear unambiguous result well, when I say 'clear unambiguous result', that's my definition, but I said in evidence I wouldn't have even required unanimity amongst the PTGSM, all I required was critical mass. But, in effect, I got unanimity. And I think is when I read the report which was probably a day after the announcement is, I was quite convinced that the winning consortium was clearly the outstanding consortium and won on merit. But what I regret, and I know, Chairman, you greatly regret it, that somehow we couldn't get Mr. Andersen to give evidence here. Because ringing in my ears at the time, because I

was made so aware, I think in February 1996, his unsolicited report, as I understand it, that said not only was this the best bid that had been put in the in the competition in Ireland but, as they were the leaders and had managed many competition, such competitions all over year Europe, it was probably if not one, if not one of the best bids he had seen in any jurisdiction. And I believe that to be the case.

Q. And, Mr. Loughrey, do you believe that Esat Digifone delivered on the promises it set out in its bid in terms of rolling out the second GSM network?

A. Yes, I did and, if I can recall our expectations within the Department, they far surpassed our expectations.

Q. And to conclude your memorandum of evidence, at paragraph 21, Mr. Loughrey, by stating that

"Minister Lowry exerted no undue influence on you; isn't that correct?

A. I would actually almost take issue with that as you say it.

The 'undue' suggested that there was some influence. He exerted no influence of any kind that could be termed

'discriminatory'. What he did exercise was, and this was true of every dossier he dealt with he wanted things, as

I think I think was Mr. Brennan said to happen

sooner rather than later. Yes, he was a Minister in a hurry but on, clearly not on a discriminatory basis.

Q. And as I asked both Mr. Brennan and Mr. Towey, am I correct in stating that you were not a slave to Minister Lowry?

A. I greatly resent that actually being put. Not I am this is not personal you, Mr. O'Callaghan but the idea would be abhorrent to any civil servant. But to a senior civil servant, to a Secretary General, who has a very particular role, and always had since the foundation of the State, but copper fastened in the 1997 legislation, the idea of that is reprehensible in every way. It couldn't have happened, it didn't happen and wouldn't happen.

Q. And you were never enthralled to Minister Lowry; is that correct?

A. I would prefer if you didn't proceed on that basis because you may be speculating Mr. O'Callaghan, I don't know, but I just do not like the tenor of those remarks. I know you mean them, perhaps, in goodwill but they are reprehensible, they would never occur in the Irish Civil Service and did not and, in particular, did not happen in this instant.

Q. And finally, the work carried out by the civil servants in your Department, was civil servant work carried out in public service and without any great bonus, or any bonus at all for civil servants, at the end of this process; isn't that correct?

A. Well, I can tell you for one, I never got a bonus in my life. Perhaps that's justice, you might say. But, no, I never got any bonus whatsoever and the civil service ethos is one where, if I may say so, is the psychic income comes from doing both exciting and worthwhile work but if you are waiting for bonuses I never got one.

Q. Thank you, Mr. Loughrey.

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

Q. MR. O'DONNELL: Two issues that I want to cover with you, I

think it was agreed that the letter written on the 24th

April by Mr. Towey was the right letter asking the right

question?

A. Correct.

Q. And you have been in the civil service - you were in the

civil service for how long in total during your career?

A. Well, I drifted in and out. I started, I left to join, in

fact I left to join IBM, I moved to the then An Foras

Taluntas, which was a pioneering organisation. I won't go

through my career. I drifted in and out of the service

several times.

Q. Yes.

A. Yes.

Q. You were Secretary General of this Department?

A. I was Secretary General in 1988 of Energy and Forestry.

Effectively, I didn't go on an acquisition trail but the

net effect was it came Transport Energy and Communications

and then further transformed itself into the Department of

Public Enterprise in 1997. So, over the 12-year period it

changed its spots but each time it grew and acquired more

responsibility.

Q. And were you Secretary General of the Department in its

various guises?

A. Always. Well this is I don't want to delay things.

Until 1997 the term was 'Secretary'. Then the title was changed to 'Secretary General' by the 1997 legislation.

But, in essence, 'yes', is the answer.

Q. And can I ask you then what would your view, given your experience of, certainly that lengthy period at the top of the civil service, what would your view be of a civil servant who asked a question but didn't get the answer, particularly where the question that was asked was an important legal question for which he required legal advice? Can I put it this way; some civil servant it's possible that a civil servant might do that out of laziness, it's possible that a civil servant might do that out of incompetence, it's possible that a civil servant might do it because he would be afraid of the answer he'd get or it's possible that he would do it under improper influence. Now

A. All four are possible but, clearly, had nothing to do with the case here. I was reflecting

Q. And your view of Mr. Towey, then, how long did you know Mr. Towey?

A. I knew Mr. Towey because I knew him to be a first I mean to say, Secretary General's management teams keep their eye on emerging talent and Mr. Towey was one of these we had sort of noted that he would be fast-tracked, in effect. Now, when I say 'fastracked' that sounds like somehow sponsoring the fastrack. We knew that if he was in the right positions and delivered in the right way he would

gain rapid promotion and merit and, of course, he was promoted on merit subsequently.

Q. Yes, yes?

A. And of course I knew of his record. I had seen him in action and I regarded him then as an outstanding young prospect and I think it's evident that he has matured into a first class senior civil servant.

Q. Can we take it then that you had no reason to believe him to be lazy or incompetent?

A. Absolutely not.

Q. Then or now?

A. Then or now, of course not.

Q. And can we take it that you had no reason to believe that he would have been afraid of a legal answer that he might receive from some legal advisor?

A. I don't believe he does fear.

Q. And the other issue then is; can you conceive of a situation whereby he would be regarded as in some way under the influence, improper or otherwise, of a Minister which might make him not seek an answer, even though he had asked the question, not follow up on an answer or ignore the answer that he had received?

A. I believe it's unthinkable. But could I answer in a more general way. This was a multidisciplinary team, including two outside creme de la creme accountants from the big practices. But there were my head count is roughly there were ten civil servants involved, including the

Department of Finance. Is, all of them had different characteristics. You have even detected or not you personally the Tribunal has detected a frisson of tension from time to time between strong personalities and that has come out in evidence. There is one, without going into them, because one could start at the most senior, Sean Fitzgerald and say and say how much he has done the State some service, what an outstanding servant, right down the most junior which is Regina Finn, who now is perhaps, in central terms, the most senior position ever in terms of sectoral regulation. But they all had one thing in common, and I don't want to delay going through all ten, is, they had this spiky independence, all of them, every one of them had had sort of now it came out in different ways but they had this spike independence. And perhaps, I don't want to short circuit any questions you might have, Mr. O'Donnell, but I believe that this was something that they had in spades, and they wouldn't have, individually or collectively been beholden to anybody.

Q. Well, can we take can we ask you then does the same apply in respect of Mr. Brennan?

A. I think Mr. Brennan is a very particular case because let me put it this way: I had we had Mr. Brennan out for our 1990 presidency. It proved to be the most successful energy presidency, and recorded as such, in, in up to then in the history of the European Union. And it wasn't alphabetically France would be the troika

the so-called troika alphabetically France went in front of us and Italy came behind us, both heavyweights politically. Now, Mr. Brennan had to liaise with him. On the margin of frequent counsel meeting, myself and Mr. Brennan would engage with Ministers from other countries and with Commissioners, and did so. An onlooker would be hard pressed to know who was the Commissioner, who was the Minister. Because Mr. Brennan is not a shrinking violet. He is totally independent and he held his own with ministers, heavyweight Ministers in other countries and with Commissioners. The idea somehow that he would be in awe of anybody is ridiculous. In fact, I used the phrase awestruck at one stage in my evidence, and I can't remember, but it was sometime in my evidence back in 2003 and I was saying that none of these civil servants would be awestruck by anybody.

Q. So can I take it that the suggestion that either Mr. Brennan or Mr. Towey, consciously or unconsciously, would be under the thumb of, or under the sway of, a Minister, is unthinkable for you?

A. It's unthinkable and if Mr. Lowry will forgive me is, they had worked, particularly Mr. Brennan, with successive Tanaiste that were in the Department of Energy. Mr. Lowry, for all his credentials, was coming in as a backbencher. It's difficult to see how that would happen, isn't it?

Q. Mr. Lowry was a first-time Minister?

A. A first-time Minister. He was coming straight from the

back benches into a Ministerial role. Now, he handled it commendably but he wasn't exactly the stuff that well civil servants wouldn't be in awe of a Minister anyway but, in particular, civil servants like Mr. Brennan, used to dealing with successive Tanaiste in the energy area hardly would be awestruck.

Q. They wouldn't be fazed by Mr. Lowry?

A. Not in the slightest, Mr. O'Donnell.

Q. Can I then take you to the other thesis that is put forward by the Tribunal through their counsel today, and indeed it's a repetition of what Mr. Coughlan put you, I think, on your first outing here, which was that in some way the Department's process was got inside, and in this particular context the suggestion is made that the Minister, and not the Department, was dictating the response to be given by the Department to the letter from Fry's of the 17th April of 1996 setting out the changes in the makeup of the consortium, or we'll use the word 'changes' in inverted commas. And it was put to you that this thesis finds support in a couple of documents. Firstly, the informal Government decision of the 19th April of 1996 sorry, I beg your pardon, the 23rd April of 1996. It's after the 19th, I beg your pardon.

Secondly, the Minister's response in the Dail to various questions on the 30th April.

And thirdly, a press release issued by the Minister following a meeting with the Commissioner Karel van Miert.

Now, firstly, in your experience as Secretary General, can you envisage a situation whereby the Minister, any minister would be able to circumvent not simply the lower officials, I don't mean that in any pejorative way, but not simply the lower ranking officials but also yourself in order to put his own view and put his own project in place irrespective of the views or the advice given by the Department and including yourself as Secretary?

A. It wouldn't arise, Mr. O'Donnell. And particularly in Mr. Lowry's case where I had to introduce him to every single civil servant. He didn't know anybody in the Department. So he was starting from scratch. Now, that's not to infer if he knew people that it would have happened anyway; it wouldn't. But you opened this point by saying you recall where Mr. Coughlan put it to me that somehow the whole process was got at, so to speak

Q. 'Got inside' or 'got at', I may be misquoting Mr. Coughlan.

A. I remember it very carefully because I got so heated in my response to Mr. Coughlan that I had to take time-out to cool, or he suggested I had to take time-out to cool because I didn't accept it under any circumstances then and now.

But as for the proposition that Ms. O'Brien put to me this morning that there is somehow inferential evidence in putting these three documents together in the one folder, that

Q. Firstly, do those three documents, to you, create the

suggestion that the Minister was ploughing his own furrow irrespective of the advice of the Department or the way in which the Department were carrying out its business?

A. Absolutely not. If we take them just rapidly one by one. The first are these so called pink slips, information. In other words, they don't have any real value as documentary evidence, they are just prompts for civil servants following informal discussions on the margin of Government meetings. That note carries no weight and many I have seen many notes, by definition I could see them on a weekly basis, and very often they were at best a hint of what happened. You could not put full credence in them whatsoever, and nor would the Department of Taoiseach expect you to put full credence on them. When we go onto the Dail debate

Q. Now I know that the Sole Member has ruled in correspondence that in coming to whatever views he forms, that he will not have regard to matters stated in Dail Eireann or material which would otherwise attract Dail privilege, so we don't have to concern ourselves with that.

MR. COUGHLAN: We'll have to review our position on that. This was a situation which arose in relation to Mr. Lowry. I don't think Mr. O'Donnell may or may not have been here at the time, where Mr. Lowry raised the ouster of jurisdiction under Article 15 of the Constitution. He was, at the time, represented by Mr. Donal O'Donnell, senior counsel, who asked for an adjournment, consulted with

Mr. Lowry, and in clear and unambiguous terms waived that particular ouster. So that's the position at the moment.

MR. O'DONNELL: Chairman, in that regard, can I just read out a question that we wrote specifically to the Department by letter of the I beg your pardon, to the Tribunal, on the 26th February, 2009, and we referred to a finding made, and I am not going to open it, but what, the question that we asked was: "To what extent, if at all, does the Tribunal rely on matters the subject of Dail privilege? To what extent, if at all, does the Tribunal rely on matters prepared for the Minister in the Dail or in answers to Dail questions?"

And the answer we got to that: "The Sole Member, in forming his provisional findings and in notifying your clients has had regard to the evidence heard by him at public sittings and..." then there is another matter which I don't need to go into but I will read the last sentence: "I am instructed to inform you that lest there be any uncertainty on the part of your clients, the Sole Member, in forming his provisional views, has had not regard to any matters stated in Dail Eireann or matters which would otherwise attract Dail privilege."

MR. COUGHLAN: That is correct, he has not. But the issue has arisen today and has been put to the witness. The transcripts were clearly checked in relation to this and Mr. Lowry waived the ouster jurisdiction under Article 15.

MR. O'DONNELL: All I am concerned with, Chairman, I don't

think a great deal hangs on it, but I am just saying that's the answer we got to date.

Q. But, Mr. Loughrey, if we could just rewind to the 30th April, leave aside the detail of what was discussed in the Dail and leave aside the issue of privilege, can you envisage a situation whereby the Minister at that stage was communicating to the Dail a decision that he had made irrespective of, or without seeking or taking advice from his own Department and in particular his own Secretary?

A. Can I answer that in two ways: It didn't happen, quite clearly it didn't happen. But it couldn't happen either, because he would have had to work through me or AN Other in the Department, but that wasn't his style to execute any such preference or any such decision, and that never happened. There is no evidence it happened. But that in itself is, I am confirming that it didn't happen and I am the person who would best know that it didn't happen.

Q. And the last plank in this somewhat sinking ship is the suggestion that the Minister, in issuing a press release following his meeting with Karel van Miert was in some way again driving on his own agenda, driving on his own project, irrespective of advice that he might get from the Department and irrespective of whether or not legal advice had been sought or was in the process of being obtained.

Can you comment firstly on his, the press release following the meeting with Karel van Miert?

A. It just gets the colour of the man more than anything else.

It gets his impatience that things be done sooner rather than later. But if you examine that press release, there is absolutely to somehow draw an inference from that that somehow something, influence was being exerted or things were happening that were at variance with the Department's recommendations is like, is far-fetched. I don't mean to be offensive, but it's quite far-fetched.

Q. Finally, Mr. Loughrey, you have heard the evidence both of Mr. Towey and of Mr. Brennan that their understanding of the legal advice obtained by them in writing was informed and supplemented by oral advices received by them by counsel?

A. Yes.

Q. And is it your view that in those circumstances it would be appropriate, albeit unusual, that counsel would give evidence as to the circumstances in which those advices were given and the circumstances in which he understood how those advices were received and understood?

A. I believe the exact words I used when addressing Mr. O'Callaghan was: I believe that they could have a decisive influence on understanding where we are coming from.

Q. Thank you, Mr. Loughrey.

CHAIRMAN: Anything in conclusion?

MS. O'BRIEN: No questions, sir.

CHAIRMAN: Very good, Mr. Loughrey. In those circumstances, thank you for coming back and I appreciate the lengthy day that you have had to deal with a wide

number of questions.

A. And thank you for your understanding as well, Chairman, thank you.

MR. O'DONNELL: Chairman before you rise

CHAIRMAN: Just as regards the outstanding matter,

Mr. O'Donnell, as you are aware, sittings are fixed for the conclusion of Mr. Christopher Vaughan, the English solicitor's evidence, and what I intend to do is I will provide a ruling either at or prior to that and in that context, it does occur to me that if perhaps you were to make available a draft of what would be the intended testimony of Mr. Nesbitt, that could be of some assistance.

MR. O'DONNELL: Well I have been instructed to make a submission to you today by my clients in respect of the issue at the end of the evidence, I won't be long, I'll be five minutes at most, but I have been given instructions to make these submissions.

CHAIRMAN: Right.

MR. O'DONNELL: I am sorry, I won't delay you, but you asked the basis on which counsel could be called to give evidence in relation to his opinion and subsequent advices and you indicated an understandable, if I might say so, but I think a reluctance but a reluctance which I think we can overcome. And it is our submission, Chairman, that there is no legal, professional or ethical reason why counsel should not be called to give evidence in relation to the circumstances of his giving the opinion and the advices

provided.

And we further say that having regard to the evidence that has transpired to date and the entitlement of the Department and its civil servants to fair procedures, that it is proper and just that counsel be called.

If I just deal with the three headings that you

Legally, it is correct that the circumstances in which oral evidence can be given in relation to the interpretation of a written agreement are limited. But that is not an issue that you have to concern yourself here with, because, sir, you are not a judge for the purposes of up here, and it's not the role or function of the Tribunal to interpret what the opinion or indeed the oral advices mean or what they should have been interpreted as meaning. Your role, sir, is to inquire into matters of fact. And the factual issue which the Tribunal is inquiring into here is, as set out by Ms. O'Brien on Day 359, "what was the civil servants' understanding as of May 1996 of the legal advice which they had received on this matter?"

So what did the persons to whom the opinion and those advices were provided with think that those opinions and advices meant at that time?

Now, sir, if I am wrong in that, even if the Tribunal were, I say, artificially to confine itself to the circumstances which would apply in a court, the Court you asked specifically could barristers give evidence and the answer is they can and they do give evidence as to their

recollection of the circumstances surrounding the creation of a document. For example, a settlement document

CHAIRMAN: Well that's fairly normal.

MR. O'DONNELL: Oh, I understand that. But they give evidence not simply in relation to they don't give evidence as to necessarily what the document means but they give evidence in relation to the circumstances in which the document was created. They give evidence in relation to, if an issue arises, as to the subject matter of that document. And they can and do give evidence to assist in the interpretation of a document where there is an ambiguity on the issue of the interpretation of that document.

So they give evidence to explain the circumstances of creation; to explain the subject matter where appropriate; and to assist in interpretation where there is ambiguity.

Now, Chairman, what we say here is that firstly, the circumstances in which the document and the oral advices came into being are of significance. They are of considerable significance here, and that is a reason alone to call Mr. Nesbitt.

It is also clear that the nature of the subject matter is disputed by counsel for the Tribunal, though it's not disputed by any witness, i.e. there is a dispute, did it cover the historical ownership issue or did it only cover the draft licence? And we say that there is, that is something that can be explained by the author.

Thirdly, insofar as there may be ambiguity as to the understanding of the civil servants in question of the opinion and the advices, that ambiguity can be resolved by the calling of counsel to give evidence. And we say in that regard, Chairman, that it is of note that three senior, well certainly two senior, highly respected civil servants have given evidence as to what they thought the document and the oral advices meant. Their integrity is beyond question and nobody, except counsel for the Tribunal, has challenged their view on that and no witness has given evidence to the contrary.

So that's the legal issue

CHAIRMAN: I suppose that's the merits, Mr. O'Donnell.

That's obviously what you'd be urging. But it's just the actual context of specifically calling a senior barrister or any barrister

MR. O'DONNELL: Well I'm just coming to that

CHAIRMAN: in circumstances, and what you are telling me is of course helpful and I'll take it on board. You have obviously done some examination or perhaps had perhaps Mr. Rossa Phelan examine it. I am just wondering did any authority emerge that might be useful?

MR. O'DONNELL: Sir, what we did do, what I did do was we took soundings within the Bar and from members of the Bar and from a senior member of the Bar Council. And we are clear in our view that where the client has deliberately waived privilege, where the client is anxious that counsel

give evidence, and where the counsel himself has no objection to doing so, and I don't wish to in any sense portray Mr. Nesbitt as being in any way reluctant, he is perfectly prepared to do so, the view expressed to me was that counsel may not just be entitled to give evidence but in a sense, obliged to give evidence, if that is the wish of his client.

Now, I appreciate, Chairman, that this isn't a court. But what we say, Chairman, is that in those circumstances, if you refuse to hear counsel, it will appear that you will be shutting your ears to what must be now regarded, even if it may not have been regarded before, but it must now be regarded as highly significant evidence.

Now we accept that Mr. Towey and Mr. Brennan have a limited recollection of the advices received orally, although they both recall receiving and relying on other oral advices.

But they have both indicated that they are both aware that counsel has a more detailed recollection of giving those advices than they have of receiving them. And again, you as Chairman are anxious, obviously, to ascertain the full picture, and we say that the fullest picture can be viewed by you by calling Mr. Nesbitt as witness.

Now, Chairman, your counsel, at the opening of this module, at Day 359, sought to minimise the importance of the materiality of this issue and described it as a relatively minor aspect of the Tribunal's inquiries. But we regard this as being extremely serious because it impinges on what

we say are the untarnished reputations of the relevant civil servants, and the seriousness with which the Department treats the issue is evidenced by the fact that it took the highly unusual step of waiving privilege. And we understand that the Tribunal would be loathe, in normal circumstances, to call counsel, but these are not normal circumstances. The privilege was waived to meet these unusual circumstances and also to deal with what has been described as the working view of the Tribunal as to the effect of the opinion, and that's a working view which we say doesn't work, a view which we say is erroneous.

Can I just deal finally, Chairman, with the balance of prejudice. Obviously the Tribunal is anxious to conclude its hearings speedily, and we accept that. It is true that the legal privilege was waived only recently, although the documents were available to the Tribunal since 2002. But in relative terms, the time that will be taken to hear counsel give evidence on this issue is likely to be short and therefore, the prejudice to the Tribunal in terms of time and cost would be minimal. But we say, on the other hand, the prejudice to the Department and to the civil servants, if counsel is excluded, is potentially devastating. They have given sworn evidence of their understanding of what was conveyed to them. The Tribunal has, through its counsel, resisted that, preferring its own working view. We say that the evidence of Mr. Nesbitt is likely to corroborate their version of events, the civil

servants' version of events, and to deny them the opportunity of that corroboration would, it is our respectful submission, be unfair. And while you are not a court, I respectfully submit that no court faced with that dilemma would refuse to hear evidence from counsel in such circumstances.

Now, Chairman, we should also say that we are anxious that you would I know you feel that Ms. O'Brien has indicated your position in relation to the correspondence with the Tribunal and the Attorney General's office of December 2002, but we ask that that matter be dealt with in any ruling you might give, and Mr. Loughrey has raised the matter at some length with you, and I don't propose to rehearse those details but we would ask that you would deal with that specifically, given that it's now clear that the Attorney General's letter indicated squarely that the matter was dealt with in the opinion.

We would also submit, Chairman, that it is open to you and indeed we would urge you to take this course, that you can now make fresh preliminary findings in the light of the evidence given at these hearings. The Tribunal has indicated in respect of at least one other witness, which I think is Mr. Vaughan, that it would, in effect, reserve its position on findings until all the evidence of that witness had been heard. And insofar as the logic in relation to that affected witness applies here, we would suggest that the provisional findings involving this Department and

these witnesses should be revised and re-issued to take account of this evidence and such other evidence as you may seek to, and which we would urge you to take from Mr. Nesbitt.

Chairman, to quote yourself on the opening day, you said it was important that you had a full rather than a selective picture of everything that transpired to be material to the issue, or that may be material to the issue. You also indicated that "in the ultimate, I am bound to ensure that fair procedures are upheld." And you said that "If it seems to me that justice can only be done by enabling the testimony to take place, I will accede to it. "And it is our submission that justice can only be done by hearing evidence from the counsel in question, because if you fail to call counsel in the circumstances there would be, and perhaps, as importantly, would be perceived to be the creation of a potential injustice to the Department and the officials concerned.

And I have already, I think, sir, I raised with you on an earlier occasion the statement of Judge Quirke in O'Brien v. Moriarty about what was opened to you about allowing witnesses be tendered for cross-examination, and I also indicated to you at the outset that it was open to you to refer, if you saw fit to do so, if you felt you needed the guidance of the High Court, to do so under section 4(b) of the Tribunal (Amendments) Act.

CHAIRMAN: I don't think that's the course I propose embark

on.

MR. O'DONNELL: I am just putting they are out there for your consideration, Chairman. But they are my submissions.

MS. O'BRIEN: Just one matter I want to raise, sir, just now as Mr. O'Donnell has raised the matter of further evidence, particularly in relation to meetings or what might have transpired at those meetings, I wonder if Mr. O'Donnell is yet in a position to clarify whether the position is agreeable to waiving privilege over the documents which relate to those subsequent meetings?

MR. O'DONNELL: We have made we have been in contact with the, my clients have been in contact, through the Attorney General's office, with the Department and we hope to be able to get back to the Tribunal in due course, but there was a Cabinet meeting today, but I don't know whether it was before them.

CHAIRMAN: It will scarcely be at the forefront.

MR. O'DONNELL: I think they have other things to think about but we will get back to the Tribunal as soon as we what if any waiver will take place. But we would not like, Chairman, our decision on waiver to dictate whether or not you call Mr. Nesbitt. It seems to us that the issue of whether you call Mr. Nesbitt is now based on the evidence that these witnesses have given as to what was said to them and what their understanding was, and unless the Tribunal reverses its position, its working view

CHAIRMAN: Well I take you're point on that, Mr. O'Donnell.

But as you did remind me, I did observe, when this matter first arose, that I would like as full a picture of the relevant papers as possible. So I would urge you, if you can, perhaps expedite the matter of seeking to get clearance of waiver, I think it would be more satisfactory.

MR. O'DONNELL: I am conscious of that, Chairman, and you can rest assured we are doing our best to expedite this within the framework that allows us to do that.

CHAIRMAN: Very good. Thank you.

THE TRIBUNAL ADJOURNED UNTIL FURTHER NOTICE.