

THE TRIBUNAL RESUMED ON THE 9TH OF JUNE, 2009, AS FOLLOWS:

MS. O'BRIEN: Sir, the Tribunal is sitting on this occasion to hear some limited further evidence from three witnesses who were, at the time of the second GSM process, officials of the Department of Transport, Energy and Communications, as it was then known, and from whom the Tribunal has already heard lengthy evidence.

Those witnesses are, firstly, Mr. John Loughrey, who was Secretary General of the Department, and from whom the Tribunal heard evidence over ten days in February and July of 2003. Secondly, Mr. Martin Brennan, who was Chairman of the Project Group established to conduct the second GSM licence process and who gave evidence over 24 days in all, 19 days from December 2002 to February 2003, a further three days in June 2003 and on a single day in November 2005. And thirdly, Mr. Fintan Towey, who was a member of the Project Group and who gave evidence over twelve days in all, eleven of which were in May of 2003 and one of which was in November 2005.

The necessity of hearing further evidence from these witnesses arises solely by reason of the fact that, following circulation of the Tribunal's provisional findings on the 18th of November, 2008, the State, through the Department, has waived its claimed to legal professional privilege over an opinion of senior counsel, which claim was invoked and maintained throughout the course of the Tribunal's work until the 13th of March,

2009, some nearly eight years after the commencement of the Tribunal's inquiries into the second GSM process. The privilege related to an opinion and a covering letter of senior counsel, both dated 9th of May, 1996, which was one of a small number of opinions sought by the Department and provided by senior counsel during the course of the second GSM process.

Before proceeding to outline the circumstances in which that opinion was sought by the Department and the matters to which the opinion was directed, it is necessary to refer briefly to the Tribunal's dealings with the Department in relation to the production of documentation, including the production of the opinion in question.

From May 2001, the Tribunal was in contact with the Department, initially directly and subsequently through the Office of the Chief State Solicitor, with a view to obtaining copies of all documents held in relation to the second GSM process. As had been the Tribunal's preference throughout the course of its work, the Department agreed to produce the documents to the Tribunal voluntarily, and that production of documents commenced in mid-2001 and it proceeded over a number of months into the year 2002. The documentation included copies of the small number of opinions furnished to the Department by senior counsel in the course of the second GSM process, including an opinion of the 9th May, 1996, and over all of which opinions, the Department invoked a claim to legal professional privilege.

The terms on which those privileged documents were provided to the Tribunal were stipulated in a letter dated the 4th of March, 2002, from the Chief State Solicitor, which terms were agreed by the Tribunal. And I am just going to refer now, sir, to that letter from the Chief State Solicitor relating to the terms on which the privileged documents were furnished to the Tribunal in the course of its private investigative work.

Now, that's a letter which is in, in fact, dated below the signature. It was dated the 4th of March, 2002. It's addressed to Mr. John Davis, who was then Solicitor to the Tribunal, and it's "re my client: Department of Public Enterprise". I should just say that the Department of Transport, Energy and Communications was by then known as the Department of Public Enterprise.

"Dear Mr. Davis,

"I refer to previous correspondence in connection with the above matter and in particular to our conversation on Thursday last.

"You will note from previous correspondence that documents were withheld by my client pending consideration of a claim of legal privilege. I have now received instructions to make available copies of the aforesaid documents subject to the following conditions:

"(a) strictly on a confidential basis.

"(b) without waiving the assertion of privilege.

"(c) on the agreed basis that should the Tribunal believe

documents to be relevant, the Tribunal will write to the Department setting out which documents they believe to be relevant and returning the other documents.

"(d) if the documents are documents over which the Department wishes to claim privilege, the Department will assert privilege and the Tribunal will return the documents.

"(e) at that stage, any dispute over whether or not the documents are covered by privilege will be resolved in the usual way.

"You might also acknowledge receipt of the Regulatory Division Files regarding Esat Telecom which were furnished to you on the 27th ult. Some documents were withheld from this batch, however they are now included with the documents enclosed herewith and are covered by the contents of this letter.

"If you have any queries, please do not hesitate to contact the writer."

And it was on those terms, therefore, sir, that the privileged documents were furnished to the Tribunal, and those documents included the opinion and covering letter of the 9th of May, 1996.

In practical terms, what that agreement meant was that whilst the Tribunal could examine the opinions in the course of its private investigative work, it could not refer to their contents in the course of evidence. That arrangement was at all times respected by the Tribunal, and

no reference, however, was made by the Tribunal to the contents of any opinion, including the opinion of the 9th of May at other sittings. The fact that the opinion had been sought was, nonetheless, directly material to the Tribunal's inquiries, and was pursued in evidence.

As it seemed to the Tribunal, having read the opinion of 9th May, 1996, that it did not, in fact, address one of the matters on which legal advice had been sought by the Department, the Tribunal explored and canvassed, in the course of evidence, the views of departmental officials, and, in particular, those of Mr. Loughrey on that point.

The Department was fully represented and in attendance at those public sittings and can have been in no doubt as to the lines of inquiry pursued by the Tribunal or the Tribunal's working view regarding the scope of that opinion.

The issue of privilege attaching to the opinion was subsequently challenged by an affected person, in circumstances which will be returned to more fully in this Opening Statement, and despite the Tribunal endeavouring to secure the Department's agreement to a limited form of waiver of privilege to enable affected persons to have access on a confidential footing to the contents of the opinion, the Department declined to waive privilege, even to that limited extent, and ultimately the Tribunal was obliged to rule on the matter, which it did by a ruling of the 25th of February, 2008.

In order to put these matters into context, it is now necessary to refer to the circumstances in which and the matters on which legal advice was sought by the Department and to some of the evidence heard by the Tribunal in the course of its sittings in 2003.

It will be recalled that the second GSM licensing process which led to the licensing of Esat Digifone comprised two distinct phases.

The first phase, which involved the competitive evaluation of applications submitted by interested parties, commenced on the 4th of August, 1995, with the receipt of applications, and concluded on the 25th of October, 1995, with the announcement that Esat Digifone was the winner of that competitive process. What Esat Digifone won was not the right to the second GSM licence, but, rather, the exclusive entitlement to negotiate with the Department for the grant of the licence and for the terms of that licence.

The second phase of the process involved negotiations between Esat Digifone and the Department which ultimately led to the granting of the licence. The second phase commenced very shortly after the announcement of 25th October, 1995, and concluded on 16th May, 1996, when the licence was issued to Esat Digifone.

It was at a late stage in the second phase of the process that the opinion in question was sought, after consultation between the Department and officials of the Office of the Attorney General. Those consultations followed receipt of

notification on the 17th April, 1996, from Messrs. William Fry, solicitors for Esat Digifone, concerning the intended shareholding of the proposed licensee company. This notification and the Department's response to it can only be understood in the light of the rules of the competitive process as stipulated in the formal document entitled "Request for Tenders" which, as will be recalled, had been issued by the Department on the previous 2nd March of 1995, and the issue of this document marked the launch of the competitive process and it prescribed the rules of the competition.

That document invited interested parties to submit applications, and it stipulated at paragraph 3 that, and I am quoting:

"Applicants must give full ownership details for proposed licensee."

The ownership details of the proposed licensee, as furnished in the Esat Digifone application, were Communicorp and Telenor as each holding 50% of the shares, with their respective shareholdings falling to 40% each either in the run-up to or on the award of the licence being made to enable 20% equity to be allocated to financial institutions. In other words, the ownership of the proposed licensee was defined as Communicorp holding a 40% shareholding, Telenor holding a 40% shareholding and financial institutions holding a 20% shareholding. The extent to which that 20% shareholding had already been

determined was described with varying degrees of certainty in the application and in the course of the evaluation process.

In the Esat Digifone Executive Summary, it was stated that:

"On award of licence, 20% of the equity of the company (10% each of Communicorp and Telenor) will be made available to third party investors. This allocation has been placed by Davy Stockbrokers (Ireland's largest stockbroking firm) with: Allied Irish Bank, Investment Bank of Ireland, Standard Life Ireland, Advent International. Confirmation letters from all equity partners are contained in the financial appendix.

A slightly different statement was made in the main body of the application where, in the management book at paragraph 2.1, it was stated as follows and a copy of that, I think, is available, and we have it there on the overhead projector.

2.1, "The Operating Partners":

"Esat Digifone has two operating partners - Communicorp Group Limited of Ireland and Telenor Invest AS of Norway. Together, they bring Esat Digifone complementary cultures, skills and experiences covering all areas necessary for the company to succeed."

Then at 2.1.1, "Communicorp Group Limited," subheading:

"Communicorp is an Irish media and telecommunications services group with operations in Ireland, Scandinavia and Central Europe. Communicorp is particularly experienced in

starting up new companies and competing with incumbent telecommunications operators and radio stations. Its subsidiary, Esat Telecom, has proven, in a short space of time, its ability to compete effectively with Telecom Eireann in the provision of telecommunications services in Ireland. At the core of Esat Telecom's telecoms success are high quality and competitively priced services.

Communicorp and Esat Telecom have an entrepreneurial and dynamic culture, a deep appreciation of the Irish market for telecommunications services, experience of the Irish business environment and Irish marketing flair."

Then at 2.1.2, under the heading "Telenor Invest AS":

"Telenor Invest AS is the international investment arm of Telenor AS, Norway's leading full service telecommunications operator. It is one of the world's most successful cellular communications operators measured in terms of market penetration. Norway's cellular penetration already exceeds 19% of the population and is forecast to grow beyond 22% by end 1995 and to 60% by 2005. Telenor has successfully implemented and launched GSM networks in Norway, Hungary and St. Petersburg, in addition to its analogue NMT networks. Telenor's 13 years' experience of managing cellular communications businesses includes design, deployment, operations and marketing. In addition, Telenor has a comprehensive range of tools, systems, training programmes and business processes which will be transferred to Esat Digifone, getting the company off to a

fast, professional start and efficient development."

And then at subsection 2.2, The Company's Ownership

Structure:

"Esat Digifone is an Irish incorporated company.

Currently, 50% of the shares are held by Communicorp and the other 50% by Telenor. On award of the licence, 20% of the equity in the company (10% each from Communicorp and Telenor) will be made available to third-party investors.

This allocation has been placed by Davy Stockbrokers (Ireland's largest stockbroking firm) with:

Allied Irish Bank

Investment Bank of Ireland

Standard Life Ireland

Advent International.

Confirmation letters from all equity partners are contained in the financial appendix. The shareholders plan to make a percentage of the company's shares publicly available on the Irish Stock Exchange some two or three years after licence award."

That, in fact, section, sir, is taken from the Executive Summary, and that's what was stated in the Executive Summary.

And I'll come on now to the slightly different description that was contained in the management section of the application, and, again, that's also numbered 2.1, and it's section 2: "Esat Digifone," subsection 2.1: "Ownership and Equity Holding":

"Esat Digifone is a limited liability company registered in Ireland. The company is jointly owned by Communicorp Group Limited and Telenor Invest AS, Norway. Communicorp Limited is the holding company for Esat Telecom, which holds a licence from the Department of Communications (a Section 111 licence issued in December 1992) for the provision of international and inland long-distance services to Irish companies. Telenor Invest AS is a wholly-owned subsidiary of Telenor International AS, a company in the Telenor Group, the Norwegian State-owned telecommunications operator."

I should say, sir, there that the question mark and the circle around "inland," that was actually on the copy of the application that was furnished to the Tribunal. It's not a mark that was made by the Tribunal.

"The terms of the shareholders' agreement between the parties are presented in Management Appendix A. Financial reports of Communicorp Group and Telenor Invest AS are presented in management Appendices B and C respectively.

"The shareholders agreement states that Communicorp Group and Telenor will each initially hold 50% of the equity of Esat Digifone. In the period leading up to the award of the licence, 20% of the equity (10% from each of the partners) will be formally placed by Davy Stockbrokers, Ireland's largest stockbroker.

"As of submission of this application, Davy Stockbrokers has received written investment commitments from:

Allied Irish Bank to make an equity commitment of IR£1/23 million;

Investment Bank of Ireland to make an equity commitment of IR£1/23 million;

Standard Life Ireland to make an equity commitment of IR£1/22.5 million;

Advent International plc to take at least a 5% of the equity.

"Letters of commitment are presented in Management Appendix D."

It then goes on to state:

"Within three years of service launch, the Communicorp Group and Telenor Invest AS will each make a further tranche of equity available to independent investors in order to reach a position whereby the equity in Esat Digifone is equally shared between Communicorp, Telenor Invest AS and independent investors. Under this agreement, 32% of Esat Digifone's equity will be made available to public and institutional investors, thus distributing the benefits of the licence widely.

"Esat Telecom is the trading name of Esat Telecommunications Limited which is the telecommunications operating company of the Communicorp Group. For convenience and clarity, Esat Telecom rather than Communicorp is referenced in those sections of this volume which address complementarity of skills from a specifically telecommunications perspective.

"In forming Esat Digifone, the prime objective was to identify partners who could offer complementary resources and compatible business approaches. Esat Digifone undertook extensive research and initiated discussions with telecommunications operators around the world. A shortlist of operators in eight countries was visited between December 1993 and January 1995. This resulted in an invitation to Telenor to participate in the company."

And then, over the page: "The result is a company which has a unique portfolio of talent and skills. Esat Digifone successfully combines specialist expertise, sound experience and financial strength and an entrepreneurial spirit.

"The diagram below illustrates the initial ownership of Esat Digifone Limited."

And I think that diagram can be seen there on the overhead projector, sir, and you'll see that, at the top, in the large box is Esat Digifone Limited, and, on the left-hand side, that shows Telenor Invest AS at 40 to 50%. In the middle, it shows Communicorp Group at 40 to 50%. And then, on the right-hand side, it shows institutional investors up to 20%, and, again, they are named below that box with bullet points: first bullet point, AIB; second bullet point, Investment Bank of Ireland; third is Standard Life Ireland; fourth bullet point, Advent International.

So that then, sir, was the slightly different description which appeared in the main body of the application in the

management section.

Now, at the Esat Digifone oral presentation on the 9th of September, 1995, Mr. Arve Johansen of Telenor described the ownership profile of the proposed licensee as follows:

"Esat Digifone is an Irish company. It's evidenced, first of all, by the Communicorp Group holding 40% as we get going, and we have institutional investors holding 20%, and they are the AIB, the Investment Bank of Ireland, Standard Life Ireland and Advent International. In addition, we have Telenor, through its subsidiary Telenor Invest, and Telenor is the major telecommunications operating company in Norway."

The matter was returned to in the course of the presentation by Mr. Denis O'Brien, when he observed as follows:

"And as Arve has mentioned, both Communicorp and the financial institutions are going to share in this investment, and I think this is important because it's the first time a utility will make available shares to financial institutions. There is a hell of a lot of money, pension money leaving this country, and this is a way of tapping that vast resource. So we have two operating partners and financial institutions. So that's done."

At a later point in his submission, Mr. O'Brien observed that: "It's also likely that the Irish institutions will probably go into a vehicle together just for simplicity that there would be that 20% block so the Irish

institutions again would control that block effectively in terms of equity terms."

And that was the information, sir, that the Department was furnished in relation to the ownership of the proposed licencee which, as I have already indicated, was a requirement under the rules of the competition as set forth in the RFP document issued on the 2nd March of 1995.

As has already been adverted to, it was the contents of a letter dated the 17th April, 1996, from Mr. Owen O'Connell of Messrs. William Fry, solicitors for Esat Digifone, which prompted the Department to seek legal advice. That letter was addressed to the ownership and capital configuration of Esat Digifone Limited, the proposed licencee.

And there is a copy of that letter, sir, on the overhead monitor. It's addressed to Ms. Regina Finn, Department of Transport, Energy and Communications, and just to remind people, sir, Ms. Finn was an Assistant Principal who was who had been transferred from the Broadcasting Section of the Regulatory Division to the Telecommunications Section, I think in late February or early March of 1996. She had had no involvement whatsoever in the competition process, and it was her evidence that she became responsible for coordinating the drafting of the terms of the licence at that stage and she reported to Mr. Sean McMahan.

It's: "Esat Digifone Limited.

"Dear Regina,

"I refer to our telephone conversation of yesterday

regarding the ownership of Esat Digifone Limited and of Esat Telecommunications Holdings Limited. The position is as follows:

"Esat Digifone Limited.

There are 3,000,000 ordinary shares of ₺1 each in issue in this company. They are held as to 1,125,000 shares by each of Esat Telecommunications Holdings Limited and Telenor Invest AS, and as to 750,000 shares by IIU Nominees Limited.

"It is intended that by the time notification is received from you that the second GSM licence is available for issue, the issued share capital will have increased by ₺15 million to ₺18 million (all comprising shares of ₺1 each) held as to 6,750,000 by each of Esat Telecommunications Holdings Limited and Telenor Invest AS, and as to 4,500,000 by IIU Nominees Limited.

"The 25% of Esat Digifone Limited held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in Esat Digifone's bid for the licence. You will recall that this referred to an immediate institutional-investor holding of 20%, with a further 12% in short and medium term stages. Of the anticipated 12%, 5% has been prepared with IIU Nominees Limited. It is understood that most, or all, of the shares held by IIU Nominees Limited will, in due course, be disposed of by it, probably to private and institutional investors."

Next heading then is "Esat Telecommunications Holdings Limited".

"This company is owned (either directly or indirectly) as to approximately 57% of its issued share capital by Denis O'Brien and as to approximately 31% thereof by a group of investment funds managed and controlled by Advent International. The remaining 12% is owned (again directly or indirectly) by a number of individuals (including Denis O'Brien) who are primarily present or former directors, employees, advisers or shareholders in Esat Telecom Limited. (These percentages assume the full conversion of all existing issued convertible debentures in the company, i.e. they are expressed on a "fully diluted" basis.)

"A placing of shares is near to completion in the United States whereby the effective ownership of Esat Telecommunications Holdings Limited will be altered by the subscription for a substantial number of shares by a number of US financial institutions. The US institutions are likely to hold approximately one third of Esat Telecommunications Holdings Limited after the placing (although Mr. O'Brien will retain a majority of voting shares); in addition, Advent International may increase its holdings somewhat by participating in the placing."

Then the final subheading is: "Other group companies":

"You asked me about a number of other companies of which you were aware, including Esat GSM Holdings Limited and Communicorp Group Limited. While these companies remain in

being and are within the overall group structure, they will not have a direct role in the licence.

"I believe that the foregoing accurately summarises the effective and beneficial shareholdings of the parties concerned, although the full shareholding structure is somewhat more complex than outlined and, as I told you on the telephone, many of the effective shareholdings are held indirectly through other companies. If you wish, a full briefing can be given as to the exact shareholdings of all parties in and through all companies, but I am not sure that this will serve any productive purpose. Please contact me if you would like such a briefing.

"At the risk of labouring the point, I must reiterate the anxiety of Esat Digifone to procure a grant of the second GSM licence as soon as possible, since significant damage to its plans and prospects is already being incurred and could largely be avoided by the grant of the licence.

"I look forward to hearing from you."

In effect, what Mr. O'Connell informed the Department was that the shares in Esat Digifone were held as to 37.5% by Communicorp, as to 37.5% by Telenor, and as to 25% by IIU Nominees Limited. Whilst their respective shareholdings would increase prior to the award of the licence, that increase would be pro rata, and would not impact on their relative shareholdings.

As regards the 25% of the shares in Esat Digifone Limited held by IIU Nominees Limited, Mr. O'Connell informed the

Department that these represented the institutional and investor shareholding, as he described it, of 20%, together with a further 5% arising from the dilution of the holdings of Communicorp and Telenor.

That letter was sent by Mr. O'Connell to Ms. Regina Finn, who, as I have already stated, was an Assistant Principal Officer and who had joined the Telecommunications Section of the Regulatory Division in late February or early March 1996, and who had commenced working with Mr. Sean McMahon on coordinating the drafting of the licence. Ms. Finn had no previous involvement whatsoever with the second GSM process. She had telephoned Mr. O'Connell on the previous day, which was the 16th April, 1996, to inquire about the ownership of Esat Digifone in the context of preparing the draft licence. Ms. Finn recorded the information which Mr. O'Connell conveyed to her in a memorandum which she forwarded to Mr. Martin Brennan and Mr. Fintan Towey, and she, likewise, forwarded a copy of the letter of the 17th April, 1995, to Mr. Towey on receipt of it.

I refer you, sir, also to that fax and enclosed memorandum.

It's to Martin Brennan/Fintan Towey, Communications Division, from Regina Finn, Department of Transport, Energy and Communications, dated 16th April, 1996, and the comments are:

"Martin, Fintan, attached is the latest information to come to light about the shareholdings in Esat Digifone. Owen O'Connell is to provide further detail in writing. You may

wish to pursue further."

And then we go over the page. I am going to deal with just the narrative that Ms. Finn made, first of all, and then refer back to the diagram. She stated in her memorandum and recorded:

"Owen O'Connell, William Fry Solicitors, provided the following information on behalf of Esat Digifone Limited.

"At present, Communicorp is the vehicle whereby Denis O'Brien holds shares in Esat Digifone. Communicorp also has ownership of Esat Telecom and the radio interests of Denis O'Brien. The objective is to uncouple the telecommunications and the radio elements of Communicorp because they are incompatible from the point of view of investors. With this in mind, Communicorp will retain the radio interests and slide out of the current picture in relation to telecommunications."

There is then a subheading: "Esat Telecommunications Holdings Limited has been incorporated to take over the telecommunications interests of Communicorp. Ownership comprises:

"Denis O'Brien: 57%;

Advent: 31%;

Miscellaneous: 12%;

Denis O'Brien: 6%;

Employees of Esat: 6%.

"A flotation is currently underway by First Boston Bank which involves the placing of shares in Esat

Telecommunications Holdings Limited. It is not yet known what percentage of the company will finally be owned by American investors.

Esat Telecommunications Holdings Limited, in turn, owns

Esat Telecommunications Limited: 100%;

Esat Digifone Limited: 37.5%."

So that portion of her memorandum related primarily, sir,

or entirely, sir, to the restructuring of Mr. Denis

O'Brien's interests through Communicorp.

She then has a heading: "Telenor Invest AS owns 37.5% of

Esat Digifone Limited".

"IIU (a Dermot Desmond company) currently holds 20% of Esat

Digifone which it intends placing with institutional

investors. It also has the right to acquire a further 5%

(by means of the 12% of Esat Holdings Limited which is held

by miscellaneous?)" And she puts a question mark. Owen

O'Connell is to provide further information in writing,

including deadlines for this change of ownership."

And, above that, she had prepared a diagram in which she

represented that same information which appeared in her

narrative. And you see at the foot of that diagram, sir,

she has "Esat Digifone Limited" and above that she has

37.5% allocated to Esat Telecom, which was the

effectively represented Communicorp. On the left, she has

Telenor Invest AS holding 37.5%, and on the right she has

"IIU (Dermot Desmond)" with a line down, 20%, and I think

that's plus 5%.

Now, in their evidence to the Tribunal, Mr. Loughrey, Mr. Brennan and Mr. Towey agreed that the ownership information contained in Ms. Finn's memorandum and Mr. O'Connell's letter was new information and represented a departure from the ownership details furnished in the course of the licensing process in two respects.

First, the share configuration had changed from a 40:40:20 configuration with Communicorp and Telenor each holding a 40% shareholding, to a 37.5:37.5:25 configuration with a Communicorp and Telenor shareholding diluted to 37.5% each.

And secondly, the financial institutions' shareholding was not to be placed by Davy Stockbrokers with Allied Irish Bank, Investment Bank of Ireland, Standard Life Ireland or Advent International, but had, instead, been taken up by IIU Limited on behalf of Mr. Dermot Desmond.

Mr. John Loughrey, who was then Secretary General of the Department, in his evidence to the Tribunal, on day 188, testified that he was very surprised when he received those documents and that he was not best pleased.

Mr. Brennan testified, on day 178, that the information triggered two responses: First, that the Department had to check who IIU was, and whether they were 'good for it', as he put it; and secondly, that they had to seek legal advice on where stood the application. In other words, the Department had to determine whether IIU Limited had the financial capacity to fund its shareholding and whether the ownership of the proposed licensee company was permissible,

having regard to the competition.

On the 22nd April, 1996, Mr. Fintan Towey and Ms. Regina Finn consulted with Mr. Denis McFadden and Mr. John Gormley of the Attorney General's Office. Mr. Towey and Ms. Finn have already given evidence concerning that meeting. Two days later, on the 24th April, 1996, Mr. Towey prepared a note of the meeting, and that document has already been led in evidence, and inquiries pursued by the Tribunal with Mr. Towey and Ms. Finn and indeed with a number of other witnesses in relation to its contents.

Now, that note recorded as follows:

It's headed "Note of Meeting" and it's in five numbered paragraphs, and if we just look over the page, it's signed by Mr. Towey, and if we just move it up a little, it's dated the 24th April, and it's been cc'ed to Mr. Brennan, Mr. McMahon and Ms. Finn.

Paragraph 1:

"Ms. R. Finn and the undersigned met with Mr. D. McFadden, Mr. J. Gormley and Mr. L. Bacon, Office of the Attorney General, on the 22 April, 1996. The purpose of the meeting was to discuss:

"(a) the disclosure of information to unsuccessful applicants for the GSM licence and

"(b) the transposition of Directive 96/2 and its impact on the award of the GSM licence to Esat Digifone.

"2. Mr. McFadden indicated that the Attorney General would approve the draft letter inviting unsuccessful applicants

to debriefing sessions by the following day. The Department agreed to provide a brief for senior counsel on the procedure to be followed at the sessions.

"3. With regard to the transposition of Commission Directive 96/2, the Attorney General Offices was particularly concerned about the applicability of the appeal procedures of the Directive to the GSM competition if the GSM licence is awarded pursuant to a Statutory Instrument to transpose the Directive. It may be possible to provide in the SI that applications received prior to the adoption of the Directive are not subject to the appeal procedures. Alternatively, the licence could be granted under Section 111 (1) and (2) of the 1983 Act and the SI could provide that it is deemed to be awarded under the proposed new legal base for mobile licences. The Department expressed a preference for the award of the licence pursuant to a SI transposing the Directive, but would not press this course if the AG's Office advised against on the grounds of increased exposure to legal action. The fact that it would be preferable to licence Esat Digifone and Eircell on the same legal basis was also pointed out. It was agreed that these questions should be addressed to senior counsel. In the meantime, the AG's Office agreed to provide a first draft of the Regulations to the Department the following day.

"4. The Department agreed to provide the following to the Office of the Attorney General in order to facilitate

further consideration of licence award.

" a report on the compatibility of the conditions of the draft GSM licence with Directive 96/2.

" a consolidated text for Section 111 of the 1983 Act, as amended by SI 45 of 1992 and including proposed amendments pursuant to Directive 96/2.

" the Department's view on consulting with the Commission on the impact of Directive 96/2 on the award of the GSM licence and on the compatibility of the conditions with the Directive.

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

And that was Mr. Towey's note made on the 24th April of the meeting which he attended in the Attorney General's Office and with officials of the Attorney General's Office on the 22nd April.

On the same day, the 24th April, 1996, Mr. Towey wrote to Mr. McFadden and Mr. Gormley of the Attorney General's Office, enclosing some additional material, making a number of points regarding other aspects of the legal advice

sought and confirming the Department's requirement for a legal opinion on the restructuring of the ownership of Esat Digifone Limited. That letter, which has likewise already been led in evidence and on which inquiries have been made, was in the following terms:

It's dated the 24th April, 1996.

It's addressed to Mr. D. McFadden/Mr. J. Gormley,  
Office of the Attorney General.

"Dear Mr. McFadden/Mr. Gormley,

"Further to our meetings on 22nd and 23rd April, I enclose the following:

" a report on the Department's assessment of the compatibility of the conditions of the draft GSM licence with Directive 96/2 and

" a consolidated text of Section 111 of the Post and Telecommunications Services Act, 1983, incorporating amendments contained in SI 45 of 1992 and amendments proposed in the transposition of Commission Directive 96/2.

"I have also, as requested, consulted internally on the question of consulting the European Commission in relation to the terms of the licence. The Department is of the view that, apart from the time constraints, it may not be prudent to invite the Commission's scrutiny at this point.

The question of compliance with the provisions of Directive 96/2 will no doubt fall to be examined in detail by the licensee in due course, possibly in consultation with the Commission.

"I would also like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat Digifone (relevant papers provided at our meeting on the 22nd April). In particular, the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application, must be addressed. Before the ultimate award of the licence, it is now considered that it would be preferable to seek warranties in relation both to the beneficial ownership of Esat Digifone and the financing package for the project. This is considered prudent, given the nature of the concession being given to the company. Perhaps you would advise, however, whether such a requirement could be challenged by Esat Digifone as an imposition not envisaged in the competition process or otherwise unreasonable on legal grounds.

"Finally, I will provide a brief for counsel on the proposed disclosure procedure as soon as possible, but would, as discussed, appreciate your early opinion on the question of whether debriefing sessions should proceed in the shadow of a complaint to the Commission regarding the process."

And it's signed "Fintan Towey".

It is clear from the contents of Mr. Towey's note, dated 24th April, 1996, and the contents of his letter of the same date, that the Department was seeking legal advice in

relation to four separate matters.

First, the transposition of Council Directive 96/2 into Irish law, and whether the second GSM licence should be issued under the framework provided by that directive, or under Section 111 of the Postal and Telecommunications Act, 1983, bearing in mind that the process which would lead to the grant of the second GSM licence had commenced prior to the coming into force of that directive early in 1996.

Second, the draft terms of the licence to be issued by the Minister, and, in particular, the extent to which the Minister could restrict the transfer of shares in the licensed company.

Thirdly, the legal implications of the Department meeting with unsuccessful applicants.

And fourthly, the ownership conformity issue.

It was this fourth and final aspect of the legal advice sought which was, and is, of interest to the Tribunal, and was, and is, material to the Tribunal's inquiries.

Both Mr. Towey's note of the 24th April, 1996, and his letter of the same date referred to papers which had been provided by Mr. Towey at the meeting of the 22nd April, 1996, relevant to the ownership conformity issue. In his note of the meeting, Mr. Towey had described those documents, it will be recalled, as comprising "copy of an extract from Esat Digifone's application outlining the ownership of the company, together with an internal Department docket and a letter from William Fry & Co.,

Solicitors, concerning restructuring of the Esat element."

The Tribunal took up inquiries with Mr. Towey in relation to those documents which he had provided to the Attorney General's Office, in the course of his evidence on the 20th May, 2003, which was day 220 of the Tribunal's public sittings, and the transcript for that date records the following exchange, and, in fact, a copy of the transcript is on the monitor, sir.

"Question 180, question: Can you I know it was a long time ago can you remember what documents were given to the Attorney General's Office at that stage about the portion of the application outlined in the ownership?

Answer: I thought I had seen a copy of this in the papers.

Question: Right.

Answer: And what I I think the papers bear out that what I gave was an extract from the Esat Digifone application.

Question: Right.

Answer: Copy of the letter from William Fry's and a copy of the chart produced.

Question: The Regina Finn chart?

Answer: Yes."

Now, the Tribunal has received documentation from the Attorney General's Office which had not previously been led in evidence and which seemed to confirm that Mr. Towey's recollection of the documents which he provided was correct. That documentation was provided, it seems, to the

Attorney General's Office, or duplicate copies of it, on the 24th April by Mr. Towey, and the letter which he forwarded, or the fax which he forwarded to the Attorney General's Office is, in fact, stamped the 25th April, and it appears that those duplicate copies were received on that date, and I'll just turn those up now, sir. Copies of those can be found at book 85, which is the book that the Tribunal has circulated for the purposes of these public sittings, at Divider G sorry, it's Divider E of that book. And we can just get those on the monitor now, sir.

You will see it's a handwritten fax copy sheet. It's

"To: Denis McFadden.

From: Fintan Towey."

The fax number is there, and, below that, "7 pages," and you will see from the stamp on the right-hand side above "copy" that it was received by the Office of the Attorney General on the 25th April, 1996. And what that included was, firstly, the extract from the management section of the application of Esat Digifone which I read out earlier.

Subsection 2.1. It included the section of the page, which was the diagram that I also referred to. And then further material from that section relating to the principal shareholders, the management and decision-making structure.

Secondly, the documentation included a copy, as Mr. Towey had indicated in his evidence, a copy of the letter dated the 17th April, 1996, from Mr. O'Connell to Ms. Regina Finn.

And thirdly, a copy of Ms. Finn's note, headed "Departmental Note," in which she had recorded, both diagrammatically and in the narrative below her diagram, the information which Mr. O'Connell had furnished to her regarding ownership matters on the 16th April.

Now, it seems that these documents, together with Mr. Towey's fax cover sheet stamped by the Attorney General's Office as having been received on the 25th April, were furnished ultimately to senior counsel under cover of a letter which, although dated the 24th April, 1996, was probably, it seems, not actually sent until the 25th April of 1996, and I can refer you to a copy of that letter.

It's a letter from the Office of the Attorney General, it's dated the 24th April, 1996. It's addressed to senior counsel. It's headed "Urgent".

"re: 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 Commission Directive 96/2/EC amending Commission Directive 90/388/EEC and minute of the Department of Transport, Energy and Communications dated 24th April, 1996."

And it states:

"Dear Richard,

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

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

"A copy of the 'relevant papers' referred to in the third paragraph of the Department's minute is also enclosed, together with a new draft Article 8 of the proposed licence which is relevant, and your opinion on the issues set out in that paragraph would be appreciated."

And over the page at the top of the second page:

"If you require any additional information or consider that a consultation would be desirable, please let us know."

And it's signed "John Gormley" and "Denis McFadden".

Now, I should add that the Article 8 referred to in the second paragraph of that letter was a draft of an Article to be included in the proposed licence which would govern the entitlement of shareholders of the licensed company to transfer or dispose of their shares after the licence was issued. It seems that the final terms of that article were agreed at a very late stage prior to the 16th of May of 1996, and were subject to the terms of a side letter from Mr. Lowry, as Minister, to Mr. Knut Digerud, the Chief Executive of Esat Digifone.

Now, from the documentation available to the Tribunal and the evidence already heard, it appears that no further instructions were furnished to senior counsel or to the Attorney General's Office relating to the ownership conformity issue in advance of the furnishing of senior

Council's opinion dated the 9th of May of 1996.

In response to those instructions of the 24th April, 1996, senior counsel, in fact, furnished two opinions to the Office of the Attorney General. The first was dated the 25th April, 1996, and the second was the opinion in question, dated the 9th of May of 1996. The State's waiver of privilege extends only to the second opinion of 9th May, 1996. Senior counsel forwarded his opinion to the Office of the Attorney General under cover of a letter of the 9th of May of 1996.

And I now propose, sir, to open and read both the covering letter from senior counsel dated the 9th of May of 1996, and the opinion of the same date.

I should add, sir, that in the course of cross-examination of Mr. John Loughrey and of Mr. Owen O'Connell, Mr. John Loughrey in 2003 and I think Mr. Owen O'Connell later in the year of 2003, some short passages were opened from this covering letter and from the opinion by counsel for Mr. O'Brien, but the entire of the letter and the entire of the opinion have never been opened previously.

CHAIRMAN: And I think you will come back to those at a later

MS. O'BRIEN: Absolutely, sir, yes, indeed, I will.

Now, the letter is the 9th of May of 1996. It's addressed to the "Office of the Attorney General,  
Government Buildings,  
Upper Merrion Street,

"re licensing mobile telephones:

"Dear John,

"I enclose my suggested amendments to the Esat licence, my suggested amendments to the Statutory Instrument given to me and some general advices.

"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. The form of draft letter has already been discussed with you. My reasoning in this regard is that the Minister is committed to grant a licence. He is now in between two competing interests: One, Esat, who say that they are entitled to the licence; and the other, Persona, who are indicating that the licence should not issue. Delaying issuing the licence will 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.

"There is one final matter that is important. It occurred

to me that the Minister may wish to impose, on the persons backing Esat Digifone, an obligation to stay with their commitment to back Esat Digifone for a given period, say 3 to 5 years. It could be possible to include in the licence a condition that the licence shall not be actioned until an appropriately worded commitment is to hand. I do not know enough about the terms of the application to know what sort of commitment you could seek or from whom. However, it is a matter worth considering and, in my opinion, a sustainable condition to attach to the granting of a licence to carry on an activity which, by definition, means that somebody else will be deprived of the opportunity to carry on that activity.

"Yours sincerely,"

and it's signed there by senior counsel.

Then the opinion itself, sir. It's headed "Advices

Querist: The Minister for Transport, Energy and

Communications and the Department of Transport, Energy and Communications.

"re: The Esat Digifone (GSM) mobile telephony licence."

And it states: "I have now had the opportunity of considering the complicated issues which arise relating to the introduction of a Statutory Instrument to take into account the effects of Commission Directive 96/2/EC and to settling the terms of the draft 'Esat Digifone telecommunications licence' which the Minister wishes to issue." Then there is a subheading "The Draft Licence".

"I have dealt with the draft licence by taking the draft of the 2nd May, 1996, and indicating where I think there should be amendments. The balance of the document can remain in its current form. Attached to these advices are the amendments I suggest. You should also include in the licence the subheadings that exist in the articles. I did not trouble to repeat them in the amendments that I have suggested.

"The terms of the amendments I have suggested to Article 1, 2, 4 and 5 should be self-explanatory.

"The amendments I have suggested to Article 8 are more substantial. Article 8 imposes conditions material to the ownership of the licence and the management of the licence service, most particularly the ownership of shares in the licensee company. I view these matters as being particularly sensitive and an area where the Minister's hand is substantially tied. The Minister agreed to give the licence in question prior to the introduction of Commission Directive 96/2/EC. However, as a matter of law, I am forced to conclude that if the licence document includes terms and conditions which are not sustainable under the Directive, and licensee, in my opinion, is free to apply to the courts to have such non-conforming provisions struck down.

"If one analyses why the Minister is concerned about the ownership of shares in the licensee, the only legitimate concern he can have is that if there is a change of

ownership, the service that has to be provided will in some way be compromised. I do not think it is tenable to suggest that the licensee has been awarded the licence because of the parties who own the licensee; rather, the licensee has been awarded the licence because its plans and proposals were the most meritorious and it provided a funding plan which looked feasible. There is no reason why any of these matters have to be compromised by a change in ownership. However, I do accept that there is a possibility that this might occur. It is also a real issue in the mind of the public.

"In the circumstances, I have proposed changing Article 8 quite fundamentally. What I have proposed is that the licence continue to be personal to Esat Digifone, the restrictions on transfers and assignments of interest in the licence and assets remain and that the Minister include in the licence provisions which will allow him add additional conditions to the licence should Esat Digifone wish to issue shares to the public or by private placing and give to the Minister the right to veto any proposal to issue shares or transfer the ownership of existing shares. However, the right must be prescribed, and I have done this by only allowing the Minister to act if he forms the opinion that the proposals will be to the detriment or will compromise all or any of the matters which the directive indicates are proper concerns for the Minister when issuing licences. I find it difficult to imagine circumstances

where the Minister will see a proposed issuing of shares and/or change of ownership which justifies saying he will not consent to it. However, I think it is prudent to try and maintain such right. It will certainly allow the Minister to say that he has taken appropriate steps to protect the public interest in this regard.

"I am dubious as to whether or not the Minister can demand that the administration and management of the business be carried on in premises in the State. However, I can understand why this has been included.

"In relation to Article 15, I have suggested an amendment. It is largely cosmetic.

"Article 17 holds the licensee to the provision of a service which develops in accordance with the promises he made in his submission at competition stage. I am concerned that the penalties that are imposed on failure to deliver as promised are likely to be subject to attack falling outside what the Minister can do, given the recent Commission Directive. However, I understand why they are being imposed and simply flag these as provisions in the licence which could be subject to attack.

"As I have already stated, I am gravely concerned about the terms of Article 18. I am aware that Mr. O'Brien promised such a windfall gains provision in his submission and should be held to his promise, but I am equally satisfied that such an arrangement falls well outside what's permitted under the recent Commission Directive. I have

left it in terms as drafted, but, again, point out that, if challenged, it will be in difficulty.

"In respect of the proposed Statutory Instrument, I have caused this to be retyped and where I have made amendments I have over-lined the sections in question. Essentially, since the implementation of Commission Directive 96/2/EC, which amends directive 90/3/88/EC, the State is obliged to offer available radio frequencies to prospective communications service providers. The frequencies are to be licensed by open, non-discriminatory and transparent procedures.

"The proposed Statutory Instrument amends Section 111 of the act by inserting two new subsections, (2B) and (2C), for the provision of mobile and personal communications services, and mobile and personal communications systems is subject to licence by the Minister. What the Statutory Instrument does not do is to provide a mechanism by which the Minister will alert people to the available frequencies or provide the practical arrangements which need to be put in place for the processing of applications by persons who want to operate such services or systems. It would be prudent for the Department to consider how this is to be done, because otherwise there will be complaints by persons who would like to operate such a scheme that are not being advised as to the availability of frequencies and have not been provided with a procedure whereby applications can be submitted. This will not stop people making applications,

but it does call into question how open, non-discriminatory and transparent the procedures really are. Frankly, I do not know enough about the availability of frequencies to make any sensible suggestions at this stage. However, it is something that needs to be considered urgently and be the subject matter of a set of regulations.

"The ability of the State to limit the number of licences for mobile and personal communication systems is restricted to certain specified non-economic reasons in the public interest and the lack of availability of frequency spectrum. Restrictions have to be proportionate to the aim to be achieved. It is also clear that the directive seeks to outlaw restrictions on operators in respect of the establishment of their own infrastructure, the use of infrastructure provided by third parties and the sharing of infrastructure and other facilities and sites.

Interconnection must be permitted and restrictions on interconnection lifted. Finally, access to the public network must be guaranteed. Obviously, interconnection requires conditions, but these must be based on objective criteria which are transparent, non-discriminatory and compatible with the principle of proportionality. Clearly, the Department should think about setting out a set of interconnection conditions of general application to allow prospective licence applicants know what lies in store for them. Rather than repeat the amendments I have made to the Statutory Instrument, I suggest you take time to consider

the draft I return and I can deal with any questions that arise.

"Nothing further occurs at present."

Signed by senior counsel, dated 9th May, 1996.

The State has now also waived legal professional privilege over a letter dated the 13th May, 1996, under cover of which senior counsel's covering letter and opinion were formally provided by the Attorney General to the Department. It seems, however, from other documentation available to the Tribunal, that advance copies of the material provided by senior counsel may have been furnished informally to the Department the previous Friday, 10th May, 1996, and this is a matter which the Tribunal will explore in the course of evidence.

And I'll just refer to that letter of the 13th May, 1996.

It's from the Office of the Attorney General. It's dated the 13th May, 1996. It's addressed to the Secretary, Department of Transport, Energy and Communications.

"Attention: Fintan Towey,  
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 Number 90/388/EEC of 28 June, 1990, and Commission Directive 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, 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, Esquire, SC, dated 9 May, 1996, concerning same."

"Commission Directive 96/2/EC, which was 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 Number 90/388/EEC of 28 June, 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 by Mr. Gormley and Mr. McFadden.

Now, in the course of its inquiries at public sittings in 2003, the Tribunal was unable to refer to the contents of that letter dated the 9th May, 1996, or of the enclosed opinion, or indeed of the letter dated 13th May, 1996.

However, having seen the letter and the opinion of 9th May,

1996, the Tribunal's working view, for the purposes of its inquiries, was that the focus of the opinion was on the draft licence and on the technical issue of the statutory framework under which the licence should be issued, and that the ownership issue was addressed solely within the context of Article 8 of the proposed licence, that is the restrictions to be imposed on the transferability of shares after the licence had issued.

In other words, it was the Tribunal's working impression, for the purpose of pursuing its inquiries, that the opinion did not address whether the ownership information notified in the letter of 17th April, 1996, and as recorded in Ms. Finn's note of 16th April, 1996, was in conformity with the details of ownership of the proposed licensee furnished in the application and evaluated in the course of the process, and, if not, what legal consequences flowed from that change.

The Tribunal raised that issue with the departmental witnesses from whom it heard evidence, and, most significantly, with Mr. Loughrey, who was then Secretary General of the Department, and who testified that, on receipt of a letter of 17th April, 1996 - that's the letter from Mr. Owen O'Connell of William Fry - he took overall responsibility for dealing with the issues which had arisen from the information notified to the Department.

Mr. Loughrey was examined by counsel for the Tribunal on the 21st February, 2003 (day 188).

Having referred Mr. Loughrey to the third paragraph of Mr. Towey's letter to Mr. McFadden and Mr. Gormley dated the 24th April, 1996, the transcript records as follows, and I am starting on question 214 on page 99 of the transcript for that date.

"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 PTSA 1983, incorporating amendments contained in Section 145 of the 1992 and amendments proposed in the transposition of Commission Directive 96/2.

"I have also, as requested, consulted internally on the question of consulting the European Commission in relation to the terms of the licence. The Department is of the view that, apart from the time constraints, it may not be prudent to invite the Commission's scrutiny at this point. The question of compliance with the provisions of the Directive 96/2 will no doubt fall to be examined in detail by the licence in due course, possibly in consultation with the Commission."

And then counsel referred to the third paragraph in the letter of the 24th April, in which it was stated:

"I would also like to reiterate our requirement for a legal

opinion on the restructuring of the ownership of Esat Digifone (relevant papers were provided at our meeting on the 22nd April.) In particular, the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application, must be addressed. Before the ultimate award of the licence, it is now considered that it would be preferable to seek warranties in relation both to the beneficial ownership of Esat Digifone and the financing package for the project. This is considered prudent, given the nature of the concessions being given to the company. Perhaps you would advise, however, whether such a requirement could be challenged by Esat Digifone as an imposition not envisaged in the competition process or otherwise unreasonable on legal grounds."

And counsel commented: "This is the relevant portion of the letter."

"Answer" this is Mr. Loughrey "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 that would be an intrinsic part of it, to make sure our lines were cleared legally, so to speak.

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.

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."

And that's the end of the relevant portion from the transcript.

The letter to which reference was made by counsel for the Tribunal was a letter received by the Tribunal from the Attorney General dated 20th December, 2002, which the Tribunal understood to confirm that advice on the ownership conformity issue had not been given.

The letter and opinion of the 9th May, 1996, was taken up in cross-examination of Mr. Loughrey by counsel for Mr. Denis O'Brien on the 27th February, 2003, day 191, when extracts from the letter dated the 9th May and passages

from the opinion of senior counsel were opened and read by counsel for Mr. O'Brien, expressly without objection from counsel for the State. The relevant portion of the evidence commences on page 25, question 70 of the transcript, and concludes on page 31, question 77 of that transcript.

Question 70:

"Question: The other matter I just want to draw to your attention to, because it seems to me to be relevant as a line of inquiry, is the advices which were given to the Department, the Office of the Attorney General by Richard Nesbitt, who is 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've 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 surmising 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 mentioned it 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, the first instance, that counsel involved for the various interested parties before the Tribunal might have sight of the particular information which the Attorney General and the view the Attorney General has given to the Tribunal.

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

"Mr. McGonigal: Mr. Loughrey, the only bits that 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. A 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 Digifone, 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 issues that had arisen arising out of the Persona complaint.

Answer: Yes, Mr. McGonigal, 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, and page 2, in particular, the second paragraph there: 'If one analyses why the Minister is concerned about the ownership of shares in the licensee, the only legitimate concern he can have is that if there is a change of ownership, a service that has to be provided

will in some way be compromised. I do not think that this is tenable to suggest that the licensee has been awarded the licence because of the parties who own the licensee; rather, the licensee has been awarded the licence because its plans and proposals were the most meritorious and providing a funding plan which looked feasible. There is no reason why any of these matters had to be compromised by a change of ownership. However, I do accept that there is a possibility that this might occur. It was also a real issue in the mind of the public."

"In actual fact, I think that mirrors a lot of 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 had 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 don'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 loath 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 in 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 third-party investors, I couldn'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."

It should be explained that whilst the letter and opinion being privileged were not included within the public

sittings books circulated by the Tribunal in advance of the commencement of its public sittings in December 2002, the Tribunal had inadvertently included copies of those documents with some advance documentation provided to Mr. O'Brien's solicitors, and it was in those circumstances that Mr. O'Brien's counsel was in a position to refer to them in evidence. In fairness to Mr. O'Brien and to his legal representatives, it must be acknowledged that even though the letter and opinion had been excluded from the public sittings books, they would not have known at that time that the documents were subject to a subsisting claim of legal professional privilege.

Counsel for Mr. Denis O'Brien again sought to introduce the letter and opinion in the course of cross-examination of Mr. Owen O'Connell of William Fry Solicitors, who had represented Esat Digifone in the negotiations with the Department which had commenced in November 1995 and which concluded on the 16th May, 1996. The questions which counsel for Mr. O'Brien put to Mr. O'Connell prompted an exchange between counsel for Mr. O'Brien, counsel for the Tribunal and the Sole Member of the Tribunal, and the relevant transcript on day 247, which was the 4th November, 2003, records that questioning and those exchanges as follows:

Question 82:

"Question: Now, the next document that I want to ask you about is the last document, which is apparently an opinion

from counsel invited by the Attorney General to do one, and

I think you have that?

Answer: I have that, yes.

Question: And were you aware of this opinion?

Answer: I don't think I was aware of it at the time. I

became aware of it later.

Question: The bit that I want to draw your attention to is

on the second page.

Answer: Of the opinion or the covering letter?

Question: Yes, of the opinion.

Answer: Yes.

Question: And the following terms: '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'...

"Mr. Coughlan: As far as I am aware, this document has never been opened by the Tribunal. I just want to be careful about this now and how it is being presented here.

It would not be it may have been provided to people all right, but it was for the Tribunal, in the first instance, to consider whether it was appropriate to open the opinion of counsel, an opinion furnished in the matter. I am just unsure, and perhaps I'd like to discuss it with My Friend before he proceeds with this particular question, just what is what he seeks to elicit here. This hasn't been brought to the attention of the Tribunal in this respect.

"Chairman: Well, it certainly hasn't been opened.

"Mr. Coughlan: Certainly not, certainly not.

"Mr. McGonigal: But this is a relevant document, Chairman.

"Mr. Coughlan: It's a matter perhaps that Mr. McGonigal should discuss with me in the first instance. It is not the practice of the Tribunal to open an opinion of counsel.

"Mr. McGonigal: It may not be, Mr. Chairman, and that's a matter for Mr. Coughlan and his procedures.

"Mr. Coughlan: Precisely.

"Mr. McGonigal: This is a document which I understand may be at book 44, document 203. It's a document which is relevant to the issue of ownership and it is a document which, therefore, should be debated in the Tribunal. As to

"Mr. Coughlan: Perhaps this is precisely the type of dispute I wanted to avoid. The Tribunal sought the view of the Attorney General himself on this particular matter, who carried out various inquiries and furnished the Tribunal with a response, which I read out at the Tribunal. This is the stated view of the Attorney General on the matter.

"Mr. McGonigal: It might be the view of the Attorney General, Mr. Chairman, but my view is this is a relevant document to the issues which the Tribunal is considering, particularly in relation to ownership, and it is important that the document be brought to the attention of the Tribunal in public, as is the appropriate way to deal with it.

"What the Tribunal does, either as a matter of law or as a matter of weight to be given to that document, is a separate issue, but certainly there is absolutely no doubt that this document is relevant to the issues which the Tribunal is considering, and it would be wrong to exclude it at this time.

"Chairman: I am certainly

"Mr. Coughlan: The document has never been excluded. The document has been furnished to the parties and to their legal advisors in particular, and the position of the Attorney General has been indicated to all of the parties.

"Mr. McGonigal: It's been excluded if it has been opened to the public.

"Chairman: What I'll do is this, Mr. McGonigal: I accept that if there is a material matter that merits from the content of what may have been set out at this stage being brought to the Tribunal's attention, it would certainly not be my intention or wish to shut you out. I do have some concern, in the first instance, about what obviously were high-level confidential advices furnished, in the first instance, by senior counsel to the Attorney General, being opened, and I think I will defer, until after lunch, taking a final view on this aspect. I'll permit, if you are having a discussion with Mr. Coughlan over lunch, and, if needs be, after lunch I'll rule on it. I accept if there is a material matter and I have some familiarity with the content of a document that wishes to be, that you

wish to uncover, that I should be extremely hesitant about depriving you of that opportunity and I will have regard to that in my ruling. But, just now, to have the entire of the document opened when perhaps there has been no contact made with the Attorney's successor, is something that I would be very hesitant about.

"Mr. McGonigal: No, I understand what you are saying, Mr. Chairman, and the paragraph that I want to draw to your attention is on page 2. It is a paragraph that begins with "if" and ends with "public" and I have no difficulty in the Tribunal taking that paragraph if I am given an assurance that the paragraph is being given consideration as if it had been introduced as evidence, I have no difficulty with that. But I would have difficulty if that paragraph is not considered as part of the evidence, because it is material and I will quote it on that basis.

"Chairman: I certainly have already acquainted myself with that paragraph, Mr. McGonigal. I won't neglect it. I will hold over a final ruling as to whether or not it specifically goes in on the record because I am concerned of the nature of the document in that context.

"Mr. McGonigal: If I understand that correctly, you are going to have regard to it?

"Chairman: I will.

"Mr. McGonigal: Well, that solves my problem, I think, then."

It is important to correct any misunderstanding that might

arise from references made by counsel in the course of that extract. Neither senior counsel's letter nor his opinion of 9th May, 1996, were ever included in any public-sittings books circulated by the Tribunal, nor were those documents made available to affected persons. No affected person, other than Mr. Denis O'Brien, received copies of those documents which, as already alluded to, were included in his case inadvertently in advance documentation made available to his solicitors.

It was following these exchanges that IIU Limited and Mr. Dermot Desmond sought access to the entire of the opinion and covering letter, as they wished to ascertain for themselves what advice had been given regarding the ownership of shares regarding their ownership of shares in Esat Digifone Limited. The Tribunal had considerable sympathy with their position and endeavoured to ascertain whether the State, having regard to the fact that extracts of and passages from those documents had already been opened by Mr. O'Brien's counsel expressly without objection by counsel for the State, would be agreeable to permitting some limited form of access to affected persons. Whilst the State was agreeable to the Tribunal circulating copies of those extracts and passages which had been opened by Mr. O'Brien's counsel at public sittings, it was not agreeable to any form of further disclosure, even on a confidential footing. The Tribunal was so informed by letter dated the 6th December, 2005.

"re: Tribunal of Inquiry" it's from the Chief State

Solicitor's Office:

"Dear Mr. Brady,

"I refer to previous correspondence and in particular to your letter of 19th September, 2005, wherein you requested

"Whether the State would be prepared to agree to restricted disclosure of the opinion to IIU Limited, Mr. Dermot Desmond, Mr. Denis O'Brien, Telenor and the Public Interest, in the context of sittings of the Tribunal from which, apart from those entities, the public would be excluded under Section 2(A) of the 1921 Act."

"I note that the request specifically relates to an opinion of Richard Nesbitt dated May 1996.

My client has considered the matter and is not prepared to waive privilege in respect of the opinion. You will recall that this is in line with the position adopted by my client under cover of my letter dated 3rd October, 2003, to the Tribunal. I also refer to my letter dated 4th March, 2002, and to the terms contained therein which my client will continue to rely upon."

IIU Limited and Mr. Desmond, as was their entitlement, challenged the State's claim to legal professional privilege over the letter and opinion on the grounds that the disclosure made by counsel for Mr. O'Brien expressly, without objection by counsel for the State, constituted a waiver of privilege by the State. This was disputed by the State, which contended that the disclosure which had

occurred at public sittings did not amount to or constitute a waiver of privilege on its behalf.

In order to protect the interests of all persons concerned, you, sir, instituted a fair procedure whereby you invited IIU (Mr. Desmond) and the Department to furnish the Tribunal with written submissions addressed to that issue.

Initial written submissions were received from IIU (Mr. Desmond) on the 2nd March, 2006, and from the State on the 12th June, 2006. Copies of the submissions of each of those parties were, in turn, served on the other and on all other affected persons, including the Public Interest, and all were extended the facility of responding to them.

Submissions in response were received on behalf of Mr. Denis O'Brien on the 18th January, 2008, and copies of those responding submissions, having been provided to IIU (Mr. Desmond), the Department and the Public Interest, supplemental submissions were received from the Department on the 1st February, 2008, and from the Attorney General, on behalf of the Public Interest, on the 1st February, 2008.

Mr. O'Brien, having been served with the Public Interest submissions, provided final submissions on the 20th February, 2008. The Sole Member, having fully considered all of the submissions which he had received, then ruled on the 25th February, 2008, that the disclosure to which reference had been made could not be visited on the State and did not, in law, constitute a waiver of privilege by

the State.

There the matter rested until 13th March, 2009, when the Tribunal, having notified the State of its provisional finding on 18th November, 2008, received a letter from the Chief State Solicitor in the following terms:

It's addressed to Mr. Stuart Brady.

"re Tribunals of Inquiry.

My client: Department of Communications, Energy and Natural Resources.

My Client: Department of Finance.

"Dear Mr. Brady,

"After careful consideration, my clients have decided to waive the legal professional privilege attaching to the opinion of Richard Law Nesbitt, SC, of 9 May, 1996. This was done pursuant to decision of Cabinet of 10th March, 2009.

"My clients take this course, at this stage, in the unique and exceptional circumstances of (a) the adverse provisional findings against them; (b) the fact that passages of the opinion have been put up on screen during the public hearings, are recorded in the transcripts of evidence, and have been referred to extensively by counsel and witnesses during the public sessions; and (c), that, in the light of provisional findings, it is clear that assertion of the privilege has led to a position disadvantageous to the Department.

"My clients believe that the opinion, in fact, deals with

the issue of identity of the consortium both pre- and post-licence. My clients relied at the time, inter alia, upon the opinion and surrounding correspondence and consultations to conclude that there was no legal impediment preventing the grant of the licence to the consortium as constituted as 40% held by Telenor, 40% by Esat and 20% by IIU. My clients note that Richard Nesbitt, SC, is prepared to give evidence to prove the opinion as to the circumstances in which he gave it.

"My clients are willing that the Tribunal disclose the opinion to those parties who have a direct interest in its contents. Because of the exceptional circumstances giving rise to the waiver of privilege over the opinion, my clients exhort the Tribunal to disclose the opinion only insofar as is necessary to address the particular issue at stake.

"Please inform me how you wish to proceed to circulate this opinion so that it is put formally in evidence."

CHAIRMAN: Well, Ms. O'Brien, you are coming to the last portion of your opening which primarily deals with a summary of the intended evidence of Mr. Brennan, Mr. Towey and Mr. Loughrey. I think, in the circumstances of the relatively long opening that you have given, it is probably best deferred until five past two.

THE TRIBUNAL ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

MS. O'BRIEN: Sir, before proceeding, just to complete the

final statement. I just want to refer briefly to the submissions made on behalf of the Department in connection with the request made by IIU and Mr. Desmond that you should treat the privilege attaching to the opinion and letter of the 9th May as having been waived by reason of references made to it in the course of the cross-examination of Mr. Loughrey, expressly without objection by counsel on behalf of the Department. I am not going to refer to or quote from any of those submissions, sir, but what I do want to say in connection with them is that, as regards both sets of submissions furnished on behalf of the Department, it was made abundantly clear that the Department was resisting the contention that there had been a waiver of privilege by reason of those matters and it was further made abundantly clear that the Department was continuing to invoke and maintain the full extent of the legal professional privilege attaching to the documentation, and as you know, sir, those submissions and the other submissions, following consideration by you, resulted in the ruling which you delivered on the 25th February, 2008.

Senior counsel's letter and opinion of the 9th May, 1996, is material to a relatively minor aspect of the lengthy inquiries pursued by the Tribunal in public sittings, principally in 2003 and early 2004. Those inquiries spanned the entire of the second GSM process from the early development in 1993 of the policy to introduce competition

in the mobile telecommunications market to the comparative evaluation process which commenced on the 2nd March, 1995, and concluded on the 25th October, 1995, to the post-announcement negotiations between the Department and Esat Digifone. It is relevant only to the Tribunal's inquiries into the steps taken by the Department to investigate the information provided by Mr. Owen O'Connell of William Fry on the 16th April, to Ms. Regina Finn, and on the 17th April, 1996, in his letter also addressed to Ms. Finn regarding the ownership of the proposed licensee company, Esat Digifone Limited. Notwithstanding the evidence which the Tribunal has already heard, the Tribunal now wishes to hear further evidence from Mr. Loughrey, Mr. Brennan and Mr. Towey as to their understanding as of May 1996 of the legal advice which they had received on this matter.

The Tribunal has been assisted by Mr. Towey, Mr. Brennan and Mr. Loughrey by the provision of Memoranda of Intended Evidence. In his memorandum, Mr. Towey has informed the Tribunal that his recollection of the specifics of the receipt of the advice or the consideration given to it is somewhat limited. However, he does recall the following. First, he recalls being of the view that senior counsel did not believe that any wish which the Department may have had to tightly control ownership changes could be sustained. He cannot say whether this view arose from the opinion of the 9th May or earlier or later meetings. He believes

senior counsel also recalls meetings where this view was put by him.

Secondly, he also recalls a discussion with Mr. Martin Brennan in which Mr. Brennan expressed the view that senior counsel's opinion confirmed that there was no legal reason to have concerns about the restructuring of ownership being undertaken in Esat Digifone.

Mr. Towey, in his memorandum, has further confirmed that he had no questions in his mind as to what the position was regarding the ownership conformity issue after considering the opinion of 9th May, 1996. He was clear that even if there had been a change in the makeup of the ownership of the consortium between the entry into the competition and the licensing stage, that had no impact on the entitlement of the consortium to be awarded the licence and could not prevent the Department from awarding the licence to the consortium in question.

Mr. Brennan has informed the Tribunal in his Memorandum of Intended Evidence that he does not accept that the opinion on 9th May, 1996, falls to be considered in isolation from the context which led to its creation, including, first, that Mr. Towey undoubtedly asked the appropriate question in his letter of 24th December, 1996; namely, I would also like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat Digifone, in particular the question of whether recent correspondence suggests any change in the identity of the beneficial

owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed.

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

Thirdly, that there were several consultations with counsel during the relevant period.

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

Mr. Brennan has informed the Tribunal that the net position is, that the question whether the ownership then on the table had any negative implications for the award of the licence was raised. The opinion was furnished and then discussed with senior counsel and the representatives of the Attorney General's Office. Mr. Brennan formed the clear view that this issue, namely the difference, if any, between the ownership at the time of the competition and the ownership at the time of the licensing presented no obstacle to the issue of the licence. He believes that the other people involved in this analysis and discussion were of the same view. He had no question in his mind after discussing the opinion with senior counsel and Fintan Towey. He was clear that even if there had been a change in the makeup of the ownership of the consortium between the entry into the competition and the licensing stage,

that had no impact on the entitlement of the consortium to be awarded the licence and could not prevent the Department from awarding the licence to the consortium in question.

Mr. Loughrey has informed the Tribunal in his Memorandum of Intended Evidence that, in giving the evidence to the Tribunal on day 188, he was less than fully informed, and that it should be clear from his responses that they were, at best, a limited reaction on his feet. Now that the State has granted a waiver of privilege, and, having had an opportunity to analyse the professional input of senior counsel, it will be his evidence that senior counsel'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. Senior counsel's letters and advices were forwarded to the Department by the Office of the Attorney General with a covering letter dated 13th May, 1996, and Mr. Loughrey has informed the Tribunal that this letter, in referring to senior counsel's advices, indicated no apparent reservation, and, thus, clearly gave the institutional approval of that office to those advices. Had Mr. Loughrey had sight of this letter, he would have taken from senior counsel's response a clear approval of the consortia makeup before licence signature.

Mr. Loughrey has further informed the Tribunal that he clearly recognises that the advice dated 9th May, 1996, was addressing, for the most part, the Article 8 wording.

However, he is firmly of the view that the first complete paragraph on page 2 of the advice provides retrospective cover for the general thrust of his own view of the essential elements of the winning bid. Mr. Loughrey would have regarded this as a clear green light on the makeup of the consortium in general, and the participation of IIU in particular. He also believes that he would have taken sufficient comfort from the collateral cover on the essential call 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.

In the course of these short sittings, sir, the Tribunal will pursue inquiries with all three of the witnesses in relation to those matters.

And that, sir, completes the Opening Statement.

CHAIRMAN: Thank you, Ms. O'Brien.

MR. O'DONNELL: Chairman, before the evidence starts, I wonder if I could make an application to you, sir, in relation to certain elements, having heard Ms. O'Brien's opening.

As you aware, Chairman, what this relates to is the understanding of the three named witnesses of the legal advice which they received from Mr. Nesbitt, from Senior Counsel. Now, it is clear from the opinion that's been opened that Mr. Nesbitt concluded that the only reason why the Minister could ever be legitimately concerned about any

change in ownership would be if it compromises service which the licensee would be providing, and he concluded, in writing, in May of 1996, that it was not tenable to suggest that the licence was awarded to the licensee because of the parties who owned the licence or the licensee, but, rather, the licence was awarded to the licensee because its planned proposals were the most meritorious and because it provided a funding plan which looked reasonable, and so he was of the view that there was no reason why any of those matters would be compromised by a change in ownership.

Now, that was the clear advice given by him in writing to the Department.

Now, in that context, unfortunately, Chairman, the Tribunal appeared to have taken the view that, despite what we say is a clear statement of the position, that the opinion did not address the issue of whether the consortium which was awarded the licence was different to the consortium that entered the competition and also appears to have taken the view that that is a matter of significance, and they have also contended that the Attorney General confirmed in a letter that no advice on this issue had been received. And I want to come back to that in a minute.

And perhaps it's in that context that I should explain why the Department has waived its claim for privilege. It should be said that, first, the claim for privilege has always been upheld as being valid in law and has been recognised as such by the Tribunal, but the Tribunal has,

in the course of its opening here and on previous occasions, indicated that its working view is that the officials did not receive the advice which Mr. Nesbitt's opinion gave and did not act on that advice, and it is the contention of the Department that that view is erroneous, and the Department are anxious to be able to show that it had obtained an advice on the issue of change of ownership before the licence issued, and, specifically, the Department wishes to be able to demonstrate that it, through its officials, had interpreted that advice as allowing the Department to award the licence to the winning consortium, even if a change of identity of the 20% investor had occurred in the meantime, provided this did not, in the words of senior counsel who provided the opinion, provided this did not compromise the service which the licensee will be providing. The opinion, on its face, suggested that such advice had been received. And it is a fact that the relevant civil servants acted in the belief that this was the effect of the advice contained in the opinion, and, in order to demonstrate to the fullest possible extent the advices contained in the opinion and to allow the civil servants in question to amplify their responses previously given, the Department took the highly unusual step of waiving privilege over the opinion and the associated letter. And it is now the position that the three civil servants have been recalled, and it is, as I say, anticipated that their evidence will be confined to

the circumstances in which they received the opinion, what they understood the opinion to mean, and what steps they took, if any, following on the receipt of the opinion.

Now, the first point, Chairman, I should make, is that the opinion has to be seen in a context where advice was being given by counsel on a number of different issues.

The second issue that the court has that the Tribunal must remember is that the opinion was supplemented and amplified by oral advices given by senior counsel in or around April and May of 1996.

My clients, the Department, have repeatedly requested the Tribunal to call Mr. Nesbitt in order to give evidence on these issues. The Tribunal has refused to do so, in effect contending that the opinion of Mr. Nesbitt "speaks for itself" and that it is unnecessary to call the author of the document to explain its meaning. The Department have suggested that Mr. Nesbitt might be able to give evidence of what effect he believed the opinion had on the minds of the civil servants, since he attended meetings with the civil servants at or after the opinion was given.

And regrettably, Chairman, the Department take the view that the Tribunal's present refusal to allow Mr. Nesbitt to give evidence appears not only unfair, but has the capacity to work an injustice, and we respectfully submit that it is not sufficient to assert, as the Tribunal does, that the opinion "speaks for itself," and we say that it is clear that this is not the case, because the Tribunal takes a

significantly different view from other parties as to the effect of advice given by counsel.

We say that the refusal by the Tribunal to allow Mr. Nesbitt to give evidence deprives the parties of the opportunity to understand the context in which the advice in question was given and it also deprives the Tribunal of the opportunity to learn that, to the knowledge of Mr. Nesbitt himself, the persons to whom his advice was given took a radically different view of the advice now taken by the Tribunal. Mr. Nesbitt is also in a position to give evidence in respect of the response to his opinion at the time, which would surely be relevant as to the understanding of the persons to whom the opinion was provided as to the content and effect thereof.

We have indicated, at all stages, that we are anxious and willing to assist the Tribunal. The Tribunal has always indicated that it is anxious to know of any relevance or any evidence of any relevance to its task, and we offer Mr. Nesbitt as a witness who would be able to provide evidence which would be of relevance to its task. We cannot, and we do not understand why this offer of Mr. Nesbitt to give evidence is now to be ignored. The Tribunal, presumably, are anxious to know what the response to the opinion is, but are at the same time, appear determined to shut out evidence from one person who would be in a position to give evidence in relation to this matter.

And, Chairman, again, my instructions are that the my clients are of the view that the refusal to allow Mr. Nesbitt to give evidence in this situation is a breach of my client's entitlements to fair procedures in the conduct of the Tribunal. The Tribunal has sat for 156 days hearing evidence and submissions in relation to this module alone. It has called hundreds of witnesses, it has asked them to comment on thousands of documents, yet it is not prepared to allow the author of this highly significant document, which is now to be subject to considerable scrutiny, to be examined in respect of that document itself. The Tribunal has repeatedly contended that it has no agenda and is simply inquiring into the matters under investigation, and has also indicated on many occasions that it will seek to act fairly towards all the parties appearing before it.

But we say that not alone in refusing to allow Mr. Nesbitt to give evidence, not alone will it be not acting fairly towards my clients, but that the failure of the Tribunal to call Mr. Nesbitt to give evidence will, or has the capacity to cause my clients irreparable prejudice in their attempts to defend and vindicate their own good names. And in such circumstances, the continued refusal of the Tribunal can only be regarded as a stance taken by the Tribunal to frustrate the efforts of my clients to protect and vindicate their own position.

Now, Chairman, we are aware that a considerable amount of

time has been expended on the hearing of this module. But we cannot see how any possible prejudice can be caused to the Tribunal or indeed to any other party appearing before the Tribunal by allowing Mr. Nesbitt to give evidence, nor has any such prejudicial, actual or potential, been identified in correspondence from the Tribunal to my client prior to this date. We are confident that no prejudice can or will arise. We do not believe that the evidence of Mr. Nesbitt will be unduly long and we are prepared to furnish a statement from Mr. Nesbitt in short order, should same be required. We do not believe that any appreciable length will be added to the Tribunal by the calling of Mr. Nesbitt to give evidence, given that the Tribunal has already lasted almost twelve years.

We say that to deprive my clients of the evidence will be to deprive them of a constitutionally-protected entitlement to have their position put fairly before the Tribunal; in essence, their right to be heard. We do not believe the Tribunal can or should countenance this, and my instructions are to ask the Tribunal to allow Mr. Nesbitt to give evidence before the Tribunal.

Now, Judge, there are number of Chairman, there are a number of ways in which this can be done. The first and most satisfactory way is for us to provide a statement from Mr. Nesbitt to the Tribunal which can be circulated to the parties and Mr. Nesbitt can be called to give evidence.

The Tribunal should note that, as it is aware, of course,

in the decision of Mr. Justice Quirke, which was upheld in the Supreme Court, in O'Brien -v- Moriarty, the Tribunal will be aware that Quirke J held, in respect of an expert witness "Should the Tribunal opt not to call such an expert witness to give evidence at public sittings, it should, upon request, make the witness available in order to be subjected to cross-examination." And we say that that is an option that is also open to the Tribunal. In other words, even if the Tribunal don't wish to call him directly, they can allow Mr. Nesbitt's statement to be circulated and he can then be called to be subjected to cross-examination.

Further, we say, Chairman, that if the Tribunal has any doubts about this issue, it should not hesitate to use the procedure provided for at Section 4(b) of the 2004 Amendment to the Tribunals of Inquiries Acts, and this, as the Court is aware, is sorry, I think it's 4(a), is a provision which allows the Tribunal, where it considers it appropriate to do so, to apply to the High Court for directions relating to the performance of the functions of the Tribunal. We say that one of those functions is clearly the taking of evidence from witnesses, and we say that it is also open to the Tribunal to apply to the High Court, if it sees fit, to have that matter determined by the High Court under the provisions of Section 4(a) of the act.

But my application to the Court to the Tribunal, is for

Mr. Nesbitt to be allowed to give evidence, and we will cooperate in every possible way in relation to the furnishing of a statement and the making available of Mr. Nesbitt to give evidence, subject to the constraints of time of all the parties. I do not know what the attitude of the other parties is to this, but that's a matter for themselves.

There is one other point that I should make, Chairman, which is to correct an impression that appears to have been given both in evidence in the past and perhaps unintentionally today. It has been suggested in the past that there was a letter from the Attorney General indicating that no advice in relation to the effective changes of ownership within the consortium had been received prior to the award of the licence. Now, insofar as that may appear to refer to a letter from the then Attorney General, i.e. in 1995/1996, who was then Mr. Dermot Gleeson, no such letter exists. Insofar as it refers to the letter of the 22nd December of 2002 from the Attorney General, it is clear that that letter makes it absolutely clear that, in fact, advice was given, and I will read the relevant paragraph.

The relevant paragraph from the letter from the Attorney General's Office of the 20th December, 2002, signed by the Attorney General, Mr. Brady, says:

"There was a request for advice contained in the Department's minute of the 24th April, 1996, concerning the

restructuring of the ownership of Esat Digifone since the date of their application, and the Attorney General's response thereto has already been made available to the Tribunal. Mr. Nesbitt's opinion of 9 May, 1996, which was released to the Department with the sanction of the then Attorney General on the 13th May, 1996, dealt with the matter."

And we say, therefore, that the Tribunal has that letter and it's clear, and could not, in my submission, be clearer, that the Attorney General, in 2002, was of the view that the request for advice concerning the restructuring of the ownership since the date of their application was dealt with in Mr. Nesbitt's opinion of the 9th May. So it is not only the witnesses themselves, but it is also the former Attorney General, Mr. Brady, who was of that view. So I wanted to correct that misapprehension which may have gone abroad.

I should say, Chairman, that my clients are anxious to assist the Tribunal in any way possible. They are also anxious to ensure that the Tribunal concludes its business as speedily as possible, but the Department are anxious that the reputations of my clients, and of the Civil Service generally, are protected. They have done nothing wrong. No witness has suggested that they have done anything wrong. And we respectfully submit that they are entitled to fair procedures, and that, in allowing Mr. Nesbitt to give evidence, this will assist them in

being provided with the fair procedures which I seek.

CHAIRMAN: From your practice, considerable as it is, at the Inner and Outer Bar, can you give me any example of a barrister having been called to indicate what he intended to convey in his advices, and bear in mind the remark in the document "the advice speaks for itself" which you have attributed to the Tribunal; it was, in fact, Mr. McGonigal who made that observation.

MR. O'DONNELL: Well, it is repeated, we can go through the correspondence, but it is repeated in the same terms, if not exactly in quotes in the correspondence, but we will find that aspect of the correspondence and open it to you if you so wish, Chairman.

There have been numerous examples of situations where professional witnesses have given evidence as to what advice they gave, what the response was to those advices and whether or not they changed their advices as a result.

One of the professional witnesses who gave evidence at length here was a Mr. Owen O'Connell, who is a solicitor, who was asked at length about the circumstances which gave rise to his writing of a variety of letters and the receipt of those various letters. And in those circumstances, it is abundantly clear that witnesses can, and do frequently, expert witnesses, such as lawyers, can and do frequently give evidence about the context of the advices, in which advices were given and in respect of the response to the advices which were given. And one of the things that is

important in this regard, Chairman, is that the opinion itself expressly says, at the end says, "Rather than repeat the amendments I have made to the Statutory Instrument, I suggest you take time to consider the draft I return and I can deal with any questions that arise."

It is known to the Tribunal that Mr. Brennan and Mr. Towey have a recollection of receiving oral advices and being in meetings with Mr. Nesbitt prior to and subsequent to the writing of these opinions. And it seems, if I might say so, extraordinary that the Tribunal would be anxious to explore with the authors of every other document what that document meant, what was in their minds at the time that that document was written, what the response to that document was, and whether they felt that they had conveyed the message that they wanted to, and yet that the Tribunal would shut out my client from calling the person who wrote this document to give evidence.

You asked, Chairman, about where the phrase came from. And I'll just quote the letter from the Solicitor to the Tribunal, Mr. Brady, of the 28th April, 2009, and I'll just read the sentence of the letter:

"The Sole Member does not intend to hear evidence from Mr. Nesbitt, whose opinion must be taken to speak for itself."

So that's a quote from the Solicitor for the Tribunal's letter of the 28th April.

CHAIRMAN: Yes, but you heard Ms. O'Brien indicating that

it was Mr. McGonigal who made that observation in the course of a portion of the evidence that was recalled this morning.

MR. O'DONNELL: The Court asked me where the quote came from, and that's where it came

CHAIRMAN: Where it emanated from

MR. O'DONNELL: Well, it's not attributed to Mr. McGonigal in the letter, but there is no point in us squabbling over that, Chairman. That is the attitude that the Tribunal has taken, that the opinion speaks for itself and that Mr. Nesbitt is not allowed to give evidence. And we say that it works as an injustice on our clients in circumstances where it would be open to the Tribunal, at very little extra time, at very little extra trouble, to hear Mr. Nesbitt give his evidence and form what view they might of it, attach what view they wish to it, in circumstances where the alternative is to allow a question mark to arise over what the true interpretation of those advices were. We say that it works an unfairness to our clients, particularly in the context of hundreds of witnesses having been asked to explain documents that they themselves wrote. We have had hours, days and weeks of people explaining doodles, memos, notes, reports, and yet, when we ask for one witness to give his view about one issue, we are told no.

CHAIRMAN: Would it not have been helpful, Mr. O'Donnell, during what I fully accept were the lengthy sessions in

pursuing these matters when it came evident that the Tribunal lawyers were pursuing a certain line of inquiry, when both yourself and Mr. Nesbitt were present, that, at that juncture, some reference might have been made to supplemental oral advices having been given so that I might have had the fuller picture there and then?

MR. O'DONNELL: Well, firstly, Chairman, the view of the Tribunal, what's now described as the working view of the Tribunal was not apparent to us at the time of those inquiries, and the importance that clearly attached to that opinion was not apparent to us back in 2003. That's the first point.

The second point, Chairman, is that we are where we are now, and to simply say that it could have been done earlier is not, in my respectful submission, a reason to say why it can't be done now. And I don't, with respect, see it as being reasonable to say, well, he should have thought of that earlier, or you should have thought of that earlier, because, let's face it, Chairman, the Tribunal has had a number of openings of the Tribunal, has moved its position on a number of occasions and been allowed to restate its position along the way. So I don't think it's unreasonable for us to suggest that this would be open to you now.

CHAIRMAN: I think you referred to Mr. Owen O'Connell, who gave helpful and very deliberative and careful evidence on this and many other aspects and he referred to the question of proportionality. If there had been a change and there

was some difficulties about it, one looks to how material and how fundamental the change was. Is that not something one would expect to have been considered and deliberated upon if this specific issue was being addressed in full?

MR. O'DONNELL: Well, Chairman, I don't want to trespass on the sacred nature of the provisional findings, but we have made it clear that the reason why we have waived the privilege in question is because we believe that we have been the subject to findings adverse to my clients, and that they would not have taken this very significant step of waiving privilege, had it not been for that fact. And, it seems to me, Chairman, in my respectful submission, that the purpose of providing provisional findings is to allow the parties to consider those and to address them and to make further to take further steps as they see fit, and one of the steps that we see as important, particularly in the context of this situation, was to waive privilege in respect of the opinion so that a full discussion could take place in relation to that opinion and in relation to the letter accompanying that opinion, where nobody would be inhibited by the issues arising in relation to legal privilege. And again, for the Tribunal to say that it didn't appear to matter much then. It certainly is apparent that it matters greatly to the Tribunal now. And it's not reasonable, in my respectful submission, to say that it is a relatively minor to try and brush it away by saying that it is a relatively minor aspect of the

second module, because ownership seems to matter a great deal to the Tribunal. Our respectful submission is that it doesn't appear to relate in any obvious way to the Terms of Reference, but that's a separate issue. We are here to deal with the issue of what view was taken of the advices given in respect of ownership, and there clearly were discussions before and after Mr. Nesbitt's opinion had been provided, at which Mr. Nesbitt gave advice. And if the Tribunal is saying that Mr. Nesbitt can't give evidence about the circumstances in which he was asked to write the opinion, the opinion he gave and the subsequent discussions, that, in my respectful submission, seems to work an injustice, an unfairness on my clients in that they are not being allowed to be heard in respect of what they believed and what response they gave to that opinion.

MS. O'BRIEN: Sir, the first thing I want to say

MR. O'CALLAGHAN: Sorry, sir, before Ms. O'Brien speaks, if I could lend support to Mr. O'Donnell's application and then perhaps Ms. O'Brien could reply to both submissions.

CHAIRMAN: I'll have regard to that, Mr. O'Callaghan. I'll take the opportunity of congratulating you on your success in a rather different forum.

MR. O'CALLAGHAN: Thank you very much.

Chairman, I only became aware this afternoon of the application that was to be made by the Department, and I can say to the Tribunal that we support that application, and I don't think that will come as a surprise to you, sir,

because we wrote to the Tribunal on the 5th June last, my solicitor did, and, in that, we indicated that we believed that Mr. Nesbitt should be called as a witness, and we listed five other officials from the Attorney General's Office and from the Department who we also believed should be called. And the reason we wrote that letter on the 5th June, sir, was because, when we read the Memoranda of Intended Evidence of the three departmental witnesses which were furnished to us, it seemed to us that it would not be possible for the Tribunal to reach any conclusions in respect of their evidence without hearing the evidence of witnesses such as Mr. Nesbitt. And, in particular, you will know, sir, in the memorandum of Mr. Fintan Towey, that he refers, in the second paragraph of his evidence, that he recalls being of the view that Richard Nesbitt did not believe that any wish which the Department may have had to tightly control ownership changes could be sustained, and he also refers to meetings which he had with Mr. Nesbitt, and he says, in what is clearly hearsay evidence, he says he believes Richard Nesbitt also recalls meetings where this view was put by him. So I say, sir, when we have Mr. Nesbitt sitting here and clearly there is hearsay evidence in respect of Mr. Nesbitt which is in the Memorandum of Intended Evidence of Mr. Towey, that would be, I say, inappropriate not to call Mr. Nesbitt.

I can understand, sir, why you would have a hesitance about calling a barrister to give evidence in respect of advices

they have given in writing, but this is something different, because we are now being told that, as well as the written opinion of the 9th May, 2006, there were also meetings at which Mr. Nesbitt appears to have given advice that the ownership issue or the ownership change was not a significant issue and the licence should be granted.

And the reason why we are anxious for Mr. Nesbitt and the other departmental witnesses to be called, sir, is because we do know that you regard this issue as an issue of some significant importance, because when you issued your ruling on the 29th September, 2005, you highlighted, sir, what you said might be indicators of the permeability of the process, in effect you were identifying what you regarded as potential aspects where the Minister may have intervened in the process. And one of them, sir, was the indicator where you said related to the meeting which took place in Hartigan's public house, on Leeson Street, on the 17th September, 1995. And what you said is, "I have already alluded to the evidence of a meeting between Mr. O'Brien and Mr. Lowry at Hartigan's and the question upon which I will be obliged to reach a conclusion is as to whether, and, if so, to what extent, the involvement of IIU or of Mr. Dermot Desmond was discussed at that meeting, and, further, the extent to which any such discussions were reflected in steps taken between 18 September, 1995, and 29 September, 1995, to substitute IIU, Mr. Dermot Desmond, for the four financial institutions notified in the bid

document."

And another factor that was referred to when the GSM process was being examined was whether or not the identity of IIU was being hidden in order to ensure that IIU or Mr. Desmond didn't get properly evaluated. And they are fundamentally important issues. And if we have evidence from the Departmental officials and from Mr. Nesbitt stating that the decision to grant it was based on advice from Mr. Nesbitt that it was legally sound to do so, I say that's of fundamental importance to my client, and, for that reason, I say he should be called.

I don't need to go into the letter of the 5th of June, which I have referred to, but we ask you to call other witnesses as well, Chairman, and the reason for that is because at paragraph 5 of Mr. Towey's Memorandum of Intended Evidence, he says, "I am concerned that the views of Sean McMahon, Regina Finn and Sean Fitzgerald on this issue are not being sought by the Tribunal."

So he regards them as being important.

And just another point, sir, in respect of the second issue raised by Mr. O'Donnell, which concerned the letters between the Attorney General and the Tribunal. I was surprised, sir, that those letters weren't opened. There is no criticism, but I obviously will be opening them later on, but it is apparent from your ruling, sir, of February 2008, that you have reached a finding in respect of that correspondence at paragraph 8 or paragraph 9, rather,

that the Attorney General has confirmed that the advice has not been provided. That's a matter, sir, that I'll have to return to, I think, with one of the witnesses who are giving evidence here, but I think it is a relevant factor, particularly since there is a finding to that effect made by the Tribunal on the 25th February, 2008, in its ruling. So, in short, sir, I am supporting Mr. O'Donnell's application.

CHAIRMAN: Thanks, Mr. O'Callaghan.

MR. SHIPSEY: Mr. Chairman, I appear for Mr. Desmond, and, like Mr. O'Callaghan, I had no notice, until this afternoon, that the Department were going to make an application to hear Mr. Nesbitt, and nor did I have any notice that Mr. O'Callaghan was going to make an application in support of that. But on behalf of Mr. Desmond, having taken instructions in the matter, my instructions are to strongly support the application of Mr. O'Donnell and Mr. O'Callaghan that Mr. Nesbitt's evidence would be called. Mr. Desmond, you will recall, is the unnamed affected party who has been writing in relation to this opinion since the 13th November, 2003, and whilst it is true, of course, sir, that you did make efforts to ascertain whether it were possible for the Department to waive their privilege in relation to the matter, and ultimately that was not originally possible and there was a hearing at which we applied to have a ruling that privilege had been waived, which we were unsuccessful on. But now

that privilege has been waived in relation to the matter, we say, in the interests of justice and fairness to all the parties affected, and I would, of course, have to say Mr. Desmond is not as directly affected as other parties in relation to this evidence, but he would still wish to have the benefit of Mr. Nesbitt's evidence in this matter.

You also, sir, asked Mr. O'Donnell the question as to whether he was aware of any precedent for counsel giving evidence in relation to the meaning of their opinion, and there is, I suppose, a fair point there. If this were a court of law and you were construing the meaning of an opinion, or, for example, the meaning of a contract, and we all know, or at least should know, that one is not allowed to call extraneous parole evidence in relation to the meaning of a document. But your function, sir, is very different. You are a Tribunal of Inquiry. You are inquisitorial and not adversarial, and it's not part of your function. You have a number of, obviously, onerous functions and you have a number of facts that you have to find, but you don't have to make a determination, as a matter of law, as to the meaning of Mr. Nesbitt's opinion.

And in circumstances where you are going to entertain evidence from three persons who were in receipt of that opinion, it does seem as if you are ruling out some very important and cogent evidence that can be given, factual evidence that can be given by Mr. Nesbitt, because we do know that not only did he furnish this evidence in writing,

but he had meetings both, I think, before and after the furnishing of this opinion. And Mr. Nesbitt, surely, I don't want to anticipate what his evidence might be, but he can certainly give factual evidence as to how that opinion was understood, whether there were follow-up questions, whether there was any doubt in his mind that he hadn't addressed any of the questions that had been raised or that were of concern to the Department.

And it's perhaps understandably invidious from a lawyer's perspective, we don't like to be put in the position of having to give evidence in relation to our opinions or matters that happen, it is very often the case that barristers are called upon to give evidence in relation to the meaning of a particular settlement, as to whether a settlement was reached. So there is certainly ample precedent. And I have personal experience of having to give evidence in relation to what was or was not agreed in relation to a settlement. And I know that's not a perfect analogy

CHAIRMAN: It's a little different, but I take your point.

MR. SHIPSEY: It is, and I take your point, sir. But in circumstances where Mr. Nesbitt appears to put himself forward to offer assistance to you, the only rationale for not hearing it would be if you took the view that it was of no conceivable probative value, and I think it's very difficult in circumstances where parties are saying that they are

MS. O'BRIEN: Sir, I don't really wish to interrupt

Mr. Shipsey, but if I could just say

MR. SHIPSEY: If I could finish

MS. O'BRIEN: I think this can all be short-circuited,

sir

CHAIRMAN: Well, I have already formed something of a view,

Ms. O'Brien, that I have already acknowledged, and I think

Mr. O'Callaghan and indeed Mr. Shipsey have realistically

acknowledged the concerns that this application does

occasion for me.

MS. O'BRIEN: What I was going to bring to your attention,

sir, was that, yesterday, in response to the letter that

Mr. O'Callaghan referred to in his submission to you, the

Tribunal wrote to Messrs. Meagher solicitors, informing

them that the Tribunal, in the first instance, wishes to

hear the evidence of the protagonists in this matter, Mr.

Towey, Mr. Brennan and Mr. Loughrey, and wants to hear

their evidence of their understanding of the opinion of the

9th May, their evidence of their understanding of the

advice that they received. Having heard that evidence,

sir, the Tribunal informed Messrs. Meagher that the

Tribunal would then consider, at that stage, whether it was

appropriate or necessary to hear evidence from any other

persons, including Mr. Nesbitt. Now, in fact, what the

Tribunal should have done, but given that there was many

matters that needed to be dealt with in relation to the

hearings commencing today, the Tribunal should also have so

informed the Department and other affected persons. But that is the position at the moment. There is no question of shutting out a determination that any possible witness's evidence will not be heard.

One other matter, or a number of other matters, sir, that you also want to refer to, is, firstly, I think it was Mr. O'Callaghan indicated that you had made a finding in your ruling of the 25th February, 2008, that advice had not been given on this point. I just want to draw to your attention, sir, and to make clear that you made no findings whatsoever in that ruling, even though I think it's also clear from the Opening Statement this morning that your working impression of the scope of this opinion of the 9th of May could not have been clearer in the course of the hearings in 2003 and 2004, and I opened and referred to in some detail to the evidence that Mr. Loughrey gave in response to counsel for the Tribunal where it was made clear to him that the Tribunal's view was that that opinion did not address the question that had been posed. So I think there can be no question that your working view on that had been made clear.

We are now being told, sir, both in these memoranda and it's been repeated today in these submissions that have been made to you, that, in addition to the opinion, that there were various meetings with counsel in relation to the opinion itself and the various questions that were being raised, and what is interesting, sir, is that we are being

told, in the face of a letter of yesterday's date, received by fax at the Tribunal at 17.27 from the Department, and we can put a copy of that letter on the overhead screen, and in order to understand this letter, sir, I have to put it into context.

On the 4th February, 2003, the Tribunal received a letter from the Attorney General, the then Attorney General, Mr. Rory Brady, setting out an explanation of events that had occurred in the three days prior to the grant of this licence. That's on the 14th of May, the 15th of May and the 16th of May. And appended to that letter were a series of documents, including attendances and correspondence between the Department and counsel. And the Tribunal asked the Department to confirm that they would also waive privilege in relation to those documents, and this was the response the Tribunal received.

MR. O'DONNELL: Sorry, Chairman, I think it should be put in context. Firstly, this is, I understand, an interruption to Mr. Shipsey's submission which hasn't concluded. And secondly, if we are going to deal with correspondence, we should probably see the letter, if it's necessary. I would prefer to address you on what I asked you to make a ruling on, is whether Mr. Nesbitt is going to give evidence. I would have thought the first thing was to do, was hear Mr. Shipsey out and then Ms. O'Brien can reply to everybody and say what she has to say. If she requires to deal with correspondence, we will be putting in

correspondence, but my position is I want a ruling as to whether or not Mr. Nesbitt is going to give evidence. It now appears that the Tribunal decided to tell Mr. O'Brien's legal team that they were thinking about calling him but didn't have the courtesy to tell us

CHAIRMAN: You know, it is a little bit like your reference to twelve years; it is unhelpful. This started in 2001.

It's long enough, I fully accept, but please don't make it twelve years, but

MR. O'DONNELL: Chairman, we were told, in absolutely clear terms, "we do not intend to hear evidence from you because his opinion must be taken to speak for itself." Now, that's bulwark. The sole principle on which it was said that Mr. Nesbitt wouldn't be heard wasn't to do with relevance, wasn't to do with materiality; it was because an opinion must be deemed to speak for itself. Now, that appears to have been conceded. Now, let's get on with it.

Get Mr. Nesbitt to draft his evidence, and we can provide that to you in very short order. I suppose it would be appropriate to hear Mr. Shipsey conclude his submission.

MS. O'BRIEN: There is no question of any concession being made in relation to Mr. Nesbitt being called or not being called. The Tribunal wants to hear, and has wished to hear for the last hour, and commence on the evidence of Mr. Towey, Mr. Loughrey and Mr. Brennan in relation to the evidence, in relation to their evidence as to what was in the opinion and the advices that they received.

The Tribunal received a letter yesterday from the Department in which they confirmed that all of the documentation relating to interaction between Mr. Nesbitt and the Department from the 14th of May appeared to relate to matters that had nothing to do with the ownership issue, and the selfsame Department is now telling you today, sir, through their counsel, that there were meetings after this opinion was received on the 13th of May, relating to it, and that is simply the point I wanted to make.

What you have said, sir, and it remains the position, and I was not seeking to interrupt nor was I intending any discourtesy to Mr. Shipsey, I was just hoping we could short-circuit matters and get on with the evidence. To indicate that you have taken the view that, subject to the evidence being heard, if it appears appropriate or necessary for the purpose of pursuing and advancing your inquiries, you will consider, at that stage, both the calling of Mr. Nesbitt and the calling of any other officials or any other persons which you feel would be appropriate or of assistance to you in determining this matter. And that is all I was seeking to establish, sir.

CHAIRMAN: Well, very good. Mr. Shipsey, I think I have the thrust of your application, which, like that of Mr. O'Callaghan, I found measured and helpful.

MR. FANNING: Briefly, sir, I am somewhat confused at this stage I don't know if Mr. Shipsey is finished. I certainly don't want to interrupt him if he isn't.

MR. SHIPSEY: I think I had forgotten what point I wished to make, the interruption was of sufficient length, but I didn't take any offence.

MR. FANNING: I am not clear if the dialogue now between Ms. O'Brien, the Tribunal, Mr. O'Donnell and Mr. Shipsey has clarified what the Tribunal's attitude is. For the record, on behalf of Mr. Lowry, I am supporting Mr. O'Donnell's application and I certainly don't understand why an unequivocal ruling can't be made now in respect of it, as Mr. O'Donnell asks for. Mr. Nesbitt is plainly a relevant witness; that would distinguish him from many that have given evidence here at different stages who have given very tangential and vestigial evidence to any of the core issues. Ownership is now a clearly significant issue from the perspective of the Tribunal, without putting it any further than that. Mr. Nesbitt is a witness as to fact, as Mr. Shipsey says, and I don't understand why an unequivocal ruling can't be made now that he will be called to give evidence. I would have thought that Mr. O'Donnell's application is irresistible, given that he himself is making it. Another party might have some reticence or embarrassment in calling Mr. Nesbitt to give evidence. But given it's Mr. O'Donnell himself is the author of the application, I don't see how the Tribunal can resist the ruling that Mr. O'Donnell is seeking now.

MS. RUANE: On behalf of Telenor, I want to say for the record that we weren't aware of any of these applications

being made this afternoon. I haven't any time to take instructions to be able to assist you, but just for the record, I think it's appropriate to indicate that.

CHAIRMAN: In the circumstances of what I have heard to date, I am certainly not going to give a snap ruling here and now on what I feel would be an unusual departure on which I would have to tread very warily, but there have been factors which have been brought to my attention which will have to be considered as they emerge in the course of later today and remaining parts of this week as regards the testimony of the three senior departmental officials at the time, and in the context of what I hear in that regard and in the context of what transpire may transpire by way of ensuring that I have a full rather than selective picture of everything that has transpired that may be material to that issue, I will then give a ruling.

I have concerns, as Mr. O'Callaghan has helpfully and constructively alluded to, over acceding to this type of submission, which I feel is distinguishable from factors such as were referred to by Mr. Justice Quirke in the case affecting this Tribunal and to the analogy referred to by Mr. Shipsey, but, in the ultimate, I am bound to ensure that fair procedures are upheld, and I will evaluate the ongoing evidence of the three departmental officials, reflect on the matter and have regard to the matter of whether or not I have the fullest necessary documentation to hand openly to enable me to rule on the matter. I will

then do so, and, if it seems to me that justice can only be done by enabling that testimony to take place, I will accede to it. I will consider it in due course at the end of the evidence. Let's hear from Mr. Towey.

MS. O'BRIEN: Mr. Fintan Towey, please.

FINTAN TOWEY, PREVIOUSLY SWORN, WAS EXAMINED BY MS. O'BRIEN AS FOLLOWS:

CHAIRMAN: Just for the assistance of practitioners, it would seem to me that the logical sequence would be Telenor, IIU, Mr. O'Brien, Mr. Lowry, and then, finally, the Departmental representations, since each of these individuals would be their witnesses.

Thank you for attending again, Mr. Towey. You are, of course, already sworn from earlier hearings.

Q. MS. O'BRIEN: Mr. Towey, thank you very much. You have furnished the Tribunal with a Memorandum of Intended Evidence, and what I propose doing, firstly, is just taking you through that, I might clarify one or two matters, and then we'll have a look at some of the documentation - there isn't really an awful lot of it - and we can explore matters further. I wonder, do you have a copy of your Memorandum of Intended Evidence?

A. Not in front of me.

Q. You will need book 85, the recent book 85 the Tribunal circulated.

Now, paragraph 1, you inform the Tribunal that the legal opinion given by Richard Nesbitt, SC, on the 9th May, 1996,

was in response to a formal request for legal advice issued to the Office of the Attorney General on the 24th April, 1996. The request sought advice, amongst other things, on the question of whether the proposed restructuring of ownership of Esat Digifone suggested any change in the identity of the beneficial owners of the company that could be considered incompatible with the ownership proposals outlined in the company's application. The request for advice eventually followed on from a meeting on the 22nd April, 1996, where this same request was made verbally, and is that correct?

A. Yes.

Q. At paragraph 2, you inform the Tribunal that your recollection of the specifics of the receipt of the advice, or the consideration given to it, is somewhat limited.

However, you do recall the following:

"1. I recall being of the view that Richard Nesbitt, SC, did not believe that any wish which the Department may have to tightly control ownership changes could be sustained. I cannot say whether this view arose from the opinion of the 9th May or earlier or later meetings. I believe Richard Nesbitt, SC, also recalls meetings where this view was put by him.

"2. I also recall a discussion with Martin Brennan in which he expressed the view that senior counsel's opinion confirmed that there was no legal reason to have concerns about the restructuring of ownership being undertaken in

Esat Digifone."

Is that correct?

A. Correct.

Q. You state that you understand that this view expressed by Martin Brennan is fully consistent with Mr. Nesbitt's view of the intention of his advice. Is that correct?

A. Correct.

Q. You state that "In the light of the legal advice given, work continued to:

"1. Finalise regulations to establish a clear and correct legal base for the issue of the licence in accordance with EU legislation.

2. Finalise the draft licence.

3. Complete the process of documenting clearly the ownership and financing of Esat Digifone."

That's correct, I presume?

A. Correct.

Q. You state that you are concerned that the views of Sean McMahon, Regina Finn and Sean Fitzgerald on this issue are not being sought by the Tribunal. You believe that their views on this issue may be similar. It is your view that they would have known of the change of ownership, but, nonetheless, had no issue or difficulty in accepting that the Esat consortium should be awarded the licence. You are also concerned that the views of Richard Nesbitt, SC, are not being sought since he has recollection of unrecorded discussions relating to the ownership issue which may not

be fully reflected in the written opinion. Is that

correct?

A. Correct.

Q. You state that it now appears that the Tribunal takes the view that the opinion may not directly respond to the questions asked. You can confirm that you, for one, had no questions in your mind as to what the position was after considering the opinion. It should be recalled that the opinion was passed to you by two experienced officers of the Attorney General's Office. You believe that they were fully aware of all the issues. You also think that if they or any other civil servant had raised doubts or queries as to the nature of the advice given by counsel, it is certain that they would have raised any such doubts or queries by seeking further clarification through the appropriate legal channels from counsel. You should say that there was no need for further instructions. You were clear that even if there had been a change in the makeup of the ownership of the consortium between the entry into the competition and the licensing stage, this had no impact on the entitlement of the consortium to be awarded the licence and could not prevent the Department from awarding the licence to the Department in question. Is that correct?

A. That's correct.

Q. Then, finally, you say you should conclude by stating that you stand by your original assertion that you, in common with your fellow civil servants, carried out your role in

relation to the GSM2 licence process independently of any ministerial or other influence. Your will was not overborne. You were, and are, an experienced civil servant. You believe that if any attempt had been made to, in some way, suborn you or steer you in a particular direction, other than for objectively justifiable reasons, you would have recognised that immediately. You would also have utterly resisted same. Is that correct?

A. Yes.

Q. Just to clarify on the basis of your Memorandum of Intended Evidence, Mr. Towey, I just want to clarify that what you are saying to the Tribunal, firstly, is that your recollection of the specifics of the advice you received or the consideration given to it, are somewhat limited, so that's the first thing?

A. Yes.

Q. Then secondly, you are saying that you recall being of the view that Richard Nesbitt, SC, did not believe that any wish which the Department may have had to tightly control ownership changes could be sustained and that you are not clear whether that was as a result of the contents of the opinion of the 9th May or possibly from interaction before or after that. Is that correct?

A. Yes.

Q. Then thirdly, you are saying that you recall a discussion with Mr. Brennan in which Mr. Brennan expressed the view that the opinion confirmed that there was no legal reason

to have concerns about the restructuring of the ownership.

Is that correct?

A. Yes.

Q. And when you refer, then, there to "opinion," I take it that you are referring to the opinion of the 9th May?

A. Yes.

Q. And then, finally, just to confirm with you that what you are telling the Tribunal, on the evidence that you are giving, is that you had no question in your mind as to what the position was after considering the opinion of the 9th May?

A. Yes.

Q. Now, we know, Mr. Towey, that the opinion itself, it's dated the 9th of May, it's not clear, actually, whether you received it perhaps on the 10th, the Friday, or perhaps not until the Monday, but it was really in the closing days of the entire competitive process; isn't that right?

A. It was, yes.

Q. And what had prompted you seeking that an opinion on the ownership conformity issue, which I am just going to call it for the purposes of the evidence so that we can distinguish it from Article 8, if that's all right, was the contents, really, of Mr. O'Donnell's letter of the 17th of April?

A. That's right, yes.

Q. It was the contents of that letter which prompted you to raise it at your meeting with the officials in the Attorney

General's Office on the 22nd of April and to follow that up by your confirming letter of the 24th of April?

A. Yes.

Q. And as I said, it's not clear, and we'll look into it a little further in your evidence, whether you might have received an advance copy on the 10th of May, which was the Friday, but, in any event, we know you definitely received it on the 13th of May, which was the Monday; isn't that right?

A. Yes, I think so.

Q. And the licence itself was then issued on the 16th of May, four days later?

A. Yes.

Q. We know, from hearing your evidence in May of 2003, and indeed from the documents, and so forth, that you had been very heavily committed and involved in the evaluation process from the 4th of March right up to the 25th of October; isn't that right?

A. Yes.

Q. And to an extent, then, you were less involved in the negotiating process which had commenced immediately after the 25th of October, because the terms of the licence were being dealt with on the regulatory side in consultation with the parliamentary draftsman; isn't that right?

A. I think it was from about November or December onwards, the regulatory side took leadership.

Q. Then you seem to re-engage more from perhaps the latter

part of March, the early part of April, would that be

correct?

A. I think it was only after the letter of the 17th of April.

Q. Okay. We can look at the documentation.

A. Okay.

Q. Can I before I actually look at, or consider the events surrounding the 22nd, 23rd, 24th of April, can I first ask you just to look at, because I want to get rid of them at the beginning of your evidence, some of the documentation that the Tribunal received on Friday last, because it's of assistance in that it it's informative of the background to that interaction that you had with the Attorney General's Office between the 22nd and the 24th. So if you don't mind, I just want to deal with this and dispose of it at the beginning of your evidence.

Now, if you turn to Divider A1, you see the first document is a letter dated the 25th of March, 1996, from Regina Finn to the Office of the Attorney General. Do you have that there?

A. I have, yes.

Q. I'll read it briefly:

"Dear Sirs,

"Further to recent conversations, please find enclosed the Draft Postal and Telecommunications Licence, 1996. This Draft has been prepared in consultation with the parliamentary draftsman (Mr. Laney Bacon), and, as you are aware, was issued to Esat Digifone.

"I would be grateful if you could now examine this Draft with a view to preparing a final draft as soon as possible.

There are a number of points which should be borne in mind:

1. It is anticipated that the mobile directive will be transposed before the issue of the final licence. The effect of this will be to remove mobile telephony from Telecom Eireann's privilege, returning it to the Minister's privilege. This would eliminate the need to issue the licence under Section 111(1) of the 1983 Act, thus eliminating the need for the consultation with Telecom Eireann and the consent of the Minister for Finance in certain circumstances (revocation etc.)

"2. Due to time constraints Article 11 re security and interception of calls and call-related data has been omitted to allow for further discussion and agreement on a final text. This will be cleared with Mr. Bacon and forwarded to you as soon as possible.

"If you have any queries, please contact Mr. Fintan Towey of this Department at" and it gives a number "or myself" at another number. And it's signed by Regina Finn. Do you see that?

A. Yes.

Q. And there we have Ms. Finn, who, as we know from the evidence and from her evidence, had recently transferred from the broadcasting side to the telecommunications side of the Regulatory Division, coordinating the drafting of the licence, which, in her evidence, she indicated was her

principal area of responsibility when she became involved;

isn't that right?

A. I think so, yes.

Q. And that's a draft of the actual licence that the Department was working on that would ultimately be issued to Esat Digifone; isn't that right?

A. Yes.

Q. And can I just refer you, again, because I am very anxious that nobody should be confused as to what we are talking about in this evidence. I just want to refer you very briefly to the draft of Article 8 in that draft licence appended to that letter. It's page 16 of the draft. And again, I am only looking at it, Mr. Towey, because I want us to be clear what we are talking about when we are referring to Article 8.

Article 8, it's headed "Ownership of Licence, Management, Operation," etc.

"1 (a) Esat Limited shall not, without the prior consent of the Minister, dispose of any shares if, by so doing, the number of shares held by it would be less than 20 percent of the shares or the number of shares held by it and Telenor combined would be less than 51 percent of the shares."

"(b) it provides the selfsame provision in relation to Telenor."

Then, at (c), it just defines what "shares" means.

Then, at 2, it says: "The licensee shall not

(a) transfer, assign or otherwise dispose of any asset, infrastructure, authorisation, permission or licence; or  
(b) transfer or delegate the operation or management of any part of the service without the consent of the Minister, which shall not, if he or she is satisfied that the action would not and would not be likely to hinder or prevent the provision of the service by the licensee or cause a deterioration in the nature, quality or efficiency of the service, be unreasonably withheld.

"(3) the licensee shall ensure that the administration and management of the business associated with the provision of the service shall be carried out in premises in the State.

The business aforesaid shall be carried on on a normal commercial basis and at arm's length from the business of any of its shareholders."

And that was the draft of Article 8, as it then was, as of the 25th March of 1996, when Ms. Finn was furnishing the then most up-to-date draft to the Attorney General's Office; isn't that right?

A. Yes.

Q. And Article 8 of the licence was all about restricting the dealings by the shareholders in Esat Digifone of the shares after the licence issued; isn't that right?

A. Yes.

Q. And, in fact, just to digress for a moment, this whole question of restricting ownership, that was something that had been in the mind of the Department, in fact, during the

evaluation process itself; isn't that right?

A. It was, yes.

Q. It was always anticipated, wasn't it, that the licence that was going to be issued was one whereby the Minister would be entitled to restrict ownership and to control ownership?

A. Yes, that's right.

Q. And that was in effect, I don't know if you actually provided a draft licence for the RFP document, but insofar as you provided information on the licence to interested parties that might apply and enter the competition, it was always clear that it was going to be a licence on which restrictions would be placed on the disposal of shares by the licensee; isn't that right?

A. Yes, that's right.

Q. Now, in that letter, you will see at the base of it Ms. Finn had said that if you have any queries, please contact yourself or Ms. Finn. So it would seem there that you and she were working possibly in tandem in your dealings with the Attorney General's Office; isn't that right?

A. Yeah, I forget the detail, but I think I may have been leading on the transposition of the mobile telephony directive.

Q. Yes, that's what we are going to come to, which is the next document in this book. It's at A, Divider 2. That's a letter from you to the Attorney General's Office dated the 12th April, 1996.

It says, "Dear Sirs,

"Further to previous discussions, I enclose draft regulations to implement Commission Directive 96/2/EC in relation to mobile and personal communications, together with an explanatory note covering the main issues involved in transposition and outlining the correlation between the Directive and the draft regulations.

"I also enclose for information a letter received from Dr. Ungerer, DGIV of the European Commission which seeks to provide guidance on the impact and implementation of the directive.

"I would appreciate if you could contact me with a view to an early meeting on this subject when you have examined the draft regulations."

And that's you writing to the Attorney General's Office on the 12th of April on the separate but related topic of the Statutory Instrument that was going to have to be passed to implement this Directive 96/2, which was a Commission Directive which I think was issued in about February of 1996; isn't that right?

A. I think that's right, yes.

Q. And just in terms of background so as, again, we understand all the advice you were looking for at the time from the Attorney General's Office, this directive that had come into force, it was a complicating factor, wasn't it, in terms of the issuing of the licence?

A. It was, yes.

Q. Initially, the Department would have intended to issue the licence under Section 111 of the 1983 act, isn't that right?

A. Yes, there were different subsections, but the overlay of European legislation meant that there would have been a lack of clarity in giving the licence on the league base originally intended.

Q. Yes. And in order to issue the licence, you had to adopt the regulation 96/2 and that had to be done by a Statutory Instrument?

A. It was the view that that was the better course of action in terms of legal clarity, yes.

Q. So there were two documents that had to be drafted and had to be prepared: Firstly, the draft licence, and secondly, a Statutory Instrument in order to implement Regulation 96/2 ; isn't that right?

A. Correct, yes.

Q. And what we saw there on the 25th of March was Regina Finn furnishing a draft of the licence, and you are here now on the 12th of April and you are furnishing a draft of the Statutory Instrument?

A. Yes.

Q. And you are looking for advice from the Attorney General's Office in relation to both of those matters?

A. Yes.

Q. Now, again, just to refer very briefly to the documents which you enclosed I have no intention of opening them

but just so that everybody knows what they were. The first document you have there was headed "Transposition of Commission Directive 96/2" amending what was the existing directive. Do you see that?

A. Yes.

Q. That's what you enclosed. The second thing you enclosed was the Draft Statutory Instrument, which I presume you would have prepared or worked with to actually generate; is that right?

A. I would have prepared, yes.

Q. Okay. Then the third document you are enclosing is a copy of a letter that you received from Mr. Ungerer in DGIV?

A. Yes.

Q. And that's in the form of an explanatory memorandum. And then, finally, you enclosed a copy of the actual Commission Directive itself, Directive 96/2/EC? And they were your four enclosures with that letter?

A. Yeah.

Q. And they were the four enclosures with your letter of the 12th of April?

A. Yes.

Q. In the final paragraph, you say: "I would appreciate if you could contact me with a view to an early meeting on this subject when you have examined the draft regulations."

A. Yes.

Q. So it seems that, in fact, it was the matters referred to in your letter of the 12th April that prompted you to ask

the Attorney General to arrange a meeting; isn't that right?

A. That seems to be the case, based on that letter, certainly, yes.

Q. Now, can I just ask you to move over, because, again, I just want us to be clear on the chain of instruction and how the meeting was being set up and other meetings were being set up. Could I ask you to refer briefly back to book 85, which was the public-sittings book, to Divider A?

A. Yes.

Q. And this seems to be the letter that the Attorney General's Office sent to senior counsel arising from your letter of the 12th April in which you were asking the Attorney General's Office for a meeting; isn't that right?

A. Yes.

Q. I'll just read it. It's dated the 18th April, 1996. It's addressed to senior counsel, "re proposal of the Minister for Transport, Energy and Communications to grant a licence to Esat Digifone to be the second provider and operator of a GSM mobile telephony service in Ireland and Commission Directive 96/2/EC amending" the earlier Directive.

"Dear Richard,

"With reference to the above matters, the Attorney General has requested that you be furnished with the documentation listed below for your perusal:

"1. A draft licence which it is proposed to grant to Esat Digifone Limited.

"2. A copy of a minute to this office, dated 12th inst, and its enclosures concerning draft regulations to implement Commission Directive 96/2/EC.

"3. A copy of Commission Directive 90/388/EEC.

"4. A copy of SI number 45 of 1992." Do you see that?

A. Yes.

Q. So the first thing senior counsel is being furnished with is the draft of the licence, presumably the one that Ms. Finn had forwarded on the 25th of March, do you see that?

A. Yes, it or a later draft, yes.

Q. Secondly, a copy of a minute to this office dated the 12th inst and its enclosures concerning draft regulations to implement Commission Directive 96/2/EC. That would have been your letter of the 12th April, would that be right?

A. Yes.

Q. And the enclosure that we have just referred to with it. Thirdly, a copy of the Commission Directive 90/388, and a copy of the Statutory Instrument 45 of 1992, and I think they are actually in the book we have just been referring to.

A. They are.

Q. It then says "On the basis that regulations similar to the draft are made in the near future, the Minister is considering granting the said licence pursuant to what would be the new Section 111 (2B) of the Postal and Telecommunications Services Act, 1983.

"The Attorney General wishes to obtain your general advices concerning the validity of the content of the draft licence and the proposal to grant it pursuant to the said Section 111 (2B).

"John Gormley or myself will contact you with a view to arranging a consultation to discuss some of the issues involved in this matter."

Isn't that right?

A. Yeah.

Q. So there, would you agree with me that the Attorney General's Office is writing to senior counsel enclosing the documents we have referred to already on the previous page and indicating that the Attorney General wished to get advices firstly on the draft licence, and, secondly, the proposal that it be issued under the section that would be amended by the Statutory Instrument?

A. Yes.

Q. And what they are suggesting then is that contact be made with a view to arranging a consultation?

A. Yes.

Q. Okay. Now, if I could just go back to the black book. Sorry about having to juggle between the two books. Now, if you can just go on to Divider 3 in that book, because, as I said, I just want to deal with these documents and dispose of them.

Divider 3 or behind Divider 3 is another Commission Directive of the 28th of June, 1990/388, and I think that

was the Directive that was amended by the 96/2 Directive.

A. Correct.

Q. And it's one of the enclosure that went to senior counsel with the letter of the 18th April; is that right?

A. Correct, yes.

Q. And then just on to the next divider, at (iv), there is a copy of Statutory Instrument number 45 of 1992, and without it all becoming very technical, that's the Statutory Instrument under which the earlier regulation that was amended by the 96/2 would have been implemented?

A. Correct.

Q. And that would have been the fourth enclosure with the letter to senior counsel of the 18th April?

A. Yes.

Q. Now, if we just go to the next document in that booklet, it's Divider B, and again I just want to refer you to them very briefly. I think what these were, were enclosures with ultimately with your letter that you sent to the Attorney General's Office of the 24th April we'll come back to them, but just to identify what they are at the moment, is that all right?

A. Okay, yes.

Q. The first one, I think, is headed "Postal and Telecommunications (GSM Mobile Telephony) Licence, 1996. Compliance With Mobile Directive." And I think what you described this as, an analysis of compatibility of the draft licence with the new regulations, and I think that

was an enclosure that you sent on the 24th October with your letter to the AG's Office; is that right?

A. I think that's correct, yes.

Q. And then, over again, we have the three documents: An extract from the Esat Digifone application, from the management section; a copy of the William Fry letter of the 17th April; and a copy of Ms. Finn's memorandum and her diagram, and I think they were the three documents which you described in your previous evidence as being the probable documents that you had furnished at the meetings of the 22nd of April; is that right?

A. Yes.

Q. And then if we go over to D, and, again, it's just to deal with these documents that were furnished together. There is a copy of a fax from Regina Finn to Mr. McFadden and Mr. Gormley of the 24th of April.

"Denis,

"The only article which Esat Digifone had any specific desire to change at our meeting with them was the one on ownership of the company. The attached draft is being prepared by Laney Bacon in consultation with ourselves. We are satisfied that it addresses the issues that were raised. It is proposed to give it to Esat Digifone with the same disclaimer which is on the last version of the licence.

"Your comments on the attached draft would be appreciated."

And that's just a further revised draft of Article 8, the

Article that we already referred to. Do you see that?

A. Yes.

Q. Now, can I just draw one matter in that to your attention, because, again, it's relevant to what was going on within the Department and in negotiations between the Department and Esat regarding the ownership issue. And if you look to that draft of Article 8, it is identical, I think, in all respects, to the earlier draft of the 25th of March, except it looks to me as if an additional paragraph was put in, and that was probably to meet concerns that Esat Digifone had at the time. Do you see that on the second page, paragraph 3?

A. Oh, yes.

Q. And paragraph 3 says "Paragraph 2C does not apply to:

"(a) a mortgage or other transaction entered into for the purposes of securing borrowings, the licensee or the subsidiaries being borrowings for the purposes of the service of the provision thereof or anything incidental thereto; or

"(b) a transfer, assignment or other disposal of assets that are intended to be, and are immediately after their transfer, assignment or other disposal, assigned by way of leave to the licensee or, as the case may be, a subsidiary.

"4. The licensee shall ensure that the administration of the business..." well, actually, I think that actually repeats an earlier paragraph that was in the original draft. But those two subparagraphs seem to have been

inserted into the draft of Article 8 to meet the concerns that were being expressed by Esat Digifone at the time as to the extent to which those restrictions might limit their ability to create securities, or so forth?

A. Yes.

Q. And then if we just go over the page to E, document E, and we'll look at this again in the context, Mr. Towey, of your interaction with the Attorney General's Office on the 22nd, 23rd and 24th, and it appears to be a one-line note which records "Consultation with R. Nesbitt, F. Towey, J.F.G." which I think is Mr. Gormley "and D. McFadden. 23/4/96. 4.15 to 5.45."

And below that: "Trips case - Mella Carroll."

Now, that seems to be somebody's note of a consultation with Richard Nesbitt on the 23rd of April; isn't that right?

A. Yes.

Q. We'll come back to that, but you will recall, just at this stage, that, in fact, the Tribunal had asked you, in the course of your evidence, about a meeting of the 23rd of April, and I think at that stage you had no recollection of it?

A. Yes, I still don't, but

Q. That's fair enough. Just to bring that to your attention.

As I said, we'll come back to that in the context of the interaction.

And then the final document in that booklet of documents is

a copy of the draft letter of the 1st of May, 1996. I am not going to open it because we have had evidence of it before and we will be referring to it. It's the letter that the Department sent to Owen O'Connell in response to the letter of the 17th April in which the Department sought further information. You remember that letter?

A. Yes, yeah.

Q. And just included with that is a copy of a fax which you had sent to the Attorney General's Office I think the previous day, requesting the Attorney General's Office to settle your draft letter?

A. Yes.

Q. And that's the entire of the documents that we received on Friday and were distributed.

Now, what I want to do, Mr. Towey, is to retrace briefly with you the matters that led up to the meeting of the 22nd of April. We have already referred to your letter of the 12th of April, in which you had furnished a copy of your Draft of the Statutory Instrument to implement the European Directive, and I now want to look just at the information that came to light through Regina Finn. And I don't know if you have a copy of it, but I am going to refer back to book 43 of the old public-sittings documents.

The first document I want to refer you to is at flag 183.

That's the memo that you and Mr. Brennan received on the 16th April, 1996, from Regina Finn, in which she had attached the latest information which had come to light

about the shareholding in Esat Digifone, "Owen O'Connell is to provide further detail in writing. You may wish to pursue further." Do you see that?

A. Yes.

Q. And we referred to it before, and, again, it has been previously led in evidence, the diagrammatic representation made by Ms. Finn of the information she received and also the narrative explanation that she had produced below it, you see that?

A. Yes.

Q. And it was the information, I think, regarding IIU and the share structure of Esat Digifone which was of interest to you at the time?

A. Yes.

Q. And then if you go over to the next divider, to 184, there is the letter from Mr. O'Connell, and I am only going to refer you to the front page of this because that's the part that's material to the inquiries we are conducting at the moment. And again, you received this, I think, probably the 18th of April, I think you had said, around that time, close enough to the date on which it was received by Ms. Finn, would that be fair enough?

A. That seems to be the case, yes.

Q. "Dear Regina, I refer to our telephone conversation of yesterday regarding the ownership of Esat Digifone Limited and of Esat Telecommunications Holdings Limited. The position is as follows:

"There are 3 million ordinary shares of i;½1 each in issue in this company. They are held as to 1,125,000 shares by each of Esat Telecommunications Holding Limited and Telenor Invest AS and as to 750,000 shares by IIU Nominees Limited.

"It is intended that by the time notification is received from you that the second GSM licence is available for issue, the issued share capital will have increased from IRi;½15,000,000 to i;½18,000,000 (all comprising shares of i;½1 each) held as to 6,750,000 by each of Esat Telecommunications Holdings Limited and Telenor Invest AS and as to 4,500,000 by IIU Nominees Limited.

"The 25% of Esat Digifone Limited held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in Esat Digifone's bid for the licence. You will recall that this referred to an immediate institutional investor holding of 20% with a further 12% in short and medium term stages. Of the anticipated 12%, 5% has been pre-placed with IIU Nominees Limited. It is understood that most or all of the shares held by IIU Nominees Limited will, in due course, be disposed of by it, probably to private and institutional investors."

And the letter then went on about the restructuring of Communicorp and the splitting up of the radio and the telecommunications interests. And you recall that letter?

A. Yes.

Q. And the Tribunal heard your evidence in relation to that,

and also the evidence of Mr. Loughrey and Mr. Brennan, and certainly it was your evidence at the time that the information that was being conveyed here was different from the information that you had received at the time of the evaluation process; isn't that right?

A. I think that is correct, yes.

Q. And it was different in two respects: Firstly, it was a different shareholding structure in that what you had evaluated was 40:40:20. What was now being proposed was 37.5:37.5:25; isn't that right?

A. Correct, yes.

Q. And it was also different as regards the identity of the institutional shareholding in that you were now being told that it wasn't going to be placed with Davy's by the four institutions named in the bid, but was being taken up by IIU on behalf of Mr. Desmond; isn't that right?

A. Correct, yes.

Q. Now, it was on the following Monday, the 22nd of April, that you attended the meeting with the officials of the Attorney General's Office; isn't that right?

A. It was on the 22nd, yes.

Q. And I think that on the previous Friday you had had the civil servants' press conference, isn't that right, just to put it in time?

A. I think that's correct, yes.

Q. The 19th of April?

A. Yes.

Q. And the note of your meeting on the 22nd of April is at Divider 192 in that book?

A. Yeah.

Q. Now, we'll go through the note of the meeting, but it does seem to be the case, Mr. Towey, doesn't it, that that meeting had been arranged as a result of the request that you had made in your letter of the 12th April to which we have just referred; isn't that right?

A. That may have been the case. Whether the meeting was brought forward because of the new information, I don't know.

Q. Oh, I see the point you are making, yes. Well, just let's have a look at the note you made, because you made this note on the Wednesday.

You say: "1. Ms. R. Finn and the undersigned met with Mr. D. McFadden, Mr. J. Gormley and Mr. L. Bacon, Office of the Attorney General, on the 22 of April, 1996. The purpose of the meeting was to discuss:

"(a) disclosure of information to unsuccessful applicants for the GSM licence; and

"(b) the transposition of Directive 96/2 and its impact on the award of the GSM licence to Esat Digifone."

Do you see that?

A. Yes.

Q. Wouldn't that suggest to you, because it does to me, that those were the two principal purposes of the meeting; it was for those two purposes that the meeting had been

arranged?

A. That may have been the case, yes.

Q. And can you just, as well, confirm for me that the matter of disclosure of information to unsuccessful applicants, that was something that was then, and in fact had been for some months, under consideration by the Department; isn't that right?

A. It had, yes.

Q. And ultimately, I think you did meet with unsuccessful applicants the day prior to the issue of the licence on the 15th of May; isn't that right?

A. I think that's right, yes.

Q. And to an extent, that matter was also complicated at the time, am I correct in this, in that one of the unsuccessful applicants had made, or was about to make, a complaint to the Commission and had sought interim measures directing the Department not to issue the licence?

A. I think that's correct.

Q. So there were a lot of matters that you had to consider at the time in relation to the disclosure of information to unsuccessful applicants?

A. Yes.

Q. Now, at 2, you recorded: "Mr. McFadden indicated that the Attorney General would approve the draft letter inviting unsuccessful applicants to debriefing sessions by the following day. The Department agreed to provide a brief for senior counsel on the procedure to be followed at the

sessions."

Then at 3: "With regard to the transposition of Commission Directive 96/2, the Attorney General officials were particularly concerned about the applicability of the appeal procedures of the Directive to the GSM competition if the GSM licence is awarded pursuant to a Statutory Instrument to transpose the Directive. It may be possible to provide in the SI that applications received prior to the adoption of the Directive are not subject to the appeal procedures. Alternatively, the licence could be granted under Section 111(1) and (2) of the 1983 Act and the SI could provide that it is deemed to be awarded under the proposed new legal base for mobile licences. The Department expressed a preference for the award of the licence pursuant to SI transposing the Directive but would not press this course if the AG's Office advised against on the grounds of increased exposure to legal action. The fact that it would be preferable to licence Esat Digifone and Eircell on the same legal basis was also pointed out. It was agreed that these questions should be addressed to senior counsel. In the meantime, the AG's Office agreed to provide a first draft of the regulations to the Department the following day."

So that all related to the issue of the Statutory Instrument that would need to be passed in order to give effect to that Commission Directive; isn't that right?

A. Yes, yeah.

Q. Then at 4: "The Department agreed to provide the following to the Office of the Attorney General in order to facilitate further consideration of licence award:

" a report on the compatibility of the conditions of the draft GSM licence with Directive 96/2;

a consolidated text for Section 111 of the 1983 Act, as amended by SI 45 of the 1992 and including proposed amendments pursuant to Directive 96/2.

the Department's view on consulting with the Commission on the impact of Directive 96/2 on the award of the GSM licence and on the compatibility of the conditions with the Directive."

And they are the three matters that, if you like, had to be dealt with by you; you had to get back to the AG's Office on those three matters; isn't that right?

A. Yes.

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

And that's where you recorded the furnishing of material to the Attorney General's Office regarding, what we'll call

the ownership conformity issue; isn't that right?

A. Yes.

Q. If you just tell me there, because I am not entirely clear from the wording, you say there that the "Department indicated that clarification would be necessary of any changes in the ownership structure of Esat Digifone relative to that outlined in the application."

Were you saying there that the Department would need to clarify that with Esat Digifone, or something else?

A. No, that legal clarification would be required.

Q. Legal clarification would be required?

A. Mmm.

Q. And you prepared that note on the 24th of April, which was two days after the meeting?

A. I signed it off on that day.

Q. Well, maybe you created it on the 23rd, I don't know, but it seems to have been, maybe, signed off or prepared at the same time as your letter to the Attorney General's Office?

A. It was signed off on the same day, yes.

Q. Right. Now, just as a matter of interest, Mr. Towey, we know now exactly the documents that you furnished the Attorney General's Office with that day, and I think you gave them probably duplicate copies on the 25th; isn't that right?

A. I think that's probably correct.

Q. I'll just refer you to them now. It's book it's Divider E of book 85.

A. This is the fax, is it?

Q. It's the blue book.

A. I have that.

Q. We have looked at what you gave them and we know now exactly what you had. Perhaps not a lot turns on it, but did you consider at all, when you were furnishing this material to the Attorney General's Office, that you might have also furnished an extract from the Executive Summary to the application?

A. Sorry?

Q. The Executive Summary, because the description of ownership in the Executive Summary was slightly different to the description of ownership in the main body of the Esat Digifone application?

A. And which one did I send?

Q. You sent the one from the main body, from the management section. I am just wondering did it occur to you at the time that you might have also sent the one from the Executive Summary? Perhaps it didn't, but...

A. I don't believe it did.

Q. And I don't know if you were here this morning, but in the course of the Opening Statement, we referred to some of the information you were furnished with in the course of the oral presentation, and I just wondered did it occur to you at all that it might have been useful to provide the Attorney General's Office with that information also?

A. No, I don't think so.

Q. And I suppose, as well, I have to ask you, did it not occur to you that it might also have been helpful to furnish the Attorney General's Office with a copy of the RFP document? That was the document that was issued on the 2nd of March, 1995, where applicants were given the rules of the competition, where they were told at paragraph 3 that they must provide details of the ownership of the proposed licencee?

A. Yeah, I think the office had those documents from earlier correspondence.

Q. Could you tell me well, tell you what, maybe, this evening, could you look into it and let us know what correspondence you think might have furnished what correspondence you think the Attorney General's Office might have been furnished with. Maybe they did, maybe they already had it?

A. Correspondence about the first draft of the draft licence which I think was done in about August, or so, of '95.

Q. Maybe we can look at that, because I don't believe there being any reference to the RFP in it. But perhaps you could look at it this evening and we can clarify it tomorrow?

A. Okay.

Q. Because you'd agree with me, I take it, that it was the RFP document which was the vital document for any proper consideration of this issue of ownership conformity, wasn't it?

A. Yes, so I think I would either have described it or it would have been known between us as to what it contained in that respect.

Q. Well, when would you have described it, Mr. Towey?

A. I presume I would have done so at the meeting on the 22nd or 23rd.

Q. Well, let's just deal with the meeting of the 22nd at the moment. So you think you might have described the RFP document at the meeting of the 22nd?

A. I suspect that, in a discussion of the issue. I mean, the essence of the point was that legal advice was being sought in relation to change of ownership, so, as you say, the RFP document was an essential element of it in that respect.

Q. It was an essential element, wasn't it, because, otherwise, anybody asking this question wouldn't understand why they were being asked it; isn't that right?

A. Yes.

Q. You did very carefully note, at paragraph 5 of the note that you prepared, exactly what documentation you had furnished to the Department, do you see that?

A. Yeah. They were the new documents that I handed over, obviously.

Q. You don't think that, in that context, you might have also been inclined to record the fact that you had drawn the Attorney General's Office's officials attention to the RFP document and the importance of ownership?

A. Well, I don't know that I would, but, I mean, I think I did

record that we were seeking clarification of changes of ownership relative to the application document, so obviously the application document was a follow-on from the RFP.

Q. Well, the application document would have been the Esat Digifone application; isn't that right?

A. Well, the response to the RFP.

Q. It would have been the response to the RFP. All right.

The following day, then I mean, at the time, as you said, at the time you gave evidence before in 2003, and even now, you don't recall the meeting of the 23rd of April. And, in fact, when you previously gave evidence, the Tribunal didn't have a copy of this one-line note that we now have. It's in the black book. Sorry, the book of the earlier documents that we have just referred to, and it's at Divider E, and we'll just put it on the overhead monitor. And it's just a one-line document or three-line document, handwritten "Consultation with

R. Nesbitt, F. Towey, J.McG and D.McG, 23/4/'96' 4.15 to 5.45 p.m.

Trips case Mella Carroll."

Do you have any recollection of that meeting now,

Mr. Towey, with the benefit of that note?

A. No, I don't.

Q. Can you assist the Tribunal at all as to what the provenance of that note might be? I don't recognise the handwriting. I don't know is it your handwriting?

A. It's not mine. I'd hazard a guess that it's Denis

McFadden's, but I don't know.

Q. So there was a consultation with Mr. Nesbitt then on the 23rd. Now, we have seen the Attorney General's letter already to Mr. Nesbitt, dated the 18th April, and that's at 85A, which was dated the 18th April, 1993. Do you see that again?

A. Yes.

Q. And I don't know if you agree with me, but it looks as if this must have been the meeting that took place as a result of the request made in the final paragraph of that letter of the 18th of April. If you just put the 18th of April letter up again.

A. Sorry, book 85A?

Q. 85A, that's the one we just referred to, do you remember it?

A. Yeah.

Q. Where he is being furnished with a copy of the draft licence, a copy of your draft of the Statutory Instrument and one or two other documents, and he is being told that the Attorney General wishes to obtain general advices concerning the draft licence itself and the Statutory Instrument and he was asked to contact Mr. Gormley of the Office of the Attorney General with a view to arranging a consultation to discuss some of the issues involved in this matter, do you see that?

A. Yes, I see that.

Q. Doesn't it seem probable to you that the meeting of the 23rd of April, which was just the following week, on the Tuesday of the following week, was as a result of that letter to senior counsel of the 18th April?

A. I can see how that's a possibility. Again, I mean

Q. Well, isn't it

A. I don't know whether the events of the previous day

Q. You don't remember it?

A. No, I don't.

Q. But isn't it the probability, in the absence of any other letter from the Attorney General's Office to senior counsel, isn't the probability that that meeting of the 23rd April was as a result of the meeting he was asked to attend in the letter of the 18th of April?

A. Well, it's one probability, but it's not the only probability that

Q. Well, what is the other probability?

A. The other probability is that, in light of the additional question that had arisen, that the consultation with senior counsel was brought forward because of that additional issue.

Q. Okay. Right. Just let's look at this note again, this one-line note we have of the meeting of the 18th. The three-line note of the meeting of the 23rd. You see there it refers to "Trips case Mella Carroll." Do you have any recollection of what that was about?

A. No, I think I have heard the phrase 'Trips' as an

abbreviation of something, but I can't say off the top of my head what it is.

Q. Well, you might have heard a reference to something called a Trips Agreement, which was an international agreement to which the State was a signatory with regard to the issuing and grant of patents. Have you heard of that at all? Does that assist you?

A. I have heard of Trips as an international agreement, but, beyond that, I don't know anything about it.

Q. It, in fact, transpires that a short time before that meeting on the 23rd of April, on the 26th to the 28th of March a case was heard by the late Miss Justice Mella Carroll in the High Court and it was a case entitled Allen and Hansbury Limited and Glaxo Group Limited -v- The Controller of Patents, Designs & Trademarks and Clonmel Healthcare Limited, and, in fact, judgement on that wasn't delivered until the 26th of July, 1996, and it all turned on a number of technical issues, which I am not going to bother you with, Mr. Towey, except to tell you that one of the principal issues in that case is whether or not the Controller of Patents could issue a patent where an application had been made to him prior to the State entering into this Trips agreement. So that there was certain analogies between what was under consideration by the Court at that time and the dilemma facing the Department, of whether they had to issue the licence under the old Section 111 or under the amended Section 111 as a

result of the regulation that came into force after the evaluation process was complete. Do you understand that?

A. Okay.

Q. So that certainly seems to suggest that what was under consideration at that meeting were the matters referred to in your letter of the 12th April to the Attorney General's Office and the Attorney General's Office letter to Mr. Nesbitt of the 18th April where they were seeking advice on the Statutory Instrument that would need to be adopted in order to implement the Directive and in turn would be required in order to issue the licence. Do you understand me?

A. I understand what you are saying, yes. But I mean, I can't confirm that the meeting was confined to that, I'd be surprised if it was.

Q. I know, but, if you like, the only documentary evidence we have in relation to what was discussed at that meeting would suggest that what was discussed was the issue of the implementation of the regulation; isn't that right?

MR. O'DONNELL: Sorry, Chairman, just to intervene, I am sorry. He has now said on a number of occasions firstly that as a matter of probability, one probability was that it dealt with that but that there was a probability that it dealt with other matters. Then he was asked again, isn't it likely that all that was dealt with was that matter, and again he said he would be surprised if that was the only thing that was dealt with at that time. And so, Chairman,

Ms. O'Brien has her answer and again if this is, you know, running as an inquiry, then it should be accepted as the answer he has given rather than being put to him again and again that it couldn't have been discussed. It's not an adversarial situation.

MS. O'BRIEN: I most certainly did not put to Mr. Towey that something was not discussed. What I suggested to Mr. Towey was that the only documentary record we have of what was discussed at that meeting refers to a matter which can only be material to the issue of the implementation of the regulation.

MR. O'DONNELL: That's not true

CHAIRMAN: I have noted the reply, Mr. O'Donnell, without using the realtime, saying that it does appear from the documentation but he can't say that it was confined to that Trips or the

MR. O'DONNELL: Ms. O'Brien said in response to you that it is the only document that she suggests that indicates what was discussed at the meeting, but in fact in the letter of the 24th April, the letter from Mr. Towey says "I would also like to reiterate our requirement for a legal opinion on the restructuring of ownership," and a reiteration would suggest that it was something that had been iterated in the past, and it was either iterated on the 22nd or the 23rd.

So it's not, in my respectful submission, open to Ms.

O'Brien to simply say this is the only document. I am not she can put whatever questions she wants, but I am just

concerned that he is being asked the same question again.

He has been asked to confine his answer to suggesting that there was only the Trips issue discussed and not the ownership, and he has indicated on a number of occasions that's not so. I feel we should move on.

CHAIRMAN: I have noted the position. We will only do five more minutes Ms. O'Brien, it's been a long day.

MS. O'BRIEN: Just a tiny point in response to Mr. O'Donnell. What Mr. Towey said in his letter of the 24th referring to a reiteration of a requirement of a legal opinion was that he was reiterating it and the relevant papers were provided on the 22nd April. But we are not going to fall out about it.

Q. What I want to ask Mr. Towey about is: Do you remember any advice being given to you at the meeting of the 23rd April?

A. Any?

Q. Yes, do you remember Mr. Nesbitt giving you any legal advice at the meeting of the 23rd April?

A. I mean, I wouldn't have seen a verbal exchange like that as being where definitive legal advice was being given. I would have seen that as something that would follow.

Q. It was exploratory?

A. But I know Mr. Nesbitt recalls discussing the ownership

Q. I am not interested at the moment

CHAIRMAN: You will have ample opportunity

MR. O'DONNELL: He has to be allowed to give his own answer in response to Ms. O'Brien. It's not a question of saying

I can come back and re-examine him; that's not the issue.

He is giving an answer. When he started to open up that Mr. Nesbitt and himself were involved in a discussion he was closed off, and I am objecting to that occurring. I am asking that this witness be allowed to give his answer rather than to simply be shut down when an inconvenient answer is coming.

CHAIRMAN: He is not

MR. O'DONNELL: I don't mean to put it like that, Judge, but it certainly seems that way.

Q. MS. O'BRIEN: Let me ask you first of all, Mr. Towey, and I am not trying to shut you down at all and I am very interested in knowing what you have to say.

Do you have any recollection at all of the meeting of the 23rd April yourself?

A. I don't have a specific recall, no.

Q. I take it, therefore and I am not trying to shut you out you have no recollection of any advice being given by Mr. Nesbitt at the meeting of the 23rd April?

A. I have no specific recollection, that's correct.

Q. Is there anything else you want to add about the meeting of the 23rd April apart from that?

A. Well what I was going to say is that Mr. Nesbitt has recollection of discussing the ownership issues with me, and I don't recall the specific meeting but there were limited opportunities when I would have met Mr. Nesbitt and had that opportunity to have that discussion with him. So,

as a result of that, I am surmising that it may be possible that that exchange took place on the 23rd but, as I say, I don't actually remember it myself.

Q. Can I just ask you this: When did Mr. Nesbitt first tell that you that was his impression and his understanding of what had been discussed at the meeting of the 23rd?

A. I can't say specifically but it's sometime in recent weeks or months.

Q. Now, you say in recent weeks or months. Are you saying in the last weeks or are you saying in the last months, because this is important for the Tribunal to know?

A. Well I mean, I would need to consult maybe with solicitor for the State on the question of when the issue of waiving privilege over the opinion was most actively being discussed, and also the times when we had recent contact with counsel for the State in relation to responding to the Tribunal's provisional findings, but it was sometime in that context.

Q. Well we know that a letter, the letter that the Tribunal received waiving privilege was on the 13th March last, so is it the case that you had that conversation or discussion with Mr. Nesbitt prior to the 13th March or is it since then?

A. It may have been. I can't say.

Q. Can you tell me, that conversation you had with Mr. Nesbitt, I take it, was one-to-one, was it? You were both present; you must have been?

A. Others would have been present also.

Q. Others would have been present as well. And do you know whether a note of that interaction was kept at the time?

A. I wouldn't have kept one.

Q. You wouldn't have. Do you know whether anybody else kept a note of that interaction?

A. I don't know that anybody did.

Q. Can you tell me who was present when Mr. Nesbitt made that information known to you?

A. I can't say for certain, but I suspect that it was Mr. Shaw and potentially a number of other witnesses from the Department, existing and retired.

Q. Who were they? Who were potentially the other witnesses?

A. Potentially for discussion like that may have been Mr. Loughrey or Mr. Brennan or Mr. Fitzgerald, Mr. McMahon possibly, Mr. O'Callaghan. I may have been missing somebody there, but...

Q. That's fair enough. And tell me, do you recall was this one discussion or was there more than one discussion?

A. I think it may have been discussed once or twice, but probably not more than that.

Q. Do you recall was it Mr. Nesbitt who initiated it?

MR. O'DONNELL: Is this an appropriate question for this witness?

CHAIRMAN: He was present, Mr. O'Donnell. This is what you are urging on me. I have to hear what Mr. Towey has to say.

MR. O'DONNELL: I am urging that he be allowed to give evidence of what happened in 1996. But this witness is now being asked to give evidence as to what transpired in what is clearly a legally privileged situation in 2009, and I am not quite sure how that is relevant. If they want to test Mr. Nesbitt, they can do that by calling Mr. Nesbitt, which is what I asked to be done in the first place. But I don't see how asking Mr. Towey now about what happened in 2009 is going to assist the Tribunal in finding out how he viewed the opinion or advices that he was given in May of 1996.

CHAIRMAN: Well, on that last matter, Mr. Towey, do you remember at the conversation how it came up, who raised it, the question of other oral advices?

A. I believe it was in the context of waiving the legal opinion on the question of whether that would give rise to Mr. Nesbitt being called. So whether that led on to Mr. Nesbitt volunteering his recall of circumstances or whether it was initiated by somebody else asking him the question, I don't know.

Q. MS. O'BRIEN: But you have none, and you never had, and it continues to be the position that you have no recollection of the meeting of the 23rd?

A. Correct.

CHAIRMAN: I think we'll leave it there. What's the most feasible time to resume in the morning?

MS. O'BRIEN: 11, I think, sir.

CHAIRMAN: All right, I'll make it 11 and we'll look at the

position later in the week.

THE TRIBUNAL ADJOURNED UNTIL THE FOLLOWING DAY, THE 10TH

JUNE 2009 AT 11 A.M..