

THE TRIBUNAL RESUMED ON THE 12TH JUNE 2009 AS FOLLOWS:

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY MR. HEALY:

Q. MR. HEALY: Thanks, Mr. Brennan. Do you have a copy of the advices of the 9th May in front of you, or can you turn it up

A. I certainly have a folder that contains them, I just need to open them.

Q. It's the end of the folder marked Book 85. It's the last document?

A. I have it in a separate folder. I have it now, yeah.

Before you start, could I just clarify something?

Yesterday you had been asking me, because I had a look at the transcript last evening, about 'wouldn't it have been the most natural thing in the world on the 15th to tell Owen O'Connell that we had legal advice' and so on. I didn't advert then to the fact that the previous afternoon or evening Owen O'Connell was present at length in the Department and had met us with Mr. Nesbitt and had met Mr. Nesbitt separately and so on. So by then he was well aware of what was going on.

Q. I appreciate that, and I suppose I was making a further point that if you had conveyed that information to Mr. O'Connell, either at that meeting or at any other meeting, there is no mention of it in any of his notes anywhere, 'look, we are in the clear anyway, we have an opinion'. Do you follow me?

A. Yeah, I don't think I have even seen any notes of his

attendance in the Department that evening, or certainly of his one-to-one discussions with Mr. Nesbitt and so on, which did take place.

Q. As far as I know there aren't any but, obviously, I'll look into it, because I don't want to go through all of his documents with you. But you may recall that there was evidence given of contact between Mr. O'Connell and I think it was Ms. Eileen Gleeson do you remember that where they prepared a list of questions that they might have to deal with at a press conference?

A. I certainly remember that Eileen Gleeson was involved, I don't have much recall now of the detail.

Q. I am not going to open it at length, or at all, unless you want me to. There is no reference in that anywhere to the fact that 'we have a legal opinion'. That's the only point I am drawing to your attention, that it's surprising that it isn't mentioned.

To go back to the opinion itself, we were looking at the second paragraph on the second page, the one that you draw attention to "If one analyses why the Minister is concerned..." I am not going to go into all the detail of it, but I have already suggested to you that I have already suggested to you that that deals with Article 8.

And I want to draw your attention to two things: Firstly, Mr. Nesbitt, in that paragraph, explains why ownership changes shouldn't cause concern. And then in the next paragraph he goes on to say "In the circumstances, I have

proposed changing Article 8 quite fundamentally."

Now, I suggest to you that what he is doing there is, it's in a standard linking sentence between two paragraphs; he has explained his view, if you like, rejecting the Minister's concerns and then goes on to say that

"In those circumstances I have proposed changing Article 8 quite fundamentally."

and I suggest to you that he is still on Article 8, in other words?

A. I can understand why that's your state of mind at the moment. But I mentioned the final sentence of the previous paragraph yesterday, which is another linking sentence, and the question of future changes of ownership and Article 8 could not have been a matter in the public mind. What was in the public mind was the changes of ownership that had taken place in the context of issuing the licence. So, I mean, these things can be read in several ways. I don't now know whether I am reading them on the basis of what I am hearing these days or whether I was reading them that way at the time. What I know is at the time I concluded, in the context of which the advice was given and the discussion around it, I concluded in my own mind, and probably advised Mr. Loughrey that it was my opinion, that there was no obstacle to issuing the licence on the basis now proposed.

Q. If you go onto the next paragraph, he refers to a matter alluded to in the licence. He says "I am dubious as to

whether or not the Minister can demand that the administration and management of the business carried on in the premises" "be carried on in premises in the State.

However I can understand why this has been included."

Do you remember that paragraph in the licence? It doesn't matter if you don't?

A. I'll tell you approximately the history of how these paragraphs came in at all.

Q. I am not making an issue with it, just if you remember it.

A. No, but it might be important that you understand.

Q. Yes?

A. I was involved from 1993 in drafting the outline of the competition. I had been personally involved in 1975/76 in the drawing up of the first serious set of off shore licensing conditions and all of these things were covered therein, and I recall that, and I looked through them to see which of them might be relevant to this context.

Q. Right?

A. But of course since that, we had joined the EEC, the background or we had EU, EU law and legal perspective had evolved. So we had to revisit them. But I put them in as a first cut. The reason it was in offshore exploration is because you needed to be sure you could tax what was found and so on, you know.

Q. Yes?

A. It wasn't obviously as relevant but I threw everything in in the beginning on the basis it could be taken out later.

Article 8 has the same kind of history.

Q. Yes?

A. But Mr. Nesbitt gave us a different perspective on it

Q. That is the only point I am making as well. It's to do with Article 8. He then goes on to Article 15.

He then goes on in the next paragraph to Article 17.

And the next paragraph he goes on to Article 18.

And then in the next paragraph, without any break, he goes

on to the Statutory Instrument. He says, I suppose in an

introductory phrase "In respect of the proposed Statutory Instrument, I have caused this to be retyped"

and that's a reference back to, I suggest, the opening

lines of his opinion where he said he was going to deal

with Article 8 and he was going to deal with the Statutory

Instrument and I think all the rest of the opinion deals

with the Statutory Instrument.

Now, I take it you'd agree with me that nowhere in the

opinion it the RFP referred to?

A. That's clear.

Q. And nowhere in the opinion is either IIU referred to, or

any of the other matters that were brought to your

attention in the letter from Mr. O'Connell of the 17th

April, 1996?

A. That's true.

Q. And nowhere in the opinion is there any reference to the

second of the two compatibility issues, one being the

different entities and the other being the different

configuration, there is no mention to the different configuration; isn't that right? No reference to the different configuration?

A. You mean the 37.5?

Q. Yes.

A. I think I said yesterday, and I have said before, that was something that was so obviously in contravention of the bid that we decided as civil servants that it wasn't going to happen.

Q. But did you tell Mr. Nesbitt you didn't want him to discuss it?

A. I have no idea.

Q. But it certainly was in the letter that was sent to him, it was one of the issues in that letter. And can I suggest to you that the letter which, as we have all agreed, I think, definitely sought an opinion on that aspect of compatibility. The letter definitely sought an opinion on that aspect of compatibility but I don't think there is anything in the opinion that could enable you to approach the question of 40:40:20 versus 37.5:37.5:25?

A. Well, my position clearly is that we had already decided that that wasn't going to fly.

Q. You see, I suggest to you that, in fact, there was no need to refer to it in the opinion and no need to refer to the question of incompatibility of entities because the likelihood is that the whole question of compatibility had already been decided, both 40:40:20 and the changing

entities?

A. How do you link that to the fact that the letter of the 24th April issued then?

Q. Well, I suppose it cuts both ways, Mr. Brennan. You have just told me a moment ago the reason there is no reference to 40:40:20 versus 37.5 and so on in the opinion is that you have already decided that matter?

A. Yes.

Q. And I am suggesting to you applying that logic to the entity issue as well, that you had already decided the entity issue?

A. I don't accept that. I think there is a difference of magnitude of gravity between the two decisions.

Q. Okay?

A. The 37.5:37.5:25 was clearly incompatible with the bid. The other was less less definitive and we sought legal advice on it.

Q. Okay. Could I ask you to turn to book 86, the blue book that you were given yesterday. Could I ask you to go to Tab 1, if you don't mind. This is a memorandum of Mr. Owen O'Connell's in William Fry's of a telephone conversation, I think it's agreed all around, between himself and Mr. Towey in which, as you can see in the first sentence he says "Fintan Towey?

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

Now, I call that an Esat Digifone issue, in other words a consortium issue, can I put it that way?

A. Yeah.

Q. To dis if you like, I suppose, to try to find the easiest way of distinguishing these because of the similarity of the names, a licence issue.

If you go to the next entry, or next note it says "If Telecom interests held Esat Holdings"

I presume that means 'by Esat Holdings'

"And radio by Communicorp asset base of Communicorp reduced. Doesn't know whether it would be a problem."

I'd call that an Esat Holdings or a Communicorp problem, a problem arising from the change in the overall way in which Mr. O'Brien's interests were being held as notified in the letter of the 17th April

A. Yeah.

Q. And there is a reference to a suggested meeting. The portion in italics is Mr. O'Connell's separate, later editorialising, if you like.

Then it goes on: "Premature.

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

That's an Esat Digifone or a consortium issue?

A. Mm-hmm.

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



That's again a consortium issue. It may fact, now that I think about it, relate to both.

Now, we know that on the 1th May, the Department wrote a letter, if anyone wants to refer to it it's at Book 44, Tab 203, wrote a letter in response to the letter of the 17th April seeking further information. You are familiar with that letter. I can, I can put it up if you like. I can put on the projector if it makes it easier?

A. Okay.

Q. It says "Dear Mr. O'Connell"

"I refer to your letter" sorry, I beg your pardon, sorry

"I refer to your letter of the 17 April, 1996 concerning the restructuring of certain ownership interests in Esat Digifone."

And then he goes through them in the letter which is, I think, sounded by you but actually, I think, drafted by, I think you agreed on an earlier occasion, probably Fintan Towey and Sean McMahon and I think they got some assistance from the Attorney sorry, Fintan Towey drafted it, I think, and he sent it to the AG's office for clearance.

Now, that was a follow-on if you like from Mr. Towey's phone call of the 29th April.

Could I now ask you to go to Tab 2 in the blue book. This is a meeting of the 3rd May 1996 at which Mr. Digerud, I think Mr. O'Donoghue, Mr. Johansen, Mr. Walsh, Mr. Connolly and Mr. O'Connell were at the Department with you, Mr.

Towey and Ms. Regina Finn and Eanna presumably another

A. Eanna O'Conghaile

Q. Eanna O'Conghaile, yes. And the issue is being discussed again, both in the context of it being a clear political football and in the context of the legal and beneficial ownership changes relative to the bid. So it was still a live issue. And there was the request for the further information being reiterated.

Now, can I now ask you to go to Tab 4. This is a note from Mr. O'Connell's file of the 7th May 1996 of a telephone conversation he had with Mr. Towey. I think it was Mr. Towey contacted him. And I don't think that's disputed. And I'll just read it.

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

Now, just to take the third sentence in that note: "Will take Esat Holdings subject to no substantive difference" that's dealing with what I described earlier as the internal or intra-Esat Holdings, intra-Communicorp, intra-Mr. O'Brien's interests issue, where they were being rejuggled but, in fact, as far as we can see, all left the same substantively. So "Will take that subject to no substantive difference".

It seems to me that the rest of the memo seems to conclude

the compatibility issue. Because it says

"Minister very strong preference for 40:40:20 at time of licence."

That's, i.e. referring to the restructuring of the configuration of the applicants but understands that afterwards there has to be flexibility, that's an Article 8 issue. And that in fact by that time, presumably as a result of discussions he had in the Department, the matter was over as far as compatibility?

A. I would say the matter of 37.5:37.5:25 was over.

Q. Right.

A. I am not sure that you can conclude from this short note that the other matter was over and I don't believe it was over at that point.

Q. So, if you had come back I don't know what day of the week that was, I think it was a Wednesday I am told but having Mr. Towey having said "Minister" whether the Minister had spoken to him or not is another matter now but he said 'Minister has got a strong preference of 40:40:20 at time of licence'. If Mr. O'Connell had gone to all the trouble of re-jigging his consortium from 37.5 to 37.5 to 25, which involved some considerable difficulty as you will note from the evidence, you may not have known at the time, if he had gone to all that trouble, that it would have been open to you to come along on the Monday and say 'well actually, look, I know it's 40:40:20 but we won't run with it'. 40:40:20 meant, I would suggest, 40 Telenor, 40

Communicorp and 20 IIU?

A. At that stage we were aware that it was a proposal. What we hadn't decided, as far as I can recollect and as far as the documentation shows, is whether we were accepting that or not pending legal advice.

Q. If that memorandum meant that you had only disposed of the issue of 40:40:20 perhaps that might account for no precise reference to that in the opinion but if it had disposed of everything, 40:40:20, 20 to be held by IIU, could that not explain why there is no reference to anything concerning the RFP

A. I think you are the only one that thinks that the issue of IIU was disposed of at that time.

Q. I see.

A. At that time we were still fighting with them over getting information about the, as I said yesterday, financial horse power of IIU.

Q. Yes?

A. I can clearly remember saying to Michael Walsh or saying to a third party on his behalf, when they were taking the line 'everybody knows Dermot Desmond is good for it and we don't need to provide documentary evidence' and I was saying, 'no evidence, no licence, it's as simple as that'. And that's what led on to Farrell Grant Sparks' involvement and so on some days later. So we were seriously concerned that we had an evidence base on which to decide was IIU did it fit the description of financial institution and did it

have the money?

Q. Do you remember the letter that I opened to you a moment ago, the 1st May letter?

A. Yes.

Q. You sought a lot of information in that. And it was never provided. We know that a letter was drafted containing a lot of it and a lot of information was taken out of the letter and you got a letter without that information?

A. Without which information now?

Q. The letter of the 1st May I may be assuming that you are more familiar with the earlier evidence than perhaps you are the letter of the 1st May 1996 contained a response to the letter of the 17th April and it asked for explanations, if I can put it in that broad way, and a letter was drafted by Mr. O'Connell containing an explanation. That letter, the draft of it, is contained at Tab 5 of the blue book.

Now, the first part of that letter, the first eight numbered paragraphs refer to a whole load of documentation that had been requested at an earlier meeting. And then it goes on:

"During our meeting you asked for an explanation of the involvement of IIU" etc., etc.

Now, it goes on for nearly two pages dealing with that. I am not going into the detail of it now. But if you go on to the next document in Tab 6, you will see the letter that was actually sent, and what it has is the list of

certifications. In fact, I don't think it was sent and I think it was handed to you at a meeting by Mr. Digerud on the 13th May, the date of the letter. And it leaves out the explanation, and you may recall Mr. O'Connell gave evidence that that was because, either he was requested to do it or because by the Department or because the Department acquiesced in it. That was rejected by you, I think, and by Fintan Towey?

A. Well, I think what I was reminding you, probably the second or third time that I was here, was that Mr. O'Connell himself acknowledged in relation to that that he was speculating as to how it came about.

Q. Yes, yes?

A. And I was saying that my recollection didn't support his speculation.

Q. Yes, yes. But one thing is absolutely clear; the explanation that was requested was never provided?

A. Okay.

Q. And I'd suggest that there is a likelihood that that's consistent with the fact that the matter had been decided by the 7th May and communicated by Mr. Towey when the Minister expressed a very strong preference. In other words, it's all right to have Telenor, Communicorp and IIU as long as it's 40:40:20?

A. Can I comment on that?

CHAIRMAN: I think you have responded and you said the financial issue was, for one thing, still afoot.

A. Correct, yes.

CHAIRMAN: That you had made an observation to Mr. Walsh in an informal discussion that if he didn't come up with some evidence of money on behalf of Mr. Desmond, the licence was far from assured.

A. That's correct, Chairman.

Q. MR. HEALY: Now, just one other aspect concerning that document. You may have been here yesterday when I think Mr. Towey gave some I want to refer you to an aspect of this matter that was discussed when you last gave evidence.

If I could ask you to go to well I'll put it on the overhead projector. It's Day 179, page 17. And if you go to the bottom of that page, question 53:

Your answer is, I think, where I want to start.

"Answer: The question being looked at was, was there consistency between what we were now presented with as the Party to be licensed with the application? And the conclusion seems to have been reached that there was.

Question: Did the Department form the view that the way to describe the institutions who were mentioned in the application was blue chip?"

that was something we were discussing earlier but it will lead on to something else

"Answer: I don't know whether that was a conscious forming of a view in that sense. It was words used, possibly first by Mr. Loughrey, I am not sure, but by somebody.

Question: It was used in the Dail debates. It was used I

think in the public statements, wasn't it?

Answer: It probably was, yeah.

Question: I suggest it's a fair way of describing the type of institutions involved, they were blue chip institutions, so there you were able to form a view as to whether this consortium had the financial capacity to do the work. It had Telenor, it had Mr. O'Brien's vehicle and it had blue chip institutions or, if you like, it had financial institutions. Well was there a correspondence between that configuration, Mr. O'Brien, Telenor and financial institutions, and what you were being presented with on the 16th April?

Answer: It seems to me that after a lot of consideration involving a number of people, that view was formed.

Question: And was the Minister involved in that discussion?

Answer: I can't say that he wasn't but, equally, I can't say that he was. I think these are questions that you may have to put to Mr. Loughrey in the first instance as to halves going on at that level.

Question: I am sure you won't disagree with me when I say that it's my impression that if you were to reach a decision like that it's a decision that would have to go all the way up to the political head of the Department, isn't it?

Answer: That sounds reasonable, yeah."

And then I go on to another document. The only reason I



draw that to your attention is in your Memorandum of Intended Evidence, and indeed in evidence yesterday, I think you said that, as far as you were concerned, emphatically the Minister had nothing to do with this aspect of the competition, or this aspect of the licensing process, I suppose can I put it that way and I suggest to you that you described this time as a time of civil servants were dotting I's and crossing T's, at paragraph 5 of your opinion of your memorandum.

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

I suggest to you that there appears to be a contradiction between that and what you said earlier, that you didn't know whether the Minister was involved or not but that he probably was?

A. I didn't have the luxury of forensically reviewing the evidence given previously by myself and by others in writing this note.

Q. Yes, yes.

A. What I recollect is that at no time in the process of the competition or the licence award, as far as I was aware, did Mr. Lowry get involved in any aspect of the details, right. I have no way of knowing, and I am not sure whether

you have reviewed Mr. Loughrey's evidence or not, whether you put these issues to Mr. Loughrey as I suggested in my previous incarnation here you might do, and what his answers were. I don't know how much he shared with the Minister, but the Minister was not involved in the dialogue with legal advisors, he was not involved, at least via us, in the discussions/negotiations with the consortium.

That's what I am trying to convey.

Q. Okay. It's just that I don't think you are in a position to say emphatically he was not involved, having earlier said that you couldn't say one way or the other, but that a decision like this, subject to what other people might say, might have gone the whole way up to the political head?

A. That's a question Mr. Loughrey would have to answer. I don't know the answer. But my very distinct recollection is or absence of recollection is Mr. Lowry had no detailed communication, no communication at this time with me or, as far as I know, with Mr. Towey. How much Mr. Loughrey or Mr. Fitzgerald felt they had to share with him, I don't know. I am fairly certain that a 37.5:37.5:25 was such a no-brainer that we decided it wasn't going to happen and that was that. Whether it was subsequently mentioned to the Minister or not, I have no idea.

Q. Why do you say it was a no-brainer, by the way?

A. Because we always held that the application was 40:40:20. And we couldn't see how we could change that to 37.5:37.5:25 and remain faithful to the process, the

selection process we carried out.

Q. But if you apply the principles that you were suggesting were contained in the opinion, couldn't you have applied paragraph 2 of the opinion to that question paragraph 2 on the second page, sorry couldn't you have applied those principles to that question as well?

A. Well, that just wasn't the way we looked at it at the time. Clearly there was scope for those kind of changes to be made after the issuance of the licence and, if I recall correctly, that's what the dialogue about a side letter was about.

Q. But, you see, if the memorandum of the conversation with Mr. Towey of the 7th May is correct and 40:40:20 had been decided, then, as you point out, that had been decided before any legal advice had been obtained?

A. Yes.

Q. But if it applied to everything, it had been applied to everything before any legal advice had been obtained?

A. I am not sure what you mean when you say 'if it had applied to everything'.

Q. - If it applied

A. We were very clear that it applied to 20% versus 25%. That we felt - we felt was an easy decision. It didn't require legal advice.

Q. There was no letter ever we have actually canvassed this before, maybe you have a memory on this now there was no letter ever sent to Mr. O'Connell along the lines of that

document, if that document means only 40:40:20 and nothing else. There was no letter sent to Mr. O'Connell saying "Dear Mr. O'Connell, We no longer require an explanation for you concerning the 37.5:37.5:25 because we are not accepting that under any circumstances. We only require an explanation from you concerning the identity or the change in the identity of the consortium members."

A. Yeah, there's been lots of evidence about gaps in the record and things that might have been written down and weren't and so on.

Q. That's not a record.

A. Okay. If the information was conveyed, by whatever means, the information was conveyed.

Q. I want to refer you to some evidence given on Day 178, page 1. And do you remember we were discussing yesterday the matter I was hoping to explore, which was the difference between what I believe the opinion says and the absence of any references to an opinion along the lines now contended for. I just want to look at some of the evidence.

On this page, this is obviously at the start of a new day, and I am referring you to book 43 and you say:

"Answer: Before I do that, if you don't mind, there is something I want to clarify about Friday and I suppose my accurate was my answer was incomplete or maybe inaccurate, born completely out of tiredness. But towards the end you were asking me about why it was, when we got written information that IIU had become part of the scene,

that we didn't then announce that. And I said it may have been a tactical decision or something yeah, well, as soon as I had a cup of coffee it occurred to me that was a stupid answer. What really was the situation that triggered two responses what really was the situation that triggered two responses in the Department. One was to check out who are these guys and are they good for it? And the other was to trigger legal advice as to where stood the application in the light of that development."

So what we were discussing

"So when you put it like that, it's clear why weren't in a position to make any announcement at that stage.

Question: Can I just clarify that again, that you said that you think that, firstly, you were looking at it from the point of view of 'who are these people?' That was the first thing that went through your minds at that time?

Answer: I didn't deal with it directly on a hands-on basis until sometime later than that. But they were the first two responses within the Department, was, you know, who are IIU? Have we evidence as to whether they are substantial? And the other response was to get legal advice as to what the effect of this had in terms of the application."

What we had been discussing was why at the civil servants press conference, if I can put it that way, no reference was made to the change in the consortium.

But, in any case, you were saying you were to get legal advice and that was the reason one of the reasons why

we couldn't refer to matters.

I am just I am just drawing that to his attention.

MR. O'DONNELL: Does he need to respond to it or what?

MR. HEALY: If you just give me a chance.

Now, on the same day at page 12, at question 28:

Question: And the question of whether the identity of the beneficial owners of the company could be considered incompatible with the ownership proposals outlined in the company's application must now be addressed."

That shows, I suggest, that at least that issue, to some extent, you may have flagged at the outset of your evidence today, was being considered by the Department.

"mm-hmm." Was the answer

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

Answer: I haven't looked closely at the advice."

Now, I think, correct me if I am wrong, that you meant that you hadn't looked closely at it at that time?

A. Yes.

Q. So by that stage you had mentioned that you were seeking legal advice. We know that from the documents in any case.

Mr. O'Connell was informed of it. I had suggested to you in a question that the Tribunal had looked at the opinion and it didn't seem to deal with the issue and you said

"I haven't looked closely at the opinion."

Now, if you go to day 179, the next day, to page 16, if you go to the first full paragraph, it's your answer:

"Answer: I don't believe the Department ignored the identity. I think the Department made significant inquiries, and including taking legal advice.

Question: I don't think the legal advice on the change in the share configuration was ever pursued; at least we have not been able to see any legal advice dealing with it.

Answer: I can't comment without researching the documents on that."

Now, they are just a few examples I have been able to find of references to the Tribunal's view of the legal advice.

And you never stated at any subsequent occasion, certainly I don't know whether you researched the matter as you said you might do; Mr. Loughrey didn't state it; Mr. Towey didn't state it; that legal advice had been obtained and that the Tribunal was quite wrong in its interpretation.

Is that correct, you are nodding?

A. Yes. I don't accept the Tribunal I can't 'the Tribunal' the Tribunal legal team's view that there is only one way of interpreting what was going on in terms of legal advice.

Q. That's not the point I am making, Mr. Brennan. I am saying that was the interpretation put on it by the Tribunal.

Nobody sought to correct it. Now I am suggesting to you that no witness, no solicitor, no barrister, not even the author of the opinion who was present all the time said,

'look, you are barking up the wrong tree, you have got the wrong idea, the opinion does deal with it, it's plain that it deals with it'. Nobody said that.

A. I take it you are not holding me to account for the fact that nobody said it.

Q. Well, I am asking you; you didn't say it and can you offer any explanation as to why anybody else didn't say it?

A. I presume I wasn't forming a clear view as to where the Tribunal was going with the issue at that stage.

Q. You see, I'd suggest to you that the reason it wasn't mentioned, because from all we have heard in the last few days, if what is being suggested about this opinion is correct, it would have been obvious to anyone representing the State to say "You have got this wrong." And I am suggesting to you that wasn't stated because anyone reading the opinion couldn't have said the Tribunal got it wrong. The only way you can say the Tribunal got it wrong is if you referred to discussions that were held.

A. Your question there on the screen:

"In the discussions that you had in the Department, and you say there were many discussions on the issue" is that not relevant to the question you are now posing?

Q. Discussions on the not discussions on the legal the legal advice.

A. Sure, we are talking about the legal advice at this point.

Q. No, you said "I can't comment without researching the documents."



and I am suggesting to you that what the Tribunal is now being told is that you formed a view of what the opinion contained based on the opinion and on discussions with counsel. The Tribunal made its view. You are at liberty to say it's wrong, on the interpretation of the opinion clear repeatedly. But nobody said to the Tribunal 'they couldn't be right on that, they couldn't be right on it. It's plain that it means something else'. You have no comment to make on that?

A. It's very difficult to comment on why I didn't think on my feet in the witness box

Q. Ah no, no

A. on a particular day to make a particular response in considering the question at the level that you are now forensically putting it. I mean, it just life isn't like that as far as I can see, as far as I am concerned anyway.

Q. It's not forensic. I think what has been suggested by the Tribunal is that it's perfectly plain what the opinion means?

A. That's the Tribunal's view and we have all been looking Mr. Towey and I have been looking for a long time for the opinion to be put into play and for Mr. Nesbitt to give evidence. That might be the only way of finding out what was going on at the time. He has a clearer recollection than we have apparently.

Q. Well, the first the Tribunal heard that you wanted to put

into play was fairly recently, Mr. Brennan.

A. I am aware of that, but in terms of the dialogue within the Department, Mr. Towey and I couldn't understand why legal privilege was being claimed based on principles and legal niceties, because we thought always that the opinion and the surrounding evidence was in ease of our position.

Q. Well I think I can understand, if I am right in summarising something you said to me yesterday, that your view was, you don't remember reading the opinion but you feel you did?

A. I think I would have been in dereliction of duty not to read it if I got it. I don't ever remember getting a legal opinion that I didn't read, no matter how long it was.

Q. And that you reached a conclusion and that you must have reached it based on the opinion?

A. Based on the opinion and the surrounding contextual discussions.

Q. Yes. Now, do you remember you don't remember those discussions other than in a very generic way, am I right in that?

A. I remember they took place. I remember Mr. Nesbitt being physically present in the Department at critical times and so on. But I don't have recall of the detail of the discussions.

Q. Are you referring to several meetings or one meeting?

A. I think there were probably two in the Department.

Q. Well, I presume that if there were meetings about the opinion, they had to have occurred at least after the 10th

or perhaps later, because you didn't formally get the opinion until the 13th?

A. I think we are talking 13th, 14th. Mainly 14th. And I think that's also probably the date when Mr. O'Connell was present for some of the discussions.

Q. I think on the 14th there was a meeting, according to what the Tribunal has been informed and judging from the documentation, between Mr. Towey, yourself, Mr. McMahon and Mr. Nesbitt, but according to the information provided by the Attorney General's Office and provided then by Mr. Towey and Mr. Nesbitt, that was a completely forward looking meeting, a meeting discussing changes of ownership going forward.

MR. O'DONNELL: Sorry, Chairman, I think I pointed this out to previous witness, Mr. Towey; that Mr. Nesbitt said that he gave advice at that meeting about the change in ownership, the historical change in ownership.

CHAIRMAN: Well I note that, Mr. O'Donnell.

MR. O'DONNELL: So it's not strictly but we can deal with it when I come to examine Mr. Brennan.

Q. MR. HEALY: The only reason I am putting it to you, Mr. Brennan, is because of the Attorney General's letter of the 4th February 2002 where he says that the office had sought and received clarification from Mr. Nesbitt and Mr. Towey. And what he says was that, and I am quoting from paragraph 6 maybe I should just let you familiarise yourself with it.

If you go to page 1 of the letter, please.

"On the 14th May there was a consultation with counsel and others attended by Mr. McFadden and Mr. Gormley.

Mr. McFadden kept a note.

On the 15th, Mr. Towey of the Department sought advice from this office regarding the content of a draft letter which the Minister proposed to send to the Chief Executive of Esat Digifone concerning the consent required under Article 8 of the licence in relation to the issue of shares by the licensee and to the transfer of shares in the licensee in specified circumstances and under certain conditions.

Messrs. Gormley and McFadden regarded the draft letter as merely relating to the then ongoing process of negotiating the terms of the licence, in particular Article 8."

I think that's what's been called the side letter.

A. Yeah.

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

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

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

"6. Subsequent to counsel furnishing his written advice, he was requested to attend at the Department during the closing stage of the licence issuing process. Counsel has

informed this office that while he was there he furnished oral advice in relation to the licence condition regarding ownership changes and in particular, he was asked whether such condition was solely "forward looking." Counsel advised that that was the case." And so on.

I am suggesting to you that at that stage what was being discussed were the looking forward issues, what I call the pure Article 8 issues?

A. Am I right in my recollection that this is the second of two letters from the Attorney General's Office to the Tribunal at that time?

Q. Yes.

A. And in the first such letter the Attorney General's Office say that the advice of the 14th May dealt with the matter?

Q. Yes.

A. That's the issue that's been in contention in the last couple of days.

Q. Yes, but you are saying your understanding of what happened stemmed from meetings and you put the meetings to having occurred at this time. And I am suggesting to you that those meetings dealt with Article 8 forward looking issues only.

A. That's what this record seems to show. I am not the author of it.

Q. Very good.

Thanks, Mr. Brennan.

CHAIRMAN: Mr. Fitzsimons?

MR. FITZSIMONS: I have no questions.

CHAIRMAN: Mr. Shipsey?

THE WITNESS WAS EXAMINED BY MR. SHIPSEY AS FOLLOWS.

MR. SHIPSEY: Chairman, just a few questions for

Mr. Brennan.

Q. Mr. Brennan, you have, during your evidence over the last number of hours, reiterated what you did when you originally gave evidence over several days, and you have indicated that you had a far greater involvement in the initial competition phase as opposed to the licensing phase and in relation to that evidence which you gave and which you gave extensively on the last occasion, there was, and you explain that there was quite a difference between those two phases; isn't that correct?

A. Correct, yes.

Q. And you will remember that in the competition phase, coming towards the end of the competition phase, you got a letter from Mr. Walsh of IIU which, and I don't remember the full detail of it, but you regarded as a somewhat unsolicited and out of the blue letter in relation to a suggestion that IIU were involved in the Esat consortium; isn't that correct?

A. That's correct. There is plenty of evidence given here on that subject.

Q. And you took the view, which you regarded as being proper and correct, to not have regard to that and to return the letter as if you had never received it, in effect, and what

you were going to do and what you were going to determine the competition on was on the basis of the applications that had been received within the time limit imposed by you under the competition. Would that be a fair way of summarising your view?

A. Yeah.

Q. And you took the view, presumably, that it would be wrong and unfair for Esat Digifone or indeed for any of the other consortia to be able to shift participants around in the period before a decision was taken on the competition?

A. We simply took the view it was much simpler than that, that there was a clear statement given to all consortia that after the presentation meetings, that any further documentation could only be accepted if it was furnished at our request.

Q. Right. And that applied whether it was Esat Digifone or

A. Absolutely.

Q. any of the other consortia?

A. Yes.

Q. And you were going to make your decision on the basis that the material that you had up to and including the point when the presentations concluded?

A. Correct.

Q. And that, Mr. Brennan, I can see both the fairness, the soundness and the logic of such a position. But you did know, and I take it you would have been mindful of the fact that notwithstanding the fact that you were taking that

position, that if there was a result in the competition, if one of the applicants was successful, that there was the potential or the possibility for some changes to occur in the negotiation for the licence that would ensue thereafter?

A. I am not so sure that I was thinking that way at that time, I am just not sure.

Q. And it may be the case that you didn't think of it, but certainly insofar as the Esat Digifone application was concerned, there was to be a placing of shares with four institutions and you weren't to name those institutions; that much was clear at least; isn't that right?

A. That's true, yeah.

Q. And once the result of the competition became known I think in, some date in October, you then moved from the competition phase into the negotiation for a licence phase; is that correct?

A. Yes, that's correct.

Q. And the person that won the competition was going to be given the right to negotiate for the licence but without any certainty, any absolute certainty that they would get such a licence?

A. I actually think that the letter that issued to them at the time made that clear.

Q. And what ensued, then, over the next several weeks and months was the sort of detailed discussion and consideration of the actual licence; is that correct?



A. That's what occurred, but I wasn't closely involved in it.

Q. I am not suggesting you were but I mean you were, though not as directly involved as Mr. Towey whom you reposed a lot of trust in and confidence clearly, and you said that on the last occasion, that's what he and some of the other members of the team within the Department were involved in?

A. Yeah, I think we gave evidence previously, I gave evidence previously and so did others that the regulatory side of the Department led by Mr. McMahon asserted its position as the licensing authority effectively. And Mr. McMahon and Ms. Finn took over leadership for an extended period. I explained in evidence before, you may not have been here, you may not have seen the transcript, that there was actually a restructuring within the Telecoms Divisions of the Department sometime in October/November 1995 where my duties were changed significantly. There was an additional there was a Principal Officer retired who had a postal sector. I took over the postal sector in the run-in to the presidency because there was to be tricky negotiations about a contentious directive in Brussels and the Commission expected it finalised in the Irish presidency. So I was given that as new duties and other duties were removed from me and the respective roles of the three different principals were clarified. So at that stage my recollection is that Mr. McMahon, and I don't know when Ms. Finn came into it, and I noticed in the last couple of days some attempt to sort of suggest that

Ms. Finn was a minor official very new to the job and so on. I don't think that that's a reasonable description of the circumstances. She was a formidable lady who quickly, after it, went to go on to become Regulator of two utility sectors in the channel island and is now director of Ofwat in the UK. So she was not a minor inconsequential official, and I think that needed to be said.

Q. Thanks for that, Mr. Brennan. If I can just take you on, then, to April of 1996; that's a period of some several months between October '95 and April '96. Were you at all aware of press comment or speculation or reporting about the involvement of IUU and Mr. Desmond in that period of time?

A. That's, again, something which evidence has been taken here before, and in fact I was the one who brought it to the attention of the Tribunal the fact that there was a press cutting service in the Department and that it showed that there were some references, I have forgotten the time frame now, I brought the Tribunal's attention to that, and if I thought it was in any way threatening to myself, why would I have bothered, you know?

Q. I am not asking you that, but I think it shows an awareness on your part at some stage and at least the information was, as I think Mr. Fanning suggested yesterday, in the public domain even if it wasn't, as it were, very clearly on your radar screen or Mr. Towey's radar screen, would that be correct?

A. That's clear.

Q. And again the fact that that was reported in November of 1995, it was brought to your attention, or Mr. Towey's attention it didn't seem to have caused consternation that there was this reporting or speculation at the time?

A. No.

Q. Now, you got a letter then, or at least the Department got a letter from Mr. O'Connell in April of 1996, and that's the letter which spelt out the proposed alteration, what I might want to describe as, or slight alteration of one set of financial institutions by another financial institution, and clearly you have said, and said a little earlier, that just because it was IIU and because Mr. Desmond was involved in it, you were going to have to ensure that there was verification that he was good for the money and that IIU were sound and substantial and fit the description of a financial institution, would that be right?

A. That's correct, yeah.

Q. And clearly in any process for the negotiation for the licence it's not common, be it a mobile phone licence or any other licences, that there are negotiations and some things happen and changes are made in the course of that process. That happens in life and I take it has happened in your experience. In other words, if somebody wins a competition in a given month, it doesn't mean that the licence that's awarded to them is precisely as you envisage it when the competition was won?

A. I am hesitating to concede that. It's just it's a complex question that needs consideration.

Q. All right, Mr. Brennan, I won't pursue it with you then. But then the letter came in from Mr. O'Connell, and it's something you had to deal with because it was suggesting that there was to be a new financial investor and that the shareholding was going to change from what had been proposed in the original application; isn't that right?

A. Yeah.

Q. And forgetting for the moment about the percentage change, because that's something well, numeric and something that you regarded as fairly fundamental, but in relation to the identity of the new investor, you had to do two things: You had to satisfy yourself that that was legal in the sense of being permissible, that you weren't going to grant a licence to the preferred consortia in circumstances where you shouldn't legally do it. And secondly, you had to satisfy yourself that if it was legally permissible, that the entity that was going to come into the consortium that was getting the licence had the financial wherewithal to provide the money; is that correct?

A. Yes.

Q. And in relation to those two matters, what I describe as the legal and financial, that's what you and Mr. Towey and others set out to do in the weeks following Mr. O'Connell's letter?

A. That's correct.

Q. Now, the reason we are back here again revisiting this particular period of time and that particular issue is, I think you appreciate is because of a working understanding on the part of the Tribunal, or the Tribunal's legal team, that you and the Department did not have the benefit of legal advice in relation to the, what they call the shareholder configuration issue; is that your understanding as to why we are back here?

A. It is, yes.

Q. And that is based on an understanding or a suggestion or a belief on the part of the Tribunal, or the Tribunal's legal team that the opinion that they saw before you gave evidence in 2003 or whatever year it was, and that you saw but that nobody else involved in this Tribunal saw until privilege was waived earlier that year, that that opinion didn't do what the request set out to do in terms of clarifying the legal position as to whether there was a legal entitlement to substitute IIU for the Davy's placed four investors; is that correct?

A. Yeah, that's, I think, a fair description of what we are doing here at the moment.

Q. And again I asked Mr. Towey as well. When you were giving evidence in 2003 and you knew that the opinion was not in the public domain, and I think you said a little bit earlier that you were pressing for it to be, or at least you couldn't see why it wasn't in the wider public domain that the privilege hadn't been waived, did you have any

doubt in your mind when you originally gave evidence as to what your understanding of that opinion was?

A. I didn't, no.

Q. And therefore when you learnt of the working assumption of the Tribunal, or the Tribunal's legal team, is that a matter that caused you personally some concern?

A. There is a lot of matters that cause me concern, if I might put it like that, but yes, I was confident that the evidence about the opinion would support our position and what we did at the time, and I was anxious that such evidence be tested.

Q. And therefore would I be correct in saying that your desire at that point was to ensure that the Chairman, who has been investigating all these matters for a very long time, didn't proceed on, as it were, not a false premise, but on a misunderstanding of what you understood at the time, would that be correct?

A. Yeah. I think that's fair enough. And it was also of interest and you know Mr. Loughrey has to come on another date that the Tribunal seemed to me to, or at least the Tribunal legal team, maybe the Tribunal itself, to have misread the first letter from the Attorney General's Office, and I would even say put a representation of it to Mr. Loughrey in evidence where he felt, I guess, obliged to agree with the Attorney General of the day where it was being suggested that the matter wasn't dealt with in the opinion. Whereas the letter said in the very next

paragraph the advice was requested and dealt with in the opinion.

Q. You may or may not know, Mr. Brennan, I know you said you and Mr. Towey were very keen that the letter would be in the that privilege would be waived in relation to it.

Can you just tell me, is that something that you and he, is that a view you long held or is that sort of a recently held view?

A. For my own part, it's a view I held for a long time. It goes back, I suppose, as far as when the opinion was adverted to in examination by counsel for another party.

And even as far back as that, I reread the opinion and I said surely we should be waiving privilege on this, you know.

Q. And I take it that you may not always understand the workings of lawyers, why lawyers may advise that you waive or don't waive opinion, but I take it, and this is just sort of speculation on my part, but the waiving of legal privilege in circumstances where there is other litigation contemplated is something that you might have to weigh up in deciding whether to or whether not to waive legal privilege, would you accept that?

A. I think it's fair to say that the whole protection of the privilege was driven by the Attorney General's Office and those of us intimately concerned in the matter. It was never properly explained to me actually what were the legal niceties that was driving this position in the Attorney

General's Office, so I couldn't understand it. As far as I was concerned, here was a document that was critical in enabling me to further demonstrate that what we were doing at the time was done correctly.

Q. You may not have known it but it's helpful that you have clarified that this is a view that you held for a long time, that my client, Mr. Desmond, was looking, since 2003, for the opinion to be made available and engaged in very extensive and voluminous correspondence with the Tribunal in that regard.

Then you got Mr. Nesbitt's opinion and when, as you say, you read it and considered it back in May of 1996, do you recall whether you were at all confused or wishing to have greater clarity about any of the legal matters that were weighing on your minds as you moved towards the award of the licence?

A. What I said previously, and it's still my position is, that I do not have significant recall of the events that were going on, what I was doing at the time. I just don't have significant recall of it. But the notion that we didn't read the opinion or that we did read it, knew that it was faulty and decided to plough on regardless is foreign to my concept of public service.

Q. And didn't happen?

A. It didn't happen, no. I don't recall that it didn't happen, but I know it wouldn't happen, it couldn't happen.

Q. And you said, I suppose somewhat accurately, that insofar



as parties who are here in this Tribunal are concerned, that we, in our own separate way, may have, I think you used the words different agendas in relation to all of this and in relation to the opinion itself, but I take it in terms of your function and carrying out your duty, you had no agenda other than to ensure that you could do what was legal?

A. Get the licence issued in time for the business to take off and keep the State out of court.

Q. Thanks, Mr. Brennan.

CHAIRMAN: I better just make inquiry first of Mr. Kelly, Mr. O'Callaghan.

THE WITNESS WAS EXAMINED BY MR. KELLY AS FOLLOW:

Q. MR. KELLY: Just one question my counsel isn't here but you heard the questions that my counsel put yesterday to Mr. Towey?

A. I was here at that point, yeah.

Q. And arising out of that I just want to ask you one question. Through the process in '95 and '96, were you ever enthralled to Mr. Lowry, the Minister?

A. I don't believe I was ever enthralled to Mr. Lowry or any other Minister that I served.

CHAIRMAN: Mr. O'Callaghan.

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

MR. O'CALLAGHAN: Mr. Brennan, I appear to Mr. O'Brien.

Q. I think you were heavily involved in the whole GSM project, isn't that correct?

A. That's correct.

Q. And you were on the Project Team; were you Chairman of the Project Team?

A. I was, from the very beginning.

Q. And I think at the time of the negotiations in 1996, you had to pull back a bit because a lot of your time was being taken up preparing for the presidency that was coming to Ireland; isn't that correct?

A. That's right.

Q. And can I ask you though, would you agree with me that the whole GSM process was one that was carried out under intense scrutiny by the people who were competing in it and by their lawyers?

A. The entire process itself?

Q. Yes.

A. They didn't have much opportunity to scrutinise the process as it was ongoing. I mean between, say, the closing date for applications and the presentations, there was little enough contact. They had a period of presentation meetings, which were gone through here in the past, and there was little or no contact from that until the announcement of the result. So I am not sure that I understand what you are suggesting to me.

Q. Okay. Were you aware that they were all individually advised by group teams of lawyers?

A. I would have assumed that to be the case.

Q. And so obviously because of that, people working on the GSM

process within the Department had to be very careful to ensure that they took the correct procedural steps, isn't that so?

A. Oh, absolutely.

Q. And am I correct in stating that when you needed legal advice, you were able to go to the Attorney General's Office and get that legal advice; is that correct?

A. Yeah. It's even of interest in terms of looking back at it, that the Attorney General's Office deployed two legal people within the office to this particular task. That would be in itself unusual.

Q. So you had sufficient resources available to you to give you legal advice when required in this process, isn't that so?

A. Yes.

Q. And Mr. Nesbitt, we know, is involved at some stages in October 1995. Were you aware that he was involved as a senior counsel that could be availed of by the Attorney's Office?

A. I have forgotten at this moment the particular business that he was advising on in October, but it's extremely unlikely that I wasn't aware of it. I knew that he was kind of nominated by the AG's office as the one to be consulted in this instance.

Q. And if you received legal advice, you within the Department and the Department generally, isn't it as plain as a pikestaff that you followed that legal advice?

A. Yes.

Q. And it would be reckless and dangerous for you or the Department not to follow legal advice, isn't that so?

A. Yeah, if we weren't I mean, we have been getting legal advice from the Chief State's Office and the Attorney General's Office throughout my career. If there were issues and advice that we had further questions, we just asked the questions. But when we bottom out a legal position, we would follow it.

Q. In terms of the ownership issue, would you agree with me that the ownership issue that we are looking at here in terms of the conformity issue is quite a straightforward transfer of IU for four other financial institutions?

A. Yes.

Q. And that it was what I would describe as a slight change in the makeup of Esat Digifone, would you agree that it was a slight change?

A. I wouldn't seek to weigh it on a scale and use any particular adjective to be honest.

Q. But the important thing from the point of view of the financial institutions that were making up the 20%, was that they'd be good for the money; isn't that correct?

A. Absolutely, yeah.

Q. And you didn't need them to have any expertise in telecommunications or establishing a mobile network, isn't that so?

A. Yes.

Q. And what you needed simply was to ensure that they had the money available, isn't that correct?

A. Yeah.

Q. And if IIU had been identified in the bid back in August 1995 as constituting the 20% financial investor, your only concern would be whether or not it, as an institution, had the financial viability to be a financial investor; would you agree with that?

A. Well, it's a kind of a speculative question. I have no reason to disagree with it but I am conscious of the fact that you are asking me to speculate.

Q. But you have no reason to believe that that wouldn't be the case, isn't that so?

A. I haven't, no.

Q. And if you were told, when the Department sought legal advice on the ownership conformity issue, if the Department was told that this could not proceed because there was a slight change between IIU and the other institutions, what would the Department have done?

A. I think we would have had no alternative but to follow the advice and I think we would have teased out with lawyers what exactly we had to do at that point.

Q. And if there was a strenuous legal requirement that in fact the 20% financial institutions had to be the four institutions identified in the bid, there wouldn't have been any difficulty that you believe

A. I think we would have had to give the consortium the

opportunity to reinstate that position.

Q. And the likelihood is that irrespective of who made up the 20% financial investment side of it, Esat Digifone was still going to win the licence; isn't that correct?

A. Yeah, I think it probably would have there would have to have been something very significant going on for those negotiations to fail.

Q. Can I ask you to look at the book that I showed Mr. Towey yesterday. And there are just some documents in it which I wish to refer you to. I don't know if you have that book up there. And could I ask you to look at Tab 1 of that, Mr. Brennan.

A. Yes.

Q. This is the RFP document that was published on the 2nd March 1995. Did you have any involvement in the preparation of this document?

A. Yes. I was all over it for months.

Q. And you see paragraph 3 where there is the reference to how full ownership details must be provided. What was the purpose behind including that in the document?

A. I believe you need to know who you are dealing with.

Q. Am I correct in stating that nowhere in this document is there any rule which says that shareholders or the makeup of the applicant cannot be changed at the time the licence is to be granted?

A. I don't recall there being any such statement. I know that either this document or the clarification document given in

response to queries later dealt with the issue of change of ownership after the licence was issued. But I think the documentation was probably silent on the kind of thing you are putting to me.

Q. Could I ask you to look at Tab 2, and this is something I mentioned to Mr. Towey yesterday. This is the section on the ownership from the Esat management section in the bid, and you will see in the fourth paragraph down, Mr. Brennan, there is a reference to "As of submission of this application, Davy Stockbrokers has received written investment commitments from..." and it identified four proposed financial investors. Do you agree with me that the subordinate clause "as of submission of this application" implies that there may be some change to the makeup of the financial investors?

A. I heard you put that to Mr. Towey yesterday. I can see why you would put it like that. I would say that further down: "...has received written investment commitments" is probably stretching the quality of the letters, to be honest. But as regards the opening words, I don't quibble with what you are saying.

Q. Could I ask you to look at Tab 5, and I think this is a letter to which you referred to yesterday in answering one of Mr. Healy's questions, and this is the letter which prohibited the Department from publishing the name of the institutional investors, isn't that so?

A. Yes.

Q. And the letter from Esat Digifone dated 4th August 1995.

And at paragraph 2 Esat Digifone state:

"The following names to go make to our consortium are

Communicorp Group Limited

Telenor

institutional investors.

"We do not wish the names of the institutional investors to

be released at any stage."

Am I correct in stating that the Department had no

difficulty with that; isn't that correct?

A. That's correct. That's in response to a particular letter

from the Department, but there were overriding

confidentiality obligations built into the competition

documentation well before that anyway.

Q. Could I now ask you to move forward to Tab 12 now,

Mr. Brennan. And this is the letter to which Mr. Shipsey

referred you. This is the letter that was sent in by IIU

on the 19th September 1995, isn't that correct?

A. Yeah.

Q. And your response to that letter is contained at Tab 13.

Now, if I can just open that to you.

It says:

"Dear Mr. O'Brien,

"I refer to the ground rules of the competition as outlined

at our recent meeting with you on Tuesday 12th September.

The Department has already made it clear that the

applicants shall not be permitted to provide any further



material to supplement their applications, except where expressly requested to do so by the Department.

"Accordingly the additional material received from you on Friday last is enclosed herewith. It shall not be taken into consideration in the evaluation process."

Now, is there anything else you think, with the benefit of hindsight, that you should have done in respect of that other than send it back?

A. We were convinced, Mr. Towey and I, that we were following the clear rules of the competition as confirmed orally to the applicants both at the beginning and at the end of the oral presentations.

Q. At Tab 16, Mr. Brennan, is the letter that you sent to my client on the 13th November 1995 after Esat had been awarded the negotiation right with the Department in respect of the licence I have opened it previously but that is the letter that really started the negotiations, isn't that so?

A. Yes.

Q. You are aware also, Mr. Brennan, are you, that around this time in November 1995, the issue of the award of the second mobile phone licence or the right to negotiate had become a political football?

A. Yeah, those words have been used to describe it many times.

Q. And if you look at Tab 18 of the book, isn't it evident from this Irish Times report of the 22nd November 1995, that the identity of IIU was out there as of this date,

November 1995, isn't that so?

A. Correct.

Q. And at Tab 17, and I don't propose to open it, but there is clearly a Dail debate on that day in which Mr. Robert Molloy raised questions about the 20% ownership issue, isn't that so?

A. Yes.

Q. And that was dealt with by the Minister at the time, and I have opened that yesterday.

Can I now go on to specifically the ownership conformity issue, and if you look at Tab 20 you will see there is a fax from Ms. Finn to yourself and Mr. Towey on the 16th April 1996. And what she says:

"Martin/Fintan

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

So at this stage, as of the 16th April 1996, the issue of the ownership conformity was an issue within the Department, isn't that so?

A. Yes.

Q. And it was something you were considering and it's something that you thought needed to be resolved, isn't that correct?

A. Correct.

Q. And if you turn over the page, you will see at the bottom

of the page that Ms. Finn identifies, in her exposition of the ownership makeup of Esat, that "Owen O'Connell is to provide further information in writing." And I suggest that that's a further indication that the Department wanted information about this ownership change, isn't that so?

A. I guess it is, yeah.

Q. And at Tab 21 there is the letter from Mr. O'Connell that came in.

And at Tab 22 there is the note of the meeting, but of course you weren't at this meeting on the 22nd April with the Attorney General's Office, isn't that so?

A. That's right.

Q. But were you aware that your Department and Mr. Towey were seeking legal advice at this stage in respect of the ownership conformity issue?

A. I almost certainly was aware, but I have some notes from my diary here which show me that I was actually in Brussels on the 17th and 18th and again on the 23rd, 24th and 25th. So that demonstrates that I wasn't crawling all over this. I was leaving a lot of it to Mr. Towey who would regularly update me, consult me and so on, you know.

Q. And you had confidence in Mr. Towey to be able to deal with this issue?

A. Absolutely.

Q. And at Tab 25, Mr. Brennan, there is the letter that Mr. Towey wrote to the Attorney General's Office on the 24th April 1996 in which he seeks legal advice on the issue,

isn't that so?

A. Yes.

Q. And one thing in respect of which no one in this room can be in any doubt, is that the Department sought legal advice on the ownership conformity issue?

A. There is no doubt about that.

Q. And I don't think anyone can dispute that. And can you tell me from your experience working in the Department or in the Civil Service, that where a Department seeks legal advice on a particular issue, would it go ahead and make a decision without getting that legal advice?

A. Not in my experience.

Q. Could I ask you now to move forward to Tab 32. And this is your letter that was, I think, drafted with the assistance of Mr. Towey and the Attorney General's Office, isn't that correct?

A. Yes.

Q. And it's your letter to Mr. O'Connell on the 1st May 1996.

And at the penultimate paragraph on the first page he says:

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

So it's apparent again, I suggest to you, as of the 1st May 1996, that you still need clarification on this issue?

A. That's correct.

Q. And at Tab 34 we have the note of the meeting of the 3rd

May where, again, the issue is being raised. It has been referred to it Mr. O'Connell's note as a "political football." They need to know the identity of each shareholder. And there is the change in the institutional investors; the change of Advent and Davy's by IIU. And you are stating, or it is noted that the Department requires detailed information on IIU, isn't that the case?

A. Yes.

Q. And now, could I ask you to move to Mr. Nesbitt's opinion, which is at Tab 37. And could I ask you to look at his covering letter rather, on the second paragraph of that, where Mr. Nesbitt says:

"However I remain of the view that the Minister should not drag his feet in issuing the licence."

We know that at this stage, Mr. Brennan, that Mr. Nesbitt has all the documentation pertaining to ownership conformity. He has Regina Finn's note. He has the William Fry letter, and he has the Esat application which sets out details of the ownership bid, and he has a letter sent to him by the Office of the Attorney General seeking advices.

In light of that, and in seeing these advices here, isn't it clear as a pikestaff that Mr. Nesbitt was saying there is no obstacle to going ahead granting the licence?

A. Well we have been saying all along that that was our view.

Q. But irrespective of whether lawyers, 13 years later interpret it that way, that was your view back in 1996?

A. Yes.

Q. And if you look at Mr. Nesbitt's opinion, and at the second page of the opinion where he says in the second paragraph, the second sentence: "I do not think it is tenable to suggest that the licensee has been awarded the licence because of the parties who owned 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."

And if you are looking for an answer to the ownership conformity issue, that is the answer within Mr. Nesbitt's opinion, isn't that correct?

A. That's what the argument for the last three days has been about. That's our view.

Q. Could I ask you to look at Tab 38. And Mr. Healy was asking you yesterday first of all, if you look at Tab 39, there is the meeting which took place on the 13th May 1996 between yourself and Mr. Owen O'Connell, and Mr. Healy had suggested to you, well why at that meeting did you not turn around and state 'well listen, we have a legal opinion'?

Can I clarify one issue in terms of timing of this. That meeting was at 12.30 on the 13th May, isn't that correct?

A. Yes.

Q. If you go to the tab before, Tab 38. On the 13th May 1996, the same day, the Attorney General's Office sends the advices of Richard Law Nesbitt to Mr. Towey in your Department. So there is great uncertainty as to whether or

not you would have actually had those advices as of the time of that meeting on the 13th May 1996, isn't that so?

A. Even if we had, we'd be unlikely to have snatched an interpretation without due reflection.

Q. And, generally, do the Department hand out legal advice it has received to make others feel more relaxed or comfortable in their position?

A. Not I don't recall it happening, no. I am not saying it never happened, but it would be unusual, that's for sure.

Q. At Tab 39 we have the minute of the meeting, and it's apparent from the last paragraph on the first page that both yourself and Mr. Towey scanned the letters with you "noticeably pausing to read closely the letters concerning IIU."

Why were you noticeably pausing to read closely the letters concerning IIU?

A. I probably was seeking to assure myself that they contained the information that we considered necessary.

Q. And if you

A. But having said that, I would be then passing that information to Donal Buggy for an evaluation. It wasn't my call.

Q. And if you go to page 5 of that minute, the penultimate paragraph, bottom of the page, Mr. O'Connell records "The meeting ended with Martin Brennan reiterating that it was 'virtually certain that we would have to get more information on IIU' some numbers."

So at that stage you were still emphasising you needed to be satisfied as to the financial solvency of IIU, isn't that correct?

A. Yes.

Q. And that issue only, really, was resolved, I suggest to you, when you see at Tab 40, the letter that came in from Farrell Grant Sparks on the 15th May 1996, and this is a letter that was addressed to you, Mr. Brennan, isn't that so?

A. Yes.

Q. So it was still an issue in the Department until you got information to satisfy you about the financial solvency of IIU?

A. And until Mr. Buggy had a chance to analyse that information and make a presentation, as he did, to Mr. Loughrey.

Q. And if you look over at Tab 41, we see the document that evidences what you just said, because it's the note from Mr. Buggy to Mr. Loughrey. And if I just open it, it's dated the 15th May and Mr. Buggy says, "Mr. Martin Brennan and I have been involved in various discussions in respect of the financial strength of the members backing the Esat Digifone consortium over the last two days and detailed below is my understanding of the current position and an assessment of the consortium's financial strength."

And then this document concludes on the very last page, Mr. Brennan, with Mr. Buggy's approval, or his



recommendation that IIU and Esat Digifone do appear to have sufficient financial strength, isn't that so?

A. Yes.

Q. And then could I ask you to turn to Tab 44. And this is the press release that was issued by Esat Digifone on the 16th May 1996. And it's apparent from the second paragraph of that that IIU were being openly identified, isn't that so?

A. Yes.

Q. No issue in respect of it. Could I ask you now just to look at your statement, your Memorandum of Intended Evidence. Can I ask you to look at the second last paragraph on the first page, Mr. Brennan, where you say "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. An opinion was furnished and then discussed with the senior counsel and the representatives of the AG's Office."

So what that says is that once you got the opinion, after you got the opinion there were discussions with Mr. Nesbitt, isn't that so?

A. I believe that to be the case but, as I said several times, I don't have strong recollection of the actual discussions, when they took place and what their content was.

Q. But you believe Mr. Nesbitt does?

A. Yes.

Q. And if Mr. Nesbitt is to come and give evidence and says he

advised the Department that there was no obstacle to granting the licence to this Esat Digifone with IIU in for 20%, would you agree with me that that's the end of this issue?

A. Well that's a matter for the Chairman really.

Q. Could I ask you

CHAIRMAN: It's a matter, Mr. O'Callaghan, that has to be appraised on its merits.

Q. MR. O'CALLAGHAN: Could I ask you to look at paragraph 4 of your intended Statement of Evidence. And you start by saying "It now appears that the Tribunal takes the view that the opinion may not directly respond to the question asked."

Am I right in saying that you have that view because of the Tribunal's ruling, Mr. Brennan, of the 25th February 2008?

A. Yes.

Q. And if I could ask you to look at that; it's in Tab 46 of the book. And if I could ask you to go to page 5 of that?

Could I ask you to go to paragraph 9 and six lines down where the Tribunal state "The latter was achieved by obtaining from the then Attorney General a letter stating that the advice actually sought had not been produced."

Do you see that sentence there?

A. Yes.

Q. "Not been provided."

Could I ask you now to go forward to Tab 48, and a letter from the Attorney General's Office of 20th December 2002,

where, at the bottom of the page the Attorney General 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 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 13 May 1996, dealt with the matter."

Do you agree with me that that statement in the letter of

the Attorney General is diametrically opposed to what's

contained within the Tribunal ruling that I just opened to

you?

A. That's my view, yeah.

Q. Would you agree with me that it is, and I use this language

carefully, a complete misrepresentation of what the senior

law officer of this country said?

A. I am slow to get involved in that kind of pejorative

language, quite honestly.

CHAIRMAN: Let's just get the facts, Mr. O'Callaghan.

MR. O'CALLAGHAN: I sought clarification on it and I didn't

get it, Chairman. And I still say

MS. O'BRIEN: Sir, I very carefully clarified yesterday

morning precisely what the position was in the relation to

the Attorney General's letter. Not only that letter but

the subsequent letter, and I also explained precisely how

it was that the Tribunal put that interpretation on the

letter. And I do not personally accept for one moment that there was anything incorrect in the Tribunal's interpretation and nor do I believe that the Tribunal should apologise in any way for that interpretation, sir.

CHAIRMAN: You may take it

MS. O'BRIEN: Just one further matter I do wish to add because I think it's very important that this be realised.

The Attorney General made submissions in relation to your ruling on behalf of the Public Interest the current Attorney General. The current Attorney General is aware of the ruling that you made in this matter and no issue of any sort has been raised by the Attorney General in relation to the interpretation as referred to in your ruling. And I think it's very important that that matter be recognised. Nor indeed has counsel for the Public Interest as representing and as counsel for the Public Interest.

CHAIRMAN: You may take it also that in your suggestion that no response was given to your application, that Ms. O'Brien and I consulted carefully on what was said yesterday. So kindly do not indicate that there was no response when that is not the case.

MR. O'CALLAGHAN: No, I didn't say no response. I said there was no clarification. There was ostensible clarification provided yesterday, and I remain of the view that I didn't get clarification. And I would just ask the Tribunal to consider if a witness such as Mr. Brennan had, what I believe to have been misrepresented advice he

received by the Attorney General, he would be asked voluminous questions in respect of it. And, sir, and I say this with the greatest respect, I think the ruling is wrong. It is completely inconsistent with what the Attorney General wrote to the Tribunal. I say it should be corrected. I am not looking for an apology. If it's wrong, it should be corrected.

CHAIRMAN: You have your response, Mr. O'Callaghan. Please proceed with your examination if you wish to do so.

Q. MR. O'CALLAGHAN: Could I now ask you to go back to your Memorandum of Intended Evidence, Mr. Brennan. And at paragraph 6 you refer to how the process of the GSM licence was "for Ireland very important and essential that it be got right."

Can I ask you now with the benefit of hindsight, do you think you got the decision right as to who should win the licence?

A. I never had any doubt after we evaluated the applications that the application that won was the strongest application, the best application. And the consultants, while they haven't come to give evidence, have stated on the record a number of times that not alone was it the best application in this competition, but the best application of competitions they had judged up to that time.

Q. At paragraph 7 you refer to the following, you say: "I should conclude by stating that I stand by my original assertion that I, in common with my fellow civil servants,

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

Can I ask you, Mr. Brennan, how long have you worked in the Civil Service?

A. A total of about 40 years now.

Q. And you have served under numerous ministers, no doubt?

A. Absolutely, yes.

Q. And can I ask you when Minister Lowry was your Minister did he seek to inappropriately direct you as to how this licence should be awarded?

A. I don't believe he did on any aspect of it.

Q. Were you a slave to Minister Lowry's wishes?

A. No.

Q. Were you enthralled to him as a minister?

A. I don't fully understand the concept of thrall, but no

Q. It's means you are a captive or you are slave to

A. Absolutely not, or to any another minister, as I said yesterday, that I served. And several ministers that I served came here to give evidence and this idea was never canvassed with them.

Q. And in terms of the grant of the licence ultimately to the

Esat Digifone consortium that contained IIU within it as 20%, do you agree that that was agreed to by the Department based on legal advice that the Department received

A. Yes.

Q. from the Attorney General's Office based on an opinion and oral advices furnished by a respected senior counsel?

A. That's my position.

Q. Thank you very much.

CHAIRMAN: Mr. O'Donnell, what's the time factor? I am anxious not to have Mr. Brennan having to do longer than two hours.

MR. O'DONNELL: No, judge, I think I'll be 10 or 15 minutes at absolute most, so I'd be happy to proceed now because I think that would conclude Mr. Brennan sorry, subject to the Tribunal coming back.

CHAIRMAN: Well we will proceed till half past?

A. Chairman, if it helps to get this out by lunchtime, I'd be happy enough to continue.

CHAIRMAN: All right.

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

Q. MR. O'DONNELL: Mr. Brennan, just a couple of questions. I think your evidence previously this morning was I think that you reached the conclusion that the inclusion of IIU was legally acceptable and that you reached that based on the written opinion from Mr. Nesbitt and from the surrounding discussions which you had with your legal advisers in that context?

A. That is my position.

Q. And I think the records indicate that you were present with Mr. Nesbitt at a meeting on the 23rd April, and also at a meeting on the 14th May, and then subsequently again at a meeting on the 15th May? I think the first position is the 23rd April, and I think you have no memory of what was discussed at that meeting?

A. No, I think I have seen my name on the record. I went to Brussels that afternoon, so it would be easy enough to verify what time of the day the meeting took place. I take it I was at it if I am recorded as being at it, but I don't have a recollection of it.

Q. In any event, I think

MR. HEALY: I don't want to interrupt My Friend but I think there might be some confusion.

MR. O'DONNELL: I think, in any event, at the meeting of the 23rd April, there was no advice given at that meeting although the issue of ownership was raised.

MR. HEALY: Rather than I having to take it up in re-examination, perhaps Mr. O'Donnell would look at the note of the meeting of the 23rd which refers to Mr. Nesbitt, Mr. Towey, Mr. Gormley and Mr. McFadden.

MR. O'DONNELL: Sorry, you are absolutely correct.

Q. You weren't at that meeting but you were at the meeting of the 14th and recorded as being at the meeting of the 14th May?

A. Yes.



Q. And by that stage you certainly had the opinion?

A. Correct.

Q. And I think your evidence is that you don't recall specifically what was said at that meeting, but would you disagree with the evidence which Mr. Nesbitt will give, if permitted to do so by the Chairman, that he gave advice to the effect that while, if a person gained control or gained a substantial shareholding in the licensee who would be undesirable, from the public policy perspective, to the Department, that was the only basis on which a change of ownership could be objected to and that no other change could be objected to if this did not compromise the provision of the services agreed for under the licence?

A. I am aware of references to South American figures and so on in that context, but I don't recall the discussion was like that, but I take it from what I have heard around the place that there was, yeah.

Q. You don't disagree with that?

A. No, no.

Q. Kind of

A. As far as we were concerned, and Mr. Towey went on at length and it's been in evidence several times before, the important features of the consortium were the telecommunications expertise, the strength of the companies, and the equity investors we'd be pretty neutral on, so long as they could do what they were coming in to do.

Q. And maybe if I could just look at that aspect of your evidence. You said that you were pretty neutral about the equity investors. I think Mr. Towey agreed yesterday with the question from me, or perhaps from somebody else, that the letters of commitment were fairly watery, fairly insipid, if commitment they be?

A. They were, I suppose, pretty standard of what you'd expect at that stage in a process where they are not going to commit firmly in a situation where the licence hasn't been awarded.

Q. And I suppose you were at any stage, no matter who the financial investors were, you were going to have to look at the basis on which any financial investment was going to be made?

A. Yeah, but I think in the case of the so called 'blue chip', there wouldn't have been much research required, but because IIU arrived on the scene, we didn't know much about them, we had to look into them more closely.

Q. And that was the financial analysis, that's I suppose was the role of Mr. Donal Buggy or the job of Mr. Donal Buggy?

A. Mr. Buggy led. I was with him in the meetings and so on, and I am sure we discussed his report to Mr. Loughrey before he finalised it and so on, yeah.

Q. You also indicated I think in your evidence that you were anxious to get the licence issued in time to allow business to take off and also to keep the State out of court. Can you explain why you expressed that view?

A. Almost no matter what we did carried litigation risk in terms of other parties threatening to sue. Would this consortium have a basis to sue if we had gone a different direction? and so on. They were just the kind of thoughts I had at the time.

Q. I think Mr. Nesbitt's opinion, and it's at page Tab 37 of the O'Brien booklet. Mr. Nesbitt's opinion was accompanied by a letter setting out his advices and that defined them, to some extent, and at the second paragraph, the second sentence of that letter he says "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."

So, did you understand that to constitute the legal advice to the effect legal advice to the effect that you should not delay the issuing of the licence?

A. Yes, I understood that in its plain sense, yes.

Q. Did you understand that then or is it an understanding you have gotten now?

A. No, I think it's very clear.

Q. And you understood it to mean that then in 1996?

A. Yes.

Q. So there was now not simply the political imperative of Mr. Lowry wishing to issue the licence, but also a legal imperative to do so?

A. Yeah. And it also demonstrates the state of Mr. Nesbitt's knowledge when he was writing opinions by the way.

Q. Yes. Well, just on that issue, you never went back to Mr. Nesbitt and said 'we need more advice'?

A. We certainly didn't formally request further advice but it was clear that we had some discussions.

Q. Yes. And the Attorney General's Office never sought a supplementary opinion or further advices?

A. Not that I am aware of.

Q. Now, I think you were subject to some questioning from the Tribunal for failing to, as they put it, disclose the fact that you had an opinion to various different personnel, and perhaps if we can deal with that.

Firstly, you were asked on a number of occasions why you didn't provide the copy of the opinion or indicate to

Mr. O'Connell that you had an opinion. Did Mr. O'Connell ever suggest to you or ask you where is your legal advice?

What's the story on the legal advice? Have you got it yet?

A. I don't recall that he did, but I don't know.

Q. Did you think that if it's a matter that was of concern to him at that stage, that he would have pursued further legal advice?

A. I think Mr. O'Connell just wanted to get into a situation where the licence got issued as quickly as possible. And things were moving along nicely from his perspective and he was closely involved in the discussions within the Department.

Q. And I think you indicated in your evidence that the 40:40:20 was something that you couldn't break, or you

couldn't tolerate any variation from?

A. That was the view we took.

Q. The involvement of IIU was something on which you were less definitive and so you sought legal advice?

A. That's correct.

Q. But was it your, to use the phrase of the Tribunal legal team, was it a working view within the Department that provided the legal advice to allow the IIU involvement to continue, that IIU would remain involved, subject of course to them standing up financially?

A. Yes. I assumed that if the legal advice came back and said nihil obstat, that we were going to issue the licence.

Q. And is that what in fact happened as you understand it?

A. Yes.

Q. Now, you were also asked about your failure in your letter, the letter which was drafted on behalf of Mr. Dukes sent to Mr. Molloy on the 6th December 1996 to include a reference to the fact that you had a legal opinion in relation to IIU?

A. I was certainly asked about that, yes.

Q. That's Tab 12 of the blue booklet. Mr. Brennan, did you seek to conceal from Mr. Dukes the involvement of IIU or the makeup of the consortium in any way?

A. No. What I said yesterday was when Mr. Dukes arrived in the Department, it was one of the first things he inquired about was to get fully briefed in relation to this entire matter, and he was so briefed.

Q. Did you seek to misrepresent to Mr. Dukes the position in relation to the rules governing the competition at any stage?

A. No.

Q. Did you conceal any details from Mr. Dukes in relation to the way in which the consortium had changed in its makeup?

A. I don't believe that I consciously did so. But I reiterate, we are talking about things that happened a long time ago now. Our attitude always was we had nothing to hide here.

Q. Mr. Dukes, when he gave evidence, never suggested that you were anything other than straightforward, honest and truthful in your dealings with him and in the exchanges that you had with him. Does it alarm you or surprise you that there might be a suggestion out there somewhere that you had in some way obscured details or concealed details or misrepresented matters to your Minister?

A. All of that sort of notion is foreign to my concept of public service, which I have a very firm commitment to.

Q. You have worked, as you say, in the Department for over 40 years?

A. In various departments but department structures changed but I never moved from one department to another, but I served in lots of departments with lots of ministers.

Q. And has it ever been suggested to you at any stage in the course of your career that you were guilty of such misrepresentation or obscuring or concealment?

A. Only in this context.

Q. And can I take it, Mr. Brennan, from your evidence, that your view in relation to the effect of the opinion and the discussions you had subsequently with Mr. Nesbitt was a view, a conclusion that you reached in 1996 prior to the issuing of the licence, rather than something that has suddenly occurred to you in the last couple of months?

A. I can't contemplate circumstances where we might have formed a conclusion that the legal advice didn't assist us in resolving our dilemma and then proceed to ignore the advice. I just can't contemplate that. We were straight dealers. We read the advice. We discussed the advice. We came to our conclusion and we moved on.

Q. Thank you very much, Mr. Brennan.

THE WITNESS WAS EXAMINED FURTHER BY MR. HEALY AS FOLLOWS:

Q. MR. HEALY: Just one matter, I want to get one thing clear in my head.

The discussions that you said you had, coupled with the opinion, led you to form your view. Were they discussions that you remember having independently of Mr. Nesbitt reminding you of them?

A. I remember, as I think I said yesterday and previously, I can clearly remember Mr. Nesbitt being physically present in the Department on at least one occasion for a lengthy period and possibly a second occasion, and having discussions about we had discussions with him about various aspects of what was going on. But I have said on

numerous times that I don't now recall, and I don't believe I recalled when I was giving evidence six, seven years ago, the detail of that.

Q. It's not the detail of them. It's the fact that your discussions about this opinion in the context of the restructuring of the ownership of the winning consortium, it's that I want to know.

A. I have been very clear that I only remember the fact that discussions took place. I don't remember the detail.

Q. Right. But do you remember that discussions took place about that issue? Not the detail of what you were talking about but

A. No, I can't say that I specifically have that much recall.

Q. And was it Mr. Nesbitt reminding you that he had had those discussions with you that enabled you to say that in your memorandum? That's what I want to get clear.

A. It's increasingly difficult to separate cause and effect in relation to stuff like this. But certainly we have had discussions about all of these matters in recent times.

Q. Thanks very much.

CHAIRMAN: Thank you, Mr. Brennan, for coming back to give evidence.

Mr. Healy, my understanding was that the arrangement was that Mr. Loughrey would testify on Tuesday, I had the belief he had a difficulty today.

MR. O'DONNELL: He had a difficulty which I had informed the Tribunal team about on an earlier occasion. It's an



unavoidable difficulty but he will be available on Tuesday.

MR. HEALY: That's correct.

MR. O'DONNELL: And we had hoped to conclude him on Tuesday.

CHAIRMAN: I think if we make a 10.30 start, as today, I would have thought it should be feasible to conclude him reasonably comfortably within Tuesday. Thank you.

THE TRIBUNAL ADJOURNED UNTIL TUESDAY, 16TH JUNE 2009 AT 10.30 A.M..