

THE TRIBUNAL RESUMED ON THE 22ND OF JULY, 2009, AS FOLLOWS:

MR. COUGHLAN: Mr. Richard Nesbitt.

RICHARD NESBITT, HAVING BEEN SWORN, WAS EXAMINED BY

MR. COUGHLAN AS FOLLOWS:

Q. MR. COUGHLAN: Now, Mr. Nesbitt, I think you have furnished a Memorandum of Proposed Evidence, and I think you are aware of the procedures before the Tribunal, so if we just go straight into it, if that's all right?

A. Indeed.

Q. I think you have informed the Tribunal that you are a Senior Counsel, and you have a civil practice, with an emphasis on commercial matters, is that correct?

A. Yes.

Q. You have informed the Tribunal that you believe you were first approached by the State to give evidence in respect of the proposed grant of a second GSM licence in 1995. I think you have also informed the Tribunal that you believe the original issue you were asked to advise on concerned the relevance of European law to the proposed competition to be held to find a suitable licence candidate. The European Commission have strong views on the liberalisation of the mobile phone markets in the EU and the importance of leveling the playing field, vis-a-vis the incumbent monopolies. In Ireland the incumbent monopoly was Telecom. You have informed the Tribunal that in 1995, when asked to advise, you were given copies of several documents that informed you of the arrangements pertaining to the

competition process.

On the 25th October, 1995, Esat Digifone Limited were announced as winners of the exclusive right to negotiate the award of a second GSM licence for the State.

On the 18th April, 1996, the Attorney General's Office sent you the documents detailed in their Letter of Instructions of that date. It was a request for advice concerning the validity of the content of the draft licence and the proposal to grant it under Section 111.2(b) of the Postal and Telecommunications Service Act, 1983, as amended.

You have informed the Tribunal that you believe you commenced work on preparing your advices requested on the 18th, but not completed your work when, on the 23rd April, you were called to the Attorney General's Office to meet in respect of issues concerning the proposed grant of the second GSM licence. You did not give advice at that meeting.

You have informed the Tribunal that you do recall a reference to a case concerning the Trips Agreement being mentioned by one of the two officials from the Attorney General's Office. At this meeting you learnt that matters regarding the issues of a licence now involved a new issue concerning the ownership of shares in Esat Digifone, the successful bid vehicle.

At the end of the meeting, it was agreed papers would be sent to you with relevant materials and details of issues on which advice was required.

You informed the Tribunal that you received papers with a letter from the Attorney General's Office dated Wednesday, 24th April, 1996, enclosing the documents described in that letter. The Departmental minute attached to the letter delivered to you was the untitled letter of the 24th April, 1996, from Towey to McFadden/Gormley. Its enclosures were copies of the relevant papers referred to in the third paragraph of that minute and a new draft of Article 8 of the proposed licence. The relevant papers consisted of not less than an extract of the Esat Digifone application; a letter from William Fry to Regina Finn of the 17th April, 1996; and an attached Departmental note containing inter alia an organisational chart concerning Esat Digifone post a share acquisition by IIU.

On Thursday, 25th April, 1996, you advised on dealing with the unsuccessful consortia, a matter mentioned in the documents sent with the AG's Office letter of the 24th April, 1996.

On the 3rd May, 1996, the Attorney General's Office wrote to you with revised drafts of the licence and regulations to implement Commission Directive 96/2/EC.

On the 9th May, 1996, you sent, with a covering letter, your advices on the 9th May, 1996. On the same day you also spoke to McFadden about the issues surrounding the licensing process as they were unfolding at that stage.

You have informed the Tribunal that your written advices of the 9th May involved commenting on the relevance of the

Commission Directive 96/2/EC on the licensing process, the issue of ownership of Esat Digifone, and issues on the draft licence briefed to you. It should be recalled that at that time Esat Digifone had won the right to negotiate the licence. That matter was no longer in the hands of the PTGSM. It was not a matter of dealing with the issues that had it was not a matter it was now a matter of dealing with the issues that had arisen and of concluding an appropriately worded licence. The Department of Transport, Energy and Communications was responsible for doing this.

You have informed the Tribunal that so far as you were concerned, the change of ownership of the shares in the proposed licensee. If which you were informed was an issue particular to the unique circumstances of how Esat Digifone came to be in negotiation with the licensing authority, the possibility of share ownership after licence issue was a separate issue but shared material elements.

You have informed the Tribunal that you note the suggestion of Tribunal counsel that the former element was not dealt with in your advices on the 9th May, 1996, and that this advice was concerned only with the post-licence situation.

You have informed the Tribunal that you did not intend that your advice should be so understood, and do not believe that it should be so understood. The resolution of this matter aside, you believe that in the context in which your advice was given, the interaction you had with officers of

the Department and the AG's Office and events of the time when the advice was given, could not have obstructed the fact could not have obscured the fact that you were of the opinion that the involvement of IIU was not a problem. On the 10th May, 1996, you received a letter from McFadden regarding the changes being made to the draft licence and, in particular, Article 8. You replied to McFadden on the 13th May, 1996. Your advice was directed ensuring that what was offered as the winning proposal stayed true to the proposal. You were of the opinion that changes to ownership of the licence owner post licensing should and could be controlled within reason.

On the 14th May, 1996, you were called to a meeting with Gormley, McFadden of the Attorney General's Office. Towey, Brennan and McMahon of the Department were there. You cannot recall if Mr. Andersen was present. A number of topics arose at this meeting. The first dealt with disgruntled competition entrants who had failed to win the competition. The Department wanted to be proactive in responding to their questions and to allow them a debriefing on why their entries had not proved to be the winner. You were broadly supportive of such a debate. After this topic was dealt with, the meeting turned to other issues regarding licensing.

One issue concerned the ownership of the shares in Esat Digifone.

"Whilst I believe that those present had my opinion, I

don't recall knowing that as a fact. I recall outlining to the meeting my views on changes of ownership of the prospective licensee you had been told about."

You recall making the point that ownership of shares in the licence could only be a concern to a licensing body if a change in ownership might compromise the service to be provided. This issue was a pre and post licence issue matter.

It was clear to all that the proposed licence was being awarded to the competition winner and was intended to remain with the competition winner, Esat Digifone. You expressed the view that the competition had produced a winner based on Esat Digifone's plans and proposals. The merit of those plans and the feasibility of the funding plan were what drove the selection of Esat Digifone as the winner. You noted to the meeting that there was no reason why any of these matters had to be compromised by a change of ownership of the shares in the winning company, but accepted it was possible they might be.

To illustrate the distinction between the change of ownership and that imperilled to the merit of a winner's plan and when a change might render a winner unacceptable to the licences, you suggested that if a change of ownership led to control of the licensee by a party unacceptable in public policy terms, for example a South American drug lord, that might be an event which could mean the winner could be refused the licence. You also

expressed the view that simple explicable changes in ownership that were the stuff of normal business couldn't be sufficient to deprive the winner of the right to negotiate and take the licence. You said you viewed the makeup of the shareholders to involve IIU as the stuff of normal business, particularly where the involvement of new shareholders had been flagged by Esat Digifone.

At the time, you were aware of the nature of the competition process in general terms. You were aware from your instructions that Esat Digifone Limited was being offered as a 50:50 partnership of Telenor and Communicorp Group. However, the relationship was to change by the sale of initially 20% of their combined shareholdings to be placed by a stockbroker and then more equity would be sold down within three years of the launch of the service. All this was to lead to an ownership arrangement of one-third Telenor, one-third Esat, and one-third the other investors.

You have informed the Tribunal the change which triggered Fintan Towey's request for advice flowed from the fact that the 40:40:20 relationship was going to become a 37.5:37.5:25 relationship. Further, the identity of the 25% shareholder was now stated with precision, namely IIU.

You have informed the Tribunal that you personally viewed this change of ownership, IIU instead of Davy investors previously flagged as otherwise, as a matter of no material consequence.

You have informed the Tribunal that you clearly recall

making your view in this regard known to the persons you met at the time. "I was asked for advice in May of 1996, being Brennan, Towey, McMahon, as well as Mr. Gormley and Mr. McFadden. It was my opinion that the licence" sorry it was your opinion that the licence agreements had to include, by way of terms, whatever was necessary and lawful to ensure that what was promised by the winner would be delivered in fact. In that regard, your opinion of the 9th May, 1996, went on to detail how this might be achieved by way of licence terms and conditions.

On the 15th May, 1996, the issue of change of ownership in Esat Digifone was, again, addressed by you. A letter of that date from McFadden to you expressly referred to the fact of the meeting at which ownership issues were discussed on the day before and asked could you settle a draft letter to Esat Digifone on the issue of shares in Esat Digifone.

"Esat Digifone wanted to understand the effect of proposed Condition 8. At that time, I understood that the Department wished to maintain the 40:40:20 ratio to the date of licensing. Thereafter, any change in the relationship was subject to the Minister's prior written consent having been obtained through the process detailed in Condition 8."

You responded on the 15th May, 1996, and suggested the draft letter be changed as the licence had not then issued.

You noted that as the letter which the Minister was being

asked to write was being written at a time the licence was not finalised, the letter could only offer general guidance as to how the Minister might conduct himself if a request was made. You were conscious not to get a situation where any agreement to any new changes was being given at that time and before the issue of the licence.

The issue of ownership came up again when you were called to the Department of Communications in Kildare Street on what you were led to believe was the final evening of negotiations of the terms of the licence agreement with Esat Digifone. In the course of these negotiations, the exact effect of Clause 8 of the agreement on ownership change was queried by Owen O'Connell of Esat Digifone. He was concerned that if Esat Digifone signed up, the clause might be used in the future to cause difficulties in relation to the previous ownership change, namely IIU having 20% of which the Department were aware.

You discussed this matter with Department officials present, who you believe to have included Brennan, Finn, McMahon. The request for your attendance was at very short notice. At that time, the situation on the ground, as you understood it, was that IIU was taking 20 percent, and this was acceptable to the AG's Office and to the Department as advised by you. In the circumstances, it was unclear why O'Connell had a problem. The only changes that would be of concern were future changes. You said you would explain this to Owen O'Connell and would point out that on signing

the provisions would only be 'forward-looking', so that

what was his problem?

You then spoke to Owen O'Connell. You explained that the current ownership arrangements of 40:40:20 were accepted.

You said what could be the problem? He said Esat's history with the Department, and particularly the Regulatory Division that was involved in the licence negotiation was such that Esat believed absolute clarity was necessary.

You both discussed how that matter might be resolved in a practical way. You suggested that a side letter stating Condition 8 was forward-looking should be sufficient to quiet the fears of the licensee. He said he believed that would be a fair solution. You reported this to those present, and it was agreed such a letter could be given such a side letter could be given. At the same time Owen O'Connell was obtaining his client's instructions.

"The side letter solution being acceptable to all, I excused myself from the meeting on the basis I would be available on my mobile phone for the balance of the night."

The balance of negotiations to agree the licence terms continued to finality without you being called to help further.

And that's your statement?

A. That's my statement, yes.

Q. Now, could I just ask you, if you go to, I think it's the fourth paragraph of your statement, where you state that:

In 1995, when asked to advise you were given copies of

several documents that informed you of the arrangements pertaining to the competition process.

Can you be of assistance to the Tribunal of what documents you had at that time?

A. There is a letter that was written to me then that sets out a list of documents, and those are what I was given. I don't have that letter before me now.

Q. We can clarify that, so there is no need to

A. No.

Q. Further, just in relation to that, about what documents you might have had, when you say at, I think it's about the tenth paragraph of your statement, you received papers from the Attorney General's Office dated the 24th April, that particular paragraph, and you go down, in the statement, to say: "The relevant papers consisted of not less than an extract of the...." Again, can you be of any assistance to the Tribunal, what documents you had?

A. Yes, I can. You gave me a folder I think on the last occasion, it was a folder called the Opinion Documents or something, and I put that folder into chronological order, and if we think if I just go to the document dated the, it's a document dated the 24th April

Q. Well, I suppose I can approach it this way: It was the extract from the Esat Digifone application

A. I'll give it to you. The letter of the 24/4/'96, that's the Office of the Attorney General to me, has effectively two substantive paragraphs and they say: "With reference

to the above matters and yesterday's consultation" that was quite a long consultation, at which I heard for the first time about the concern of the arrival of IIU on the scene. Then it said: "Please find attached a copy of a minute received from the Department and its enclosures." That minute, in fact, is a letter, as you mentioned earlier in my statement, that letter is dated, again, the 24th April, 1996. And it refers in its heading to the two meetings that they'd had with Mr. McFadden, Mr. Gormley of the 22nd and 23rd. I had been at the one of the 23rd, and then enclosed certain information in that letter. But in paragraph 3, you see them dealing with the issues that were going to concern me, and it said: "I would like to reiterate our requirement for a legal opinion of the restructuring of the ownership of Esat Digifone, the relevant papers were provided at our meeting of the 22nd April. In particular, the question of what the recent correspondence suggests any change in the identity of the beneficial owner of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed."

Now, that was called a memorandum, but in fact it was a letter, and that was included with the letter I got on the 24th. And then we had a further set of documents which were the Esat Digifone there was an "Esat Application" written in manuscript at the top, and that started at paragraph 2, obviously it was a longer document, and it

went on for two three pages of that extract was given to me. There was a copy of a letter from William Fry of the 17th April, 1996, to Ms. Regina Finn. And finally, there was a document called "The Departmental Note." I think that's all I got. But if there was anything else, I didn't consider it relevant. I don't think there was.

Q. To the best of your recollection, that's what you got?

A. Yes. And I particularly remember the letter of the 24th April, because I sat down and I wrote on the relevant paragraphs, I numbered the questions that I was being asked to consider, so when I thought about it I'd know what I was trying to get.

Q. Now, I just want to go to paragraph 16 of your statement.

A. What does that begin with?

Q. Sorry, I beg your pardon. "I note the suggestion of Tribunal counsel that the former element was not dealt with in my advices and that this advice was only concerned with the post-licence situation. I did not intend that my advice should be understood so and do not believe it should be so understood. The resolution of this matter aside."

That particular paragraph.

A. Yes.

Q. I am not going to enter into a debate with you, Mr. Nesbitt, as to the meaning of the words "In your opinion." The opinion is there to be read, and I think you have indicated in your statement, the resolution of that matter aside, you go on to discuss other matters. What I

do want to ask you is: I think on six occasions in 2003 during the course of the evidence of Mr. Martin Brennan, Mr. John Loughrey and Mr. Fintan Towey, the view which the Tribunal had formed about that opinion was made clear, isn't that correct?

A. Yes.

Q. And I think it's correct to say that until recently, it was never brought to the Tribunal's attention that you had a different view about the opinion, is that correct?

A. No, I didn't bring it to the attention of the Tribunal.

Q. Nobody brought it to the attention of the Tribunal on behalf of your client, isn't that right?

A. Well, I think you need to understand that question in the context of where we were coming from. I had given advice to the State as a barrister, it was privileged. A decision had been made not to waive privilege on that material, and in fact, you will recall that when the opinion was mentioned, there was an objection made to it being produced because it was privileged. That issue had arisen and that arose, and I think great care was taken not to deal with the opinion in great detail. And in those circumstances, I did not feel free to mention it because I did not have a waiver of the privilege that attached to it. That changed at the beginning of this year.

Q. It was your client's opinion, isn't that right?

A. Yes, their privilege, the State.

Q. And the State had furnished the opinion to the Tribunal

prior to the commencement of the public hearings, isn't that right?

A. Yes, having retained its privilege.

Q. Absolutely. But in circumstances whereby it was freely making available to the Tribunal all documents at its disposal, isn't that right?

A. Well, it did what it did, there is no dispute about it. It made the document available and retained its privilege over it. That's what happened.

Q. And was free at all times to inform the Tribunal that the view the Tribunal, even privately, had formed about your opinion, was erroneous, isn't that correct?

A. I think that is not accurate. I was not in a position to inform the Tribunal about matters which privilege had been claimed over. And secondly, I think at the beginning of this year, it became clear that an issue had arisen on this interplay which, I don't think, with respect, could have been expected to go where it was going to go. And at that point in time, I felt I had information that it was appropriate to tell the Tribunal if the privilege was raised.

Q. Just bear with me for a moment, Mr. Nesbitt. The document was furnished to the Tribunal maintaining a claim of privilege if it was to be used, isn't that right?

A. Yes.

Q. The Tribunal had a view about the opinion, that it did not cover the post facto situation, isn't that correct?

A. I have never discovered or discussed with any person other than my client or somebody I have been authorised to discuss by my client, any opinion I have given. I find it considerably distasteful and difficult to be here discussing things I think are best kept private, because I believe in privilege.

Q. Your client did not bring your view to the attention of the Tribunal?

A. Well, I am not aware if he did or he didn't.

Q. You are aware, Mr. Nesbitt. You led in this Tribunal for your client. You are aware that your client did not bring it to the attention of the Tribunal until recently that you had a different view of that opinion in any event than the Tribunal had. Is that correct or incorrect, Mr. Nesbitt?

A. I think I am going to answer the question. The first thing that's correct, Mr. Coughlan, is that a letter was written by the Attorney General's Office, as I understand it, indicating that they believe that the opinion did deal with this particular issue. That's number one. And that's one issue.

And two: Until the privilege was waived, I did not feel in a position to deal with it.

Q. Your client did not bring it to the attention of the Tribunal, did it?

A. Well, you'll have to ask my client. All I can tell you is what I know.

Q. Maybe I'll ask Mr. O'Donnell. This is farcical,

Mr. Nesbitt. You

A. It's not farcical, with respect.

Q. You led here for your client and you are saying you don't know if your client brought it to the attention of the Tribunal?

A. My understanding is that a letter was written by the Attorney General's Office to this Tribunal saying that the opinion did deal with the issue you say it didn't deal with, that's the first thing I know. That's on the record. The second thing I am saying is, because I was bound by privilege, privilege that I owed to the State, I did not feel it appropriate to bring it to anybody's attention other than my own client's, what the situation was. And that arose at the beginning of this year, particularly because of certain things that had arisen, and I am now in a position to give you the evidence and I am trying to help.

Q. Mr. Nesbitt, the opinion was given to the Tribunal, although it was privileged. And your client was at all times free to discuss it with the Tribunal in private, isn't that correct?

A. I am sure they could.

Q. I'll come back to the letter written by the Attorney General's Office in a moment. I wasn't going to enter into any discussion with you about that, because that is the subject matter of ongoing submissions on behalf of your client, and I want to be careful and distinguish your

position as a witness as opposed to your position as advocating a position on behalf of your clients, which, of course, they are entitled to do. I'll come back to it though.

A. Very good.

Q. Now, in your statement which you have just made to the Tribunal, you have indicated that you gave oral advice, or as Mr. O'Donnell, when he made his application to have your evidence heard, indicated that you supplemented and amplified the advice you had given in the opinion orally on subsequent occasions, namely the 14th and 15th May of 1996, isn't that correct?

A. I think there is two particular occasions I think are relevant to the work of the Tribunal. The first is the meeting of the 14th, and the second is the final negotiation night.

Q. Yes. But there were two occasions?

A. Yes.

Q. And from the witnesses we have heard, namely Mr. Brennan and Mr. Towey, who would have both perhaps been at one and one at the other?

A. Yes.

Q. We know that they have no recollection of it, of you giving that advice?

A. I thought, but I am not certain, that one of the things I mention is I dealt with the concept of a South American drug lord, and I thought that Mr. Brennan had had a

recollection of me doing that.

Q. Dealing with Mr. Brennan's evidence most recently:-

"Question 216: Mr. Healy: 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?

Answer: 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 or seven years ago, the details of that.

Question: It is not the details of them, it's the fact that your discussions about the opinion in the context of the restructuring of the ownership of the winning consortium, is what I want to know.

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

Question: Right. But do you remember that discussions took place about that issue, not the detail of what you were talking about?

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

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

Answer: 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.

Question: Thanks very much."

Now, I don't think you need me to read out Mr. Towey.

Mr. Towey had no recollection, isn't that right?

A. Whatever the transcript says, it says, I don't disagree with it.

Q. So, giving evidence here, you are the only one that has a recollection some of giving this oral advice on the 14th, I think 14th and 15th May, 1996?

A. Yes.

Q. And you have a clear recollection of that?

A. I do in fact.

Q. And you always had that recollection?

A. Yes.

Q. And, again, it is a matter which was never brought to the attention of the Tribunal by your client, isn't that right?

A. Indeed, and I have explained why, as far as I understand.

Q. By your client, isn't that right?

And in fact, and I will come to the first of the letters

written by the Attorney General in due course, on the 23rd, but a second letter written by the Attorney General in February of 2003. We can go to the second page of the letter.

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

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

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

"1. On the 14th of May, 1996, there was a consultation with counsel and others attended by Mr. McFadden and Mr. Gormley had of this office and Mr. McFadden kept a note of that meeting."

Now, I think we know that the note that Mr. McFadden kept of that meeting does not record any advice other than any discussion other than forward-going Article 8, isn't that correct?

A. Yes. No, I don't agree.

Q. I don't think it deals with Article 8, it doesn't

A. I think it actually I think deals with something quite different, which we will come to in a minute.

Q. Yes, I am sorry, you are correct about that.

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

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

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

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

"6. Subsequent to counsel furnishing his written advice, he

was requested to attend the Department during the closing stage of the licence issuing process. Counsel has informed this office that, while he was there, he furnished oral advice in relation to the licence condition regarding ownership changes and, in particular, he was asked whether such condition was solely 'forward looking'. Counsel advised that that was the case.

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

"Copies of the documents from this office's file concerning the events listed at points 1 to 5 above are enclosed herewith. I am informed that Mr. Towey's letter of the 15th May, 1996, and that counsel's opinion of the 15th May, 1996, were previously furnished to the Tribunal by the Department. I also enclose other documents from this office's file which may be relevant."

So

A. Yes.

Q. two matters. First of all, nobody from the Attorney General's Office appears to have any recollection or knowledge of you giving advice in relation to the change of

ownership prior to licence issue, at this time, isn't that correct?

A. Well, if we look at the draft letter that I was asked to advise on, of May 1996, it's connected to the letter of the 15th May, 1996, sent to me by Denis McFadden, and it is to do with the imminent grant of the licence. And they are looking for the benefit of present and future direct and indirect shareholders to be assisted by what they are saying. And if you go over the page, they define the concept of direct shareholders, and they say: "Direct shareholders are Telenor Invest AS, Esat Holdings Limited and Dermot Desmond." Now, Dermot Desmond was IIU, so at that point in time, whatever was going on, they knew that these people were talking about direct shareholders, including Dermot Desmond.

And the second thing is, if you go over and we look at the advice I gave, I basically said, and you see it in my advice of the 15th May, I said: "The letter which the Minister has asked to write, if acceptable to the Minister, is being sent at a time when the arrangements to finalise the licensing legislation are incomplete. In the circumstances, a letter should be written in terms that make it clear it is no more than a statement as to how the Minister will conduct himself under the terms of the proposed licence in the event of particular types of requests being made for Article 8 consents."

And what I didn't want to do in relation to that letter was

to do something that changed where we were. And where we were, as is clear in that letter, was Dermot Desmond was part of the mix.

Q. There is no doubt about that. And Dermot Desmond was always part of the mix?

A. Yes.

Q. Now, the question I asked you, Mr. Nesbitt, was, from the response to the Tribunal from the Attorney General's Office, there is nobody recording you as having given advice other than in a forward-looking situation, isn't that right?

A. Yes, and I was giving advice about the future.

Q. Could we look I asked you to look at the letter, Mr. Nesbitt.

A. Yes.

Q. The letter records the Tribunal

A. Is there any chance of giving me a copy of that letter as opposed to trying to look at it on the screen?

Q. Yes.

(Document handed to witness)

A. Yes.

Q. The letter records, and let's take specifically one period when you say that you gave advice and it was retrospective as well. And if we go to paragraph 6, where officials of the Attorney General's Office asked you specifically whether the conditions that you were advising about were solely forward-looking, and you advised that that was the

case. Isn't that right?

A. Yes. The condition I was advising on then was Condition 8 that was going to be in the licence when you sign the licence, Condition 8 had effect. But there was a time before that and that was not what we were talking about there, we were talking about Condition 8. I was giving advice on Condition 8, which didn't come into effect until the licence was issued.

Q. Now, I suppose I didn't want to have to do this because it is a matter which submissions may be made on behalf of your client, that I would like to look at what brought about the correspondence, what commenced the correspondence between this Tribunal and the Attorney General concerning your advices. And it was an article which appeared in the Sunday Business Post.

MR. O'DONNELL: I wonder if the witness could be given hard copies of the documents of which you are going to refer.

(Document handed to witness.)

Q. MR. COUGHLAN: Would you just bear with me for a moment, Mr. Nesbitt, I just want to get my own copy.

This was the 15th of December, 2002. It's an article which appeared in the Sunday Business Post. And I suppose all of us who have been involved in this Tribunal are not unused to matters appearing in the paper from time to time.

And if you go to the sentence which begins: "The Tribunal is expected to hear just hours before the announcement was made awarding the licence to Esat Digifone, senior civil

servants sought advice from the Office of the Attorney General on whether consortia should be permitted to alter the makeup of their investors. The advice they received was that consortia could, but only for shareholdings of 20 percent or less."

And then if you go down towards the final portion of the article, and less important perhaps:-

"The legal advice they got from the Attorney General was that there was no problem whatsoever in switching anything up to 20 percent from any named investor to Dermot Desmond, a source said."

Now, I don't know, but we'll leave sources out of it, it normally indicates from a newspaper that somebody is speaking to them in on an official sort of basis but unattributed.

Now, the Tribunal already had your opinion before this article was written. When this article was written, the Tribunal then wrote to the Attorney General by letter dated 16th of December, 2002.

"Dear Attorney General,

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

"I enclose herewith a copy extract from an article which appeared on page 11 of yesterday's edition of Sunday Business Post. The relevant portion of the article reads as follows:"

Then there is a quotation. I won't read out the quotation from the newspaper.

Then the letter continues:

"The Tribunal wishes to know whether the above extract is correct. In particular, the Tribunal wishes to establish whether the following statements of fact are correct:-

"1. That 'Just hours before the announcement was made awarding the licence to Esat Digifone senior civil servants sought advice from the Office of the Attorney General on whether the consortia should be permitted to alter the makeup of their investors."

"2. That the advice that they received was that the consortia could but only for a shareholding of 20 percent or less.

3. That "In recent months the State has been examining the basis of the advice given."

"If the above statements or any one or more of them are correct, the Tribunal would be anxious to obtain a narrative account setting out all of the information available regarding these matters and, in particular:-

"A) The identity of the civil servants who sought advice from the Office of the Attorney General;

B) Precisely when the advice was sought and in what circumstances;

C) The identity of the officials (or counsel retained by the Attorney General) who provided such advice;

D) Whether such advice was furnished orally or in

writing;

E) The basis on which the advice was given;

F) All of the information made available to the Attorney General in connection with such request for advice (if any.)

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

"The request for assistance has been made in the course of the investigative stage of the Tribunal's work." And that's the usual recital which we have seen in many letters which have been addressed.

On the 20th of December, the Attorney General wrote to the Tribunal and clearly the article relates to advice being sought as to whether a change of ownership of a consortia could be permitted, isn't that correct, in the first instance, and yes, but only sorry

A. What are you reading from now?

Q. Sorry, the newspaper article.

A. Oh, yes.

Q. So the two issues: Whether a change of ownership should be permitted, and secondly, yes, but only to the extent of 20 percent. Isn't that the type of advice that has been alluded to in the newspaper article, isn't that right?

A. Well, I think what I see in the newspaper article is a very

clear assertion that "just hours before the announcement was made awarding the licence to Esat Digifone, senior civil servants sought advice from the Office of the Attorney General on whether consortia should be permitted to alter the makeup of their investors. The advice they received was that the consortia could, but only a shareholding of up to 20 percent or less."

I know of no such request for advice and I have never given advice around that time along those lines.

Q. But what is being contended for here is that advice has been obtained that allows for the change of the makeup of the consortia, isn't that right?

A. No, what I am reading there is a very particular assertion that hours before the licence was awarded, something had happened. I have no reason to believe any of that is true.

I have never heard of any of it.

Q. That's not what I am asking you.

A. Very good.

Q. I don't think anyone is asserting otherwise. I don't know either.

A. Okay.

Q. But what I am saying is, what is being asserted there is that advice was sought and obtained that you could change the ownership, isn't that right?

A. Yes. And I

Q. Is that right, Mr. Nesbitt?

MR. O'DONNELL: Sorry, it is unnecessary for Mr. Coughlan

to be so aggressive. I really think there is no reason why, just because Mr. Coughlan, as he announced earlier, that Mr. Nesbitt is a barrister, that he is entitled to less courtesy rather than more. He is trying to answer in what are unusual circumstances, and simply heckling him and saying "is that right" is not, in my respectful submission, an appropriate way to conduct his cross-examination. I beg your pardon, his examination of the witness. If Mr. Nesbitt wants to give an answer, he should be allowed to give the answer, and then Mr. Coughlan can ask as many other questions as he wants. But cutting him off by saying "isn't that right" as if

MR. COUGHLAN: I stand corrected. I apologise, Mr. Nesbitt.

CHAIRMAN: I am sure we can proceed on orderly procedural lines.

A. I have forgotten the question now.

Q. MR. COUGHLAN: The article is indicating that advice was sought and given that you could change the makeup of the consortia, isn't that right?

A. Yes, it's talking about particular advice, but yes, in general terms, it was talking about advice changes in the makeup.

Q. And what is being contended for now by your client and by you is that advice of that nature or type was given, isn't that right?

A. Yes. I say I was given express instructions to answer a

question about the introduction of IIU. I got written instructions to give an opinion on that. You have seen my opinion. You have a view what it says or it doesn't say. And I have two other pieces of information I can give to help you with, which I have dealt with.

Q. Yes. But let's be clear; your client and you are saying that advice was given of a type sorry, the type of advice that was given was that you could change the ownership, isn't that right?

A. Yes, I was saying that what had happened inside the people making the bid was not something that I considered to be a relevant issue, you know, in the way in which Mr. Towey appeared to be asking the question about it.

Q. I'll come back to it again. What is being contended for by your client and by you is that advice was given that you could change the ownership?

A. Yes.

Q. And that was what the article had said as well, isn't that right, that

A. Well, in a very general way. I have said what I think about the article. I think that article has a very particular story to tell, and

Q. Well it might, Mr. Nesbitt, but I certainly haven't got time to consider the story which an article might have. We have enough to do here.

Now, could I go on with the Attorney General's letter.

"Thank you for your letter of the 16th inst and its

enclosure. Messrs. Gormley and McFadden of this office (legal assistants here at the relevant time) have read the extract from the article which appeared in the Sunday Business Post and refers to advice being given by the Attorney General 'just hours before the announcement was made awarding the licence to Esat Digifone.' It is understood that the announcement was made on the 25th October, 1995. After an examination of the office's file, they have reported to me in the following terms:-

"1. They have no recollection of furnishing the advice referred to in the said extract or receiving a request for same and do not believe they gave such advice.

"2. There is no copy on this office's file of any advice of the type mentioned in the extract or any note of same having been given by the Attorney General or any other person in this office."

A. Yes.

Q. "3. There was a request for advice contained in the Department's minute of the 24th April, 1996m concerning the restructuring of the ownership of Esat Digifone since the date of their application, and the Attorney General's response thereto has already been made available to the Tribunal. Mr. Nesbitt's opinion on the 9th May, 1996, which was released to the Department with the sanction of the then Attorney General on the 13th May, 1996, dealt with the matter.

"For my own part I wish to state that there has been no

examination by me or my office of the alleged advice mentioned in the extract (and referred to as a statement of fact Number 3 in your letter) nor have I been made aware of such examination being carried out by any other State authority.

"Finally, I should point out that " he has not made contact with his predecessor, Mr. Gleeson.

Now, you say that that letter says that your advice, that your opinion gave the advice that you could change the ownership, isn't that correct?

A. Yes, I think it says they have got an opinion from me of a particular date that touches upon the restructuring.

Q. Sorry, are you saying that that letter is informing the Tribunal that your opinion is saying that you can change the ownership?

A. Yes, I think it's trying to say

Q. All right, well fine. We can take that into account when the Tribunal is considering the matter.

Now, on the 9th January - this letter has been opened again - the Tribunal again wrote to the Attorney General.

"Dear Attorney General,

"Thank you for letter of the 22nd of December last in response to mine of the 16th of December. The Tribunal is grateful for your prompt response to its queries.

"Having given further consideration to the wording of the article which appeared in the Sunday Business Post on the 15th December, 2002, the Tribunal is of the view that the

reference to advice given by the Attorney General 'just hours before the announcement was made awarding the licence to Esat Digifone,' may refer to the actual grant of the second mobile phone licence to Esat Digifone rather than the announcement of the result of the competition process.

While the announcement of the competition result was indeed made on the 25th October, 1995, the announcement of the actual awarding of the licence to Esat Digifone was not made until 16th May, 1996.

"In the light of such interpretation, the Tribunal would be very much obliged if you could kindly reconsider the Tribunal's request by reference to the announcement of the actual award of the licence on 14th May, 1996."

And we have already opened the response to that and dealt with the matters in it, isn't that correct?

A. Yes.

Q. You said in your statement, I think it's paragraph 23, I'll just read it:

"The change which triggered Fintan Towey's request for advice flowed from the fact that the 40:40:20 relationship was going to become a 37.5:37.5:25 relationship. Further, the identity of the 25 percent shareholder was now stated with precision, namely IIU."

Then you say you "personally viewed this change of ownership, IIU instead of Davy investors, previously flagged or otherwise as a matter of no material consequence."

Now, when you were asked for your advice on the 22nd April, up to the 24th April when you received the letter from the Attorney General's Office about the question of the restructuring and change of own the restructuring and change of ownership, that's what you were asked for advice on, wasn't it, the restructuring and change of ownership?

A. Well, I suppose you seem to be breaking it into two things.

Q. No, I am not.

A. Yes. There was information given to me that saw things being moved around the board, and there was the taking out of the radio division, from recollection, of the entity that was going to be involved in the company that had the licence, that was one thing that happened. And the other one was, there was going to be a change from a 40:40:20 to a 37.5:37.5:25, and that was I had the information you read in the two documents that were given to me for the purposes of deciding what I was going to do by way of advice.

Q. But you were asked for advice on this restructuring and the change of ownership, isn't that correct?

A. Yes, I was asked to answer the question that was put in the letter.

Q. And when did you become aware that the structure was to be, the structure of the ownership was to be 40:40:20?

A. If you look at Esat Digifone, Esat's application, which was a thing that was briefed to me, you go through it, and you see, in paragraph 2.1, "Ownership and equity holding." And

they are talking about Esat Digifone. And they talk about the shareholders agreement. And initially, it was going to be a 50:50, what I think is best described as a joint venture, and they were going to sell down 10 percent each of their 50 percent holding. And for me, that goes 40:40:20.

Q. Sorry, I beg your pardon?

A. The two shareholders were 50:50, and they were going to give away 10 percent each of their equity, which left them 40:40, and somebody else holding 20. That's

Q. I think perhaps we are at cross-purposes here. I think what had been notified to the Department was that it was now 37.5:37.5:25. This is at the time advice was being sought from you?

A. Yes. Because I was given the information and I read it to find out what are the facts that appear to be giving rise to this request. And the first thing I see was the Esat application, and I knew that was the application which they had put in for the purposes of going into the competition and winning the right to negotiate. That's the first thing I saw. The second thing I saw was a letter from William Fry that described things happening. And the next thing I had was a Departmental note which was more about detail of what was happening behind Esat Digifone Limited.

Q. Sorry, perhaps, Mr. O'Donnell corrects me, I did say the first time, and you say when you read the document. When was the first time you were informed that the configuration

this was involving IIU was going to be 40:40:20?

A. I don't think I had ever discussed IIU with anybody prior to going to the meeting which I then got a letter afterwards.

Q. Yes. You gave no advice that was the letter

A. No, I definitely gave no advice at the meeting. A number of complicated things were discussed and I wasn't saying anything, I was thinking about it.

Q. You then received the letter of the 24th?

A. Yes.

Q. Which informed you that what was being proposed here was IIU 25 percent, isn't that right?

A. I'll just check what the letter says: Yes, it says what it says to me is, in relation to this particular issue, in particular the question of whether the recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with ownership proposals outlined in the company's application to be addressed.

Q. That was what was in particular was sought, but you were also asked about the restructuring, isn't that right?

A. "The ultimate award of the licence" yes "I'd like to refer the requirement for legal opinion on the restructuring of the ownership of Esat Digifone. Relevant papers provided at our meeting on the 22nd of April." Yes, there were two and that was the second one.

Q. The two matters?

A. That's right, yes.

Q. Am I correct in saying that there is no reference in your opinion to this question of the restructuring from 40:40:20

A. I don't make reference to that because I believe the two things allude together, because I had to decide was something changing that was going to cause a problem? And my opinion, that wasn't the case.

Q. Could I just ask you this: It's not referred to at all in your opinion, is it?

A. Not in those explicit terms, no.

Q. And that's what I really want to ask you about is, when did you find out that that was the position the Department were taking?

A. That the Department were taking the view what view?

Q. That it couldn't be 37.5:37.5:25; that it had to be 40:40:20?

A. I don't have a clear recollection of that. And I don't I was aware IIU was all right at the time I gave advice on the 15th May because of the definition of shareholder. But I don't recollect anybody expressly saying to me that they were taking my advice, if I can put it like that. It wouldn't be usual, but I don't recollect that.

Q. Perhaps I can come at it this way: You have seen a number of documents in the course of recent evidence. One was a note of a Government a matter discussed at a Government meeting described as a Government decision on the 22nd

April, 1996; you recollect that document?

A. I don't actually.

Q. We can hand it up to you.

(Document handed to witness.)

It's at flag 3, I think, in that document. Do you see it?

A. It's "Informal Government decision"?

Q. Yes. I think we have dealt with that in evidence on a number of occasions.

A. Mmm.

Q. Now, I know you are probably aware of it now, but what I want to ask you is: Going back to 1996, when you were asked for your opinion, were you aware of this?

A. No.

Q. Right. When you were asked for your opinion in 1996, were you aware that Mr. Lowry had said, on the 30th April, 1996, in the House: "The Deputy mentioned Mr. Desmond. If Mr. Desmond or any other company is in a position to fund this project and is acceptable to Esat Digifone and if it means that this project is up and running, so be it, that is their business, it is not my business."

Were you aware of that at the time you were asked your opinion?

A. No.

Q. If you go to the next document. Again, this is a matter which was discussed in the course of the evidence of

A. Which is divider which?

Q. Divider 5.

A. Okay.

Q. This is Mr. Owen O'Connell's note, there being no record kept of this particular transaction in the Department, of Mr. Towey, which he now accepts, was the Department's first contact in response to the letter which they had received on the 17th April. Were you aware of this particular discussion at the time?

A. No. The only thing at that time I saw was the letter from William Fry to Regina Finn.

Q. I just want to go through this. Were you aware that on the 1st May, 1996 this is the next document, the letter which Mr. Martin Brennan, on behalf of the Department, wrote to Messrs. William Fry seeking information. Again, this has been opened on a number of occasions.

A. Yes, I have no recollection of seeing that document at the time I gave the advice.

Q. At that time?

A. Yes.

Q. And then finally: Were you aware of again if we go to the next document at Divider 7, this is Mr. Owen O'Connell's note of, again, contact which Mr. Towey had with him, and of which no record exists in the Department. We know the document: "Minister's very strong preference 40:40:20." Were you aware of that before you

A. No, I wasn't. I don't recollect anybody expressing a view like that to me. My best recollection is Mr. Towey was the man who attended the meeting that explained the problems

the day before I got the letter. And he went into it in some detail. I was just trying to keep in my mind what are they worrying about. And then when I got the letter and got the two enclosures, I worked out what they were worrying about, and I had a view on it, which I expressed.

Q. By the 7th May, of course, you had given no advice, isn't that right?

A. No, I didn't give advice until the 9th May.

Q. You had not given your advice by the 7th?

A. They got it on the 9th, and I am not sure if they had read it when I had the later meeting with them. I had hoped they had, but I didn't know.

Q. So, whatever was going on or transpired up to the 7th up to the 9th May, happened or transpired without advice from you, isn't that correct?

A. Yes.

Q. Now, at the time you were furnishing your advice, I know you had been sent the extract from the Esat application?

A. Yes.

Q. Had you been sent the RFP document?

A. I think that had been included in the original briefing material I had got. And

Q. Do you have a recollection of that?

A. I am sure it's in the list, but

Q. We'll check that.

A. I didn't look. You can look, but I can tell you something, I didn't look back at that for the purposes of

forming the view I came to. Because once I discovered what the problem was, I had a clear opinion on what the answer was.

Q. Now, I just want to, before I finish, Mr. Nesbitt, just ask you a few questions again if I may go back.

The Tribunal was given the opinion on the basis that it was privileged and on the understanding that if it had to be opened, the issue of privilege would arise, isn't that correct?

A. I am not sure I had understood that all the privileged material that was given maintaining privilege, and if there was going to be the use of privileged material, there would have to be a waiver by, effectively, the Government; a Cabinet decision would have to be made on it. That's my understanding, and when I

Q. Perhaps I can from the communication with the Tribunal, perhaps the best thing would be just to briefly open the solicitor's letter.

A. Fair enough.

Q. I'll get you a copy.

(Document handed to witness.)

"Dear Mr. Davis,

"I refer to previous correspondence.

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

subject to the following conditions:-

"(a) Strictly on a confidential basis.

"(b) Without waiving the assertion of privilege.

"(c) On the agreed basis that should the Tribunal believe documents to be relevant to the Tribunal, will write to the Department setting out which documents they believe to be relevant and returning the other documents.

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

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

So those were what was agreed between the Tribunal and the Department, isn't that correct?

A. I see that letter. My understanding is that if there was a Waiver of Privilege, it had to be made by the State or there would be an argument.

Q. You may be correct, I wouldn't be privy to that. But the point is that the documents were made available to the Tribunal, isn't that correct?

A. Yes. Well, subject to the maintenance of the privilege. Now we might have an argument about how real that was, but that's the way it was.

Q. Yes. Now, the Tribunal formed the view that the privilege

did not need to be challenged. This is because it expressed its view widely on six occasions, isn't that correct, that the opinion did not deal with the material in question?

A. Well, I think that's a view that I have heard expressed, and I started at the beginning explaining my position. I felt I couldn't talk to anybody about it, even sitting there as counsel, because I hadn't had clearance. And when I did get clearance, there was a Cabinet meeting which a decision was made and then I was told, or asked would I give evidence.

Q. But of course you could talk to your own clients about it?

A. In relation to the issues that arose in, I think, waiving privilege, which arose at the beginning of this year, as far as I understand, somebody else did it, thought it was appropriate somebody else might deal with it.

Q. I understand. But you could discuss your understanding sorry, you could discuss with your clients your view that the Tribunal had an erroneous view of your opinion, couldn't you? There was nothing

A. And I did that at the beginning of this year when other things made me feel that that was something that really needed to be said.

Q. For the first time at the beginning of this year. But the privilege, which was your client's privilege, did not prohibit or inhibit you from discussing the matter with your client, isn't that right?

A. Yes. You want to be careful about who my client is, because my client, I believed, was the State and the Department, although we had an additional brief for the individual civil servants who gave evidence. But the arrangement was that if there was a conflict, it would be decided, in my view, in favour of the Department and not the civil servant.

Q. And as we have established, to the best of your knowledge, your client brought no matter to the attention of the Tribunal. And can I take it that until the beginning of this year, you did not bring this matter to the attention of your client?

A. Whatever the record shows as to whatever my clients did, I can't remember all of it. And in relation to my issue, I would have been of the opinion, and so said and was asked did I give advice in relation to the question of change of ownership? And I did, and we identified the opinion in which it was to be seen. At the beginning of this year it became clear that other information I had might have been of assistance to the Tribunal in reaching a finding of fact on just one element of what's taking place.

Q. Now, correct me if I am wrong, but what you are asking the Tribunal is to accept your evidence that the opinion addressed the material issue which we have been discussing?

A. Well, I think everybody can read the opinion and form their own view. What I want to say about it is this: That I was asked a question, and the second paragraph on the second

page is where I give some principal views in relation to the question of changes of ownership. And there were then two later occasions. I think that should have been enough. I think when they read that opinion the only question they needed to have was: Does this change of ownership prejudice what is meant to be given on foot of the plan that they have put forward? And I assume they went away and formed the view that that wasn't so and that means it was okay but

Q. I take the point.

A. That's how I see my opinion working, because this was quite an unusual brief, because we were dealing with very real commercial events happening very fast with a lot of media attention attaching to it, and they were trying to do, as you would, a commercial transaction as opposed to a cold legal opinion normally you'd be getting from the Attorney General's Office.

Q. I can understand that, and give, as you say, everyone can read the opinion and the opinion speaks for itself.

A. Yes.

Q. You are expressing a view about it yourself?

A. Yes.

Q. And you are asking the Tribunal to accept that that is the view.

A. Yes, I would hope the Tribunal will accept that when they look at my opinion, I effectively make four statements, and if you want me to bring you through them, but they are

self-apparent because of the four elements that go into the second paragraph of my opinion. Do you want me to deal with them or

Q. No, I think we can read it ourselves, Mr. Nesbitt.

A. Okay. And the only other thing I think I am able to say that is a question of fact that may or may not assist the Tribunal is the two later meetings that were had. The more important of those is the final closing, because that's when it had to be confronted in a very simple way.

Q. Yes. And you are the person who has a recollection of advices given on those occasions?

A. I have a crystal clear recollection because it looked like we were never going to get out of the Department and the only way I could see of resolving what appeared to be a dispute caused by people's opinions of each other as opposed to a real legal dispute, as far as I was concerned, was to say will you take a side letter saying that where you are is okay, and into the future Article 8 applies.

Q. Now, bearing in mind that

A. And "where you are," included IIU.

Q. Yes. Bearing in mind that the view of the Tribunal about this opinion has been known since 2003, and it has only just been brought to the attention of the Tribunal that your view is that's erroneous and that you have a different view, isn't that correct, recently?

A. Well, whatever happened, happened. You know, I don't think it's right I should opine about that.

Q. And also, in relation to oral evidence which you have you are crystal clear in your recollection, you gave, but other witnesses who were present have no recollection, and again, you brought that to your client's attention and to the Tribunal's attention recently this year, whenever it happened?

A. Yes, it became clear that this was material evidence on a point that appeared to be quite important to a section of what was happening. And I had this recollection. It's clear in my mind. And I felt it appropriate, then, to say something, because this is we are going into the land of there is a piece of information that if I wasn't subject to privilege, would be out there.

Q. And of course, I think you'll understand why I ask you this now, that you are asking the Tribunal to consider your evidence as being credible, bearing in mind the length of time which has passed and the fact that matters have only been brought to the attention to the Tribunal of recent times?

A. Well, I have no interest in giving the evidence other than it's a factual piece of information I think is relevant.

Q. I asked you a question. You understand that you are asking the Tribunal to accept that your evidence is credible?

A. Yes.

Q. So just to join issue we are professional

A. I haven't got into the witness-box for the purpose of saying something that's not true, Mr. Coughlan.

Q. Just to join issue, just to enable the Tribunal deal with the matter, I have to put it to you, I just joined the issue with you that I put it to you that your evidence isn't credible in that respect?

A. Is which?

Q. Is not credible?

A. Not credible?

Q. Yes.

A. Well, I haven't heard anybody suggest that these events didn't happen in the way I have described them.

MR. COUGHLAN: Thank you.

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

Q. MR. O'CALLAGHAN: Mr. Nesbitt, in light of Mr. Coughlan's closing statement there, that he viewed your evidence as not being credible, can I just deal with some of the issues upon which there does not appear to be any real conflict.

If I could ask you to disagree or agree with the statements I am about to make.

I think it's correct, Mr. Nesbitt, that once the competition was announced, you were asked by the Department to provide advice in respect of the GSM project, is that correct?

A. It was I was asked to give limited advice about quite distinct questions that arose. I wasn't the architect really involved in how the competition ran. I think the earliest thing I recollect was trying to even the playing field in relation to the incumbent mobile operator, and the

Commission had a view as to penalising them to try and make an even playing field for the winner of the new licence.

Q. And when you were asked for specific advice, am I correct in stating that you provided that advice, be it orally or in writing?

A. Yes, I would try and answer the questions put to me as best I can, and I heard some witness suggesting I was quite pragmatic. I think that's quite a fair account. I was trying to give advice that would be easy to understand and durable in a very fast changing moving situation.

Q. And prior to the issue of the licence in May 1996, you were specifically asked by the Department and the Attorney General's Office to provide advice on the restructuring in the ownership of Esat Digifone, isn't that correct?

A. Yes. The question you have seen in the letter is the question I was asked, and you saw what I said, and you have heard about the other two events.

Q. And your evidence to this Tribunal is that you advised the Department and the Attorney General's Office that the change in ownership, through the introduction of IIU, was not problematic, isn't that so?

A. Yes, it was not problematic, and I think probably the only condition about that is that it had not to be damaging to the proposal that was being put.

Q. And in giving that advice, was any pressure put on you by the Department or by the Minister to ensure that you did say that IIU was not a problematic addition?

A. No, never. I never got any indication from anybody that they had a preferred person or not a preferred person.

They were trying to do a project and a process that was pretty clear.

Q. And where we arrive into areas of conflict, Mr. Nesbitt, is when we look at the source of the advices that you gave.

There is, first of all, am I correct in stating, the written advices you gave on the 9th May, 1996, isn't that correct?

A. It seems to be that.

Q. And then secondly, you are telling this Tribunal that you gave oral advice at meetings with the Department to the effect that the introduction of IIU was not a problem, isn't that so?

A. Yes, I did.

Q. And could I ask you, I know Mr. Coughlan didn't seem too enthusiastic for you to look at your covering letter and your opinion, but could I ask you to look at your covering letter and opinion, if you have it available, and perhaps Ms. Moriarty could put the covering letter up on the screen. And this is your covering letter dated the 9th May, 1996, isn't that correct, Mr. Nesbitt?

A. Yes, I am just trying to find it in my bundle of documentation.

Q. If you'd like, my solicitor

A. I have a different booklet to you that I put together myself.

Q. My solicitor can hand you up a copy of the covering letter.

A. I have it, yes.

Q. Okay. And your covering letter and your advices, both of them contain advices, isn't that so? It's not simply

A. Yes, I gave more advice in the covering letter.

Q. And could I ask you just to look at the second paragraph of your covering letter and the second sentence of that paragraph where you say: "However, I remain of the view that the Minister should not drag his feet in issuing the licence."

Would you agree with me, Mr. Nesbitt, in light of the specific questions on which you were asked to advise, that that is written advice to the Department telling them to proceed with the grant of the licence notwithstanding the change in ownership?

A. Yes.

Q. Can I ask you to look at your written advices which, I don't know if you have them in front of you there, but to go to the second page of those written advices?

A. Yes.

Q. And can I just open the second paragraph of the second page to you where you advise: "If one analyses why the Minister is concerned about the ownership of shares in the licensee, the only legitimate concern he can have is that if there is a change of ownership the service that has to be provided will in some way be compromised. I do not think it is tenable to suggest that the licensee has been awarded the

licence because of the parties who own the licence.

Rather, the licensee has been awarded the licence because its plans and proposals were the most meritorious and it provided a funding plan which looked feasible. There is no reason why any of these matters have to be compromised by a change in ownership."

Do you agree with me that the advices you set forth in that paragraph indicate, once again, that you do not believe there is any problem with a restructuring of the ownership as proposed?

A. Well, subject to one point. Effectively I say three separate things there that I think inform you how to deal with changes of ownership. And the point that I just want to draw out is that, you are looking to see has the funding plan been compromised by the change, or the plan that's there? And I would have expected there would have been things done to see that everything was still all right. As I understand, things did get done, but that's the evidence which happened after that. So, I think I agree with you, but what you need to be certain is that the changes you are seeing aren't compromising what's meant to be delivered. So that would have been a condition.

Q. But, Mr. Nesbitt, say let us assume that you never had written the covering letter or you never had provided the written advices. I am correct in stating that your evidence would still be that in meetings you had with the Department, you provided them with oral advice stating that

there was no problem in the restructuring of Esat Digifone,
is that correct?

A. Yes, I believed there was no problem in issuing the licence to the entity that was restructured. I wouldn't have minded about the shareholding changing slightly, because I in fact, looking at the application they had made, saw that they actually intended to have a third:a third:a third as the ownership of shares pretty quickly, and in those circumstances that was where they were heading, and I am not sure there was any reason why that had to be delayed in any way. They had made it clear where they were going.

And if you just look at the document that was, the application form that they produced that I was given, it's the extract of the application, and it said: "As of submission of this application, Davy Stockbrokers has received written investment commitments from a number of people. Letters of Commitment are presented in Management Appendix D. Within three years of service launch, the Communicorp Group and the Telenor Invest AS will each make further tranches of equity available to independent investors in order to reach a position where the equity in Esat Digifone is shared between Communicorp, Telenor AS Invest and independent investors."

So I understood that to mean they wanted to get to a place where it was going to be a third:a third:a third. And the issue I had is, if it's not going to be AIB, etc., was that an issue? And I didn't see that as an issue because it was

going to be independent investors. You now had the identity of the investors and you knew where they were going, and it would not have mattered to me that they got a little bit more on the basis of what they were seeing. But that's not the way it happened. They stayed on the 40:40:20, as I understand it.

Q. And in your statement, Mr. Nesbitt, on the second page of it, at the bottom, you refer specifically to a meeting you attended on the 14th May, 1996, isn't that so?

A. Yes.

Q. Now, if I could just open that part of the statement again to you, the last three lines on the second page where you say: "After this topic was dealt with, the meeting turned to the other issues regarding licensing. One issue concerned the ownership of the shares in Esat Digifone.

Whilst I believe that those present had my opinion, I don't recall knowing that as a fact. I recall outlining to the meeting my views on changes of ownership of the prospective licensee had been told about. I recall making the point that ownership of shares in the licensee could only be of concern to a licensing body. If a change in ownership might compromise the service to be provided. This issue was a pre and post licence issue matter."

Are you aware of any evidence that has been given to this Tribunal, Mr. Nesbitt, that casts a doubt over the credibility of that evidence?

A. Well, all I can say is what happened, and I am happy that I

am giving an accurate account. I wouldn't like to go through all the rest of the evidence given to the Tribunal.

Q. Mr. Coughlan also sought to criticise you for the fact that in 2003, when evidence was being given by Departmental witnesses, you, effectively, sat mute and never brought to the attention of the Tribunal your view as to the meaning of the opinion, isn't that so?

A. Yes, he was just doing his job.

Q. I want to now ask you to look at the letter from the Attorney General's Office dated the 20th of December, 2002, to the Solicitor to the Tribunal. And just to set the context, Mr. Nesbitt.

Of course at the time the sittings and the evidence was being given by the Departmental witnesses, the Tribunal had this letter, isn't that so?

A. I assume the dates, yes.

Q. The date is the 20th December, 2002, and Mr. Coughlan was referring to evidence given in 2003.

A. Yes.

Q. Can I just ask you to look at the last paragraph on that page, the 20th of December, 2002, letter page. Section 3, it says - this is the Attorney General - "There was a request for advice contained in the Department's minute of the 24th April, 1996, concerning the restructuring of the ownership of Esat Digifone since the date of their application, and the Attorney General's response thereto has already been made available to the Tribunal.

Mr. Nesbitt's opinion of 9th May, 1996, which was released to the Department with the sanction of the then Attorney General on the 13th May, 1996, dealt with the matter."

Do you agree with me that it is plain from that paragraph

MR. COUGHLAN: Sorry, sir, I object to this question. I have listened enough to matters being repeated. That is a matter for the Tribunal. Whatever Mr. Nesbitt's opinion on it is irrelevant.

CHAIRMAN: I will allow the question.

Q. MR. O'CALLAGHAN: As I was saying, Mr. Nesbitt, where the reference is to "the matter "at the end of that paragraph, do you agree with me that the matter being referred to by the Attorney General is the advice being sought concerning the restructuring of the ownership of Esat Digifone?

A. Well, the letter says what it says. I think Mr. Coughlan drew my attention to a distinction that I wasn't paying a lot of attention to, because I don't think it matters, was the distinction between restructuring and share ownership. We had been given instructions, which you can read about, that things had changed: Was this going to be okay? That was effectively what I was trying to answer. And I took the view, yes, it was okay. And I did two things: I looked how has it changed? And I saw the radio interests being stripped out and then I saw a different thing, which was somebody coming in instead of other possible investors, and I formed the view that those were all right, and I gave

the advice in my opinion that the thing you should worry about, was it going to prejudice what was meant to be the new GSM provider that was going to be rolled out on the basis of the licence being granted?

Q. But do you agree with me that the plain interpretation of that paragraph is that the Solicitor to the Tribunal is being told by the Chief Law Officer of the State that an opinion of yours dealt with the restructuring issue of the ownership of Esat Digifone?

A. I think that's a matter for the Tribunal to decide what it means. I have said what I have said and that evidence is there to help.

Q. And this letter wasn't brought to your attention when you were here in 2003 giving when you were here for the witnesses from the Department who were giving evidence, is that correct?

A. I am sure I would have seen all those letters at sometime. I have seen a lot of documentation concerning this. I don't have a recollection of that exactly. But I do know why I said nothing, because I believed it was privileged and I could not bring it up.

MR. O'CALLAGHAN: Thank you, Mr. Nesbitt.

THE WITNESS WAS EXAMINED BY MR. FANNING AS FOLLOWS:

Q. MR. FANNING: Mr. Nesbitt, in relation to the role that you played in May 1996, and the advice you gave; did it strike you at the time then, or does it strike you now in hindsight, looking back, that there was anything unusual

about the manner in which you were approached or anything unusual about the manner in which advice was sought of you, allowing for the perhaps unusual nature of the brief?

A. No, I think it was very well, it was very standard stuff. They wanted me to give advice on something or attend a consultation and discuss matters that they wanted legal advice on.

Q. Yes. And did you give your advice, as barristers do, independently and free from any pressure or interference from a third party?

A. I did the best I could, working on my own, if I can put it like that.

Q. Was there any sense, Mr. Nesbitt, that the Attorney General's Office officials, or the Department officials, had a pre-existing agenda and were simply coming to you looking for your imprimatur or rubber stamp on a course of action that they were already committed to?

A. None whatever. They gave good instructions and they appeared to be on top of what they were concerned about and seeking advice on it.

Q. Were you ever told, or did you ever infer that the Minister had a particular agenda as of this time, and legal advice being sought from you was really only a formality or a rubber-stamping exercise?

A. I can't recall any real discussion about the Minister other than as an office that might have been interested in something.

Q. Was the Minister's view made known to you at the time advice was being sought from you?

A. I can say with certainty I was never told what the Minister's view might be about something. I think there is correspondence where you see people writing "The Minister would be concerned..." but that was in the context of the civil servants using the protection of the Ministerial office to get a point across.

Q. Yes, and I think the Tribunal will be familiar in particular with the evidence that Mr. Loughrey has given in regard to the usage of the word "Minister" in that sense?

A. Yes.

Q. In light of the advices that you believe you gave the Department, do you think that there was anything inappropriate or surprising about the issue of the licence to Esat Digifone on the 16th May, 1996?

A. I knew very little. I had just been asked to give some opinions, and I gave them, so I couldn't pass any sensible opinion on that.

Q. Having regard to the nature of the advices that you tendered, would you regard it as tenable to suggest that Mr. Lowry conferred a benefit on Mr. O'Brien by conferring a licence upon an entity that had not been evaluated in the process?

A. Well, I gave the advice I gave. And insofar as that's accepted as factually accurate, I am sure the Tribunal will use it in whatever way it thinks appropriate.

Q. Insofar as there is criticism being advanced of you today, Mr. Nesbitt, or worse, for failing to disclose to the Tribunal the nature of the oral advices that you gave, is the answer to any such criticism that it did not conceivably appear to be of any relevance until the provisional findings?

A. No. I think I have explained why I felt I could say nothing. And I have explained why I felt it was a matter of such importance that I thought it would be appropriate to get evidence to the Tribunal, lest it be of assistance and eventually a decision was made that that could happen.

Q. Yes, but isn't it the reality that there was no apparent imperative for anybody to consider the requirement to waive privilege and to reveal the content of your oral advices until 2009?

A. Well, I personally believe it became something that was particularly relevant in 2009. And I don't think it's appropriate I should express any opinion why that's so.

MR. FANNING: Thank you Mr. Nesbitt.

MR. FANNING: Chairman, there is something, a remark I want to address to you at this stage in light of the questioning of Mr. Coughlan to this witness and I want to say this: I think it is shameful that this Tribunal is now reduced to discrediting one of the most distinguished Senior Counsel in the State in an effort to provide sustenance for its theories. Mr. Nesbitt is not my client, but the attack on his credibility that has been made in this Tribunal this

afternoon is for the collateral purpose of impugning my client and others, and I think it was entirely inappropriate that it was done in the manner that it was done, or that it was done at all. And I think Mr. Coughlan should withdraw the question that he asked, and I think he should apologise to the witness, and I think the Tribunal should disassociate itself from the question.

A. I just want to say something. I just felt Mr. Coughlan was doing his job. I probably would have approached it the same way.

CHAIRMAN: I don't think I'll comment, Mr. Fanning, on your somewhat presumptuous remark. This Tribunal has a remit to make independent inquiries and it appears to be, to some degree, implicit in what you have just said that perhaps the Tribunal should have adopted an entirely different course in the manner in which it has dealt with this witness and what it has dealt with any other, and I do not intend to embark on any consideration of that somewhat headline-catching remark.

MR. FANNING: Mr. Chairman

CHAIRMAN: I don't need to hear from you any more right now.

MR. FANNING: I want to respond to that

CHAIRMAN: No, you needn't.

MR. FANNING: Mr. Chairman, if you'd indulge me for 30 seconds. This witness has given evidence that no witness has contradicted and his credibility has been challenged.

In light of his professional standing, I regard that as extraordinary, and I am entitled to make that contribution.

CHAIRMAN: Your remark is on the record, Mr. Fanning.

Mr. O'Donnell?

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

Q. MR. O'DONNELL: Just a couple of questions, Mr. Nesbitt.

Mr. Nesbitt, at the risk of embarrassment to you, I think you were called to the Bar in 1975, and therefore at the time of giving these advices, you would have been in practice for some 21 years, is that correct?

A. Yes.

Q. And you had also been a member of the Inner Bar for some three years at that stage also?

A. Yes.

Q. During your professional career as a barrister, you would have advised the State on numerous different occasions on numerous different issues?

A. Yes.

Q. And you would have been used to seeking, to receiving requests for advice and then giving legal advice?

A. Yes.

Q. Did you find the State cautious in their movements before receiving legal advice in circumstances where they had requested legal advice?

A. Well, I think they put together a proper brief and asked me to answer the question, and they act very professionally.

Q. And did you feel that they were reliant on your legal

advice in this situation, or did you think that they ignored it?

A. No, I think that they take the advice and they make such use of it as they consider it appropriate. I thought Mr. Loughrey described it quite well in his evidence. You can't guarantee they are going to follow your advice, but they do accept it and form a view about it.

Q. And you gave oral advice on the 14th and later again on the 15th of May of 1996. And if I could just deal with the advice on the 14th of May of 1996. Subsequent to giving that oral advice at the meeting on the 14th of May of 1996, were you ever asked to give further written advices or to clarify in any way what you had said at that meeting?

A. No. They seemed happy with where we had got to.

Q. And can I ask you then, in respect of the advices given on the 15th of May of 1996 and the advices you gave and the suggestion put forward in relation to the side letter, were you ever asked subsequently to give written advice confirming the oral advice previously given?

A. No. And the reason I suppose the context of that advice is very simple. I had to go through with them why I thought a side letter would resolve the problem. So we needed to discuss what the issue was, which was the current state of the then ownership as had been discussed earlier. And if they felt happy with that, that then they were safe to give the side letter, and they formed the view that was right and the side letter did the business. I didn't, in

fact, draft the side letter, that was going to be done by somebody else.

Q. In coming to the advices which you gave to the civil servants and to the Attorney General's Office, was it ever suggested to you by either the civil servants in question or by the Attorney General's Office that a particular result was being sought?

A. No.

Q. Was it ever suggested to you that a particular consortia was favoured above others?

A. No.

Q. Was it ever suggested to you that a particular percentage makeup of the Esat consortia was desirable?

A. No.

Q. Did you ever meet the Minister during the course of these advices?

A. I don't think so, no. I am sure I didn't.

Q. And finally, Mr. Nesbitt, I think it is also the position that it was made clear not simply at the time of the at the time of you giving evidence, but in advance, in the submissions made by the State, that it was the view not only of the Department, but of counsel, that the change of ownership to include IIU and to have a configuration of 40:40:20 did not pose a problem; that that was a matter which was dealt with not simply in evidence here, but also in the written submissions made by the Department to the Tribunal?

A. Yes.

MR. O'DONNELL: Thanks very much, Mr. Nesbitt.

A. Thank you.

CHAIRMAN: Just, a last point that just occurs to me, Mr. Nesbitt, just having heard, and I'll very carefully consider everything that you have said. In giving your advice and telling me that in fact you were seeking to cover both the section in the future and to date changes, did it occur to you to perhaps set forth some consideration of the RFP in the requirement to give full particulars of ownership to cover the position, perhaps a position that you have said yourself there was an element of pragmatism

A. No, it wasn't pragmatic. When I started wondering how I would come up with the answer, I had to try and form a view as to what was the issue that was giving rise to the request, and it became clear to me, and this was my opinion, that what was happening was not changing the identity of the entity who was wanting to get the licence in a way that was upsetting the granting of a licence to that person. So, I didn't so I came to a view that I didn't need to go back and dig through the competition, because the competition had ended. What was now happening was the plan that had won the competition, this was what I believed, was going to be awarded a licence, and that's why I was trying to set out in very simple terms in paragraph 2 of my opinion, here is the things I think are essential,

and one was the compromising of what was meant to be coming if you granted the licence. And I didn't believe, and was of the legal opinion that what changes had taken place didn't make a difference in legal terms. That was my very strong opinion. Now, those circumstances, I didn't feel it necessary to go back and dig through the competition process, because I didn't understand that to have been any more than a decision that this was the appropriate project which would get the chance to run the mobile licence. And I was very strong about that, and I believe very strongly that's the correct view. Somebody else may have a different view. But I feel that very strongly, because of the commercial nature of what was happening. And once I formed the view that here is an entity that is still being backed by effectively its joint venture beginners, and is still simply going to have investors putting money in, and they have already told everybody they are going to get to a third:a third:a third in the fullness of time. If what's now happened isn't going to prejudice that vehicle being able to deliver, then I don't see a difference or a problem in relation to them being entitled to take the licence.

And I think that is it's not a pragmatic view, I think that is the correct legal interpretation, but that's just my opinion, and maybe other people would differ about that, but I think that is correct.

And I don't think, going back to try and dig through the process was going to help me, and I would have gone there

if I thought I needed to, but I didn't. I did think about where I was going to have to look because I had quite a slim brief, but the two documents I had, or the three documents I had made it clear what the issue was. This was an identity of the investor. There was always going to be another investor, and I say it was just an identity issue. And once they formed the view that there wasn't going to prejudice what would be delivered, in my opinion that was the end of the matter, that there was not a problem.

CHAIRMAN: I'll have regard to that, Mr. Nesbitt.

MR. O'DONNELL: I have just one question arising out of that.

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

Q. MR. O'DONNELL: Therefore, Mr. Nesbitt, just for the avoidance of all doubt, as lawyers frequently say; your advice, in May of 1996, was not simply that the involvement of IIU at the percentages in question was commercially acceptable, your advice was, as a Senior Counsel, that its inclusion was legally acceptable?

A. Yes, and I wouldn't have minded the slightly higher figure either.

Q. You could have lived with 37.5:37.5:25?

A. Yes.

Q. But your advice was that 40:40:20, and IIU being the 20, was a legally acceptable proposition?

A. I said what was taking place was legally acceptable, and I

didn't learn till later that I can't remember when I learned that it was 40:40:20 was going to be acceptable.

They didn't discuss it with me. I gave advice.

MR. O'DONNELL: Sorry, Chairman, that arose just simply out of your question.

CHAIRMAN: Thank you for your attendance, Mr. Nesbitt, for what I readily accept neither for you nor for anybody else present was a particularly palatable occasion. I think there is evidence fixed for the 31st. If there is any change in that, an announcement will be made in the usual fashion.

Thank you.

THE TRIBUNAL ADJOURNED UNTIL THE 31ST JULY, 2009.