

THE TRIBUNAL RESUMED ON THE 18TH MARCH 2010 AS FOLLOWS:

MR. HEALY: It's not envisaged that a lengthy Opening

Statement would be made, in view of the fact that there are

only two witnesses, but, at the same time, so as to put in

context to some extent the evidence to be given by these

witnesses, a brief statement may be of assistance.

It will be recalled that in the course of its inquiries,

the Tribunal formed the view that the opinion of

Mr. Richard Nesbitt did not address the question of changes

in the makeup of the Esat Digifone Consortium, and as a

result, the opinion was, to all intents and purposes, of

limited significance. Essentially, it was for the most

part treated as neutral. I don't think that anything

improper was suggested in consequence of the Tribunal,

assuming that the opinion did not deal with the question of

whether the changes in the makeup of the consortium could be incompatible with the ownership proposals outlined in the Esat Digifone application.

Until about, I think about 18 months ago, the Tribunal operated on the basis that not only had the opinion not addressed the questions posed by Mr. Towey in his letter of the 24th April, 1996, but that those questions, for whatever reason, had not been addressed in any other exchanges by either Mr. Nesbitt or by lawyers for the Attorney General -- from the Attorney General's Office.

Then, for the first time, I think in late 2009, the Tribunal was informed by the Department that further information was available on this matter. And the Department conveyed to the Tribunal that two officials, Mr. Brennan and Mr. Towey, had information that oral advice had been given by Mr. Richard Nesbitt, SC, concerning

changes in the makeup of the Esat Digifone Consortium.

They, themselves, had no recollection of having received

such advice, but sometime prior to their giving evidence,

which they gave recently, they had a meeting with

Mr. Nesbitt, in which he had stated to them that he had, in

fact, given such advice and that such advice had been given

orally in the course of a consultation.

Mr. Brennan and Mr. Towey then gave evidence.

In examining Mr. Towey, counsel for the Department put it

to Mr. Towey that Mr. Nesbitt had given such advice in the

course of a meeting with Mr. Towey. Mr. Towey had given

evidence of a number of meetings with Mr. Nesbitt, but

having no memory of this advice, couldn't say when the

advice had been given. Counsel for the Department, I think

rather emphatically, put it to Mr. Towey that it had not

occurred in the course of this meeting with Mr. Nesbitt on

the 23rd April. It was put to Mr. Towey that were

Mr. Nesbitt called to give evidence, he would say that he

had not given advice on that date, but that he had, in

fact, given such advice on the 14th May, 1996. Mr. Nesbitt

then gave evidence of having given such advice on that day.

Some notes were kept of each of these consultations, both

of the 23rd April, 1996, and the 14th May. However, in

neither case, to assist the Tribunal, was there any

indication that any such advice had been given and, in

fact, there appears to be no reference whatever to the

issue even in the note of either meeting.

In a further development, the Tribunal has now received

information in the form of a Memoranda of Intended Evidence

of two officials of the Office of the Attorney General

dealing with the matter. They have informed the Tribunal

that oral advice was given by Mr. Nesbitt concerning the

changes in the makeup of the Esat Digifone Consortium.

They have also informed the Tribunal that they, themselves, gave such advice. They have informed the Tribunal that all of this advice, their advice, and Mr. Nesbitt's advice, was given in the course of a consultation on the 23rd April, 1996.

It should be stated that I think both of the witnesses, certainly one of them, has indicated that this advice, which to his mind was consistent with the advice given by Mr. Nesbitt in his opinion, was also given on the 14th May, 1996, but I think he indicates that on that occasion it was not central to the meeting.

Now, again, in examining the documents produced by the Attorney General -- by the Office of the Attorney General, there appears to be no reference to any such advice. And this is the case despite the fact that from an examination

of other documentation made available to the Tribunal by the Department and by the Office of the Attorney General, consultations between public servants and officials of the Attorney General's Office or outside counsel are invariably noted and frequently noted extensively.

The Tribunal is now in a position where its inquiries into the GSM2 licence until about 18 months ago or so were conducted on the basis that advice, having been requested on changes in the makeup of the consortium, no such advice appeared to have been given. It has now been asserted that notwithstanding the Tribunal's reading of the opinion, the opinion did, in fact, address the question of changes in the makeup of the consortium, but more significantly, the Tribunal has now been informed, and for the first time prior to the evidence of Messrs. Brennan and Towey last year, that Mr. Nesbitt recalled giving oral advice on this

question, and that this advice was given on the 14th May, 1996, and that most definitively it was not given on the 23rd April.

Obtaining clarity on this issue is proving more and not less difficult, as more information comes to hand so late in the day. And in particular, the information which has now become available whereby two officials have indicated that their evidence will be that this advice was given by them and in their presence, but that the advice was given in fact on the 23rd April.

Now, these advices were never drawn to the attention of the Tribunal, either by the Department or by -- well, needless to say not by the Department, since neither Mr. Nesbitt nor Mr. Brennan has any recollection of them, nor by any official of the Attorney General's Office either in the course of a letter from the Attorney General's Office

relating to these matters or in a private meeting with members of the Tribunal legal team concerning the matter.

The Tribunal will have to consider a number of questions arising from all this material.

There is, firstly, the question whether the opinion can be read as having provided such advice? And this is primarily a matter upon which you, as Sole Member, is equipped to form your own views. Although some of the documentation from the Attorney General's Office may throw some additional light on this issue as well as on other issues.

And there is then the question as to whether oral advice was given and as to whether, as I have already indicated, clarity can be obtained on this matter having regard to the absence of any note or other written reference concerning the same.

MR. O'DONNELL: Sir, before you take the evidence of

Mr. McFadden and Mr. Gormely, there are one or two issues that I would like to address with you on behalf of the Department. As you are aware, sir, I appear for the Department. And we have requested that Mr. McFadden and Mr. Gormley be called, they are two senior and long-serving officials from the Office of the Attorney General, and we have asked for this, as indeed, we believe other parties have, for a number of reasons. As the Tribunal is aware, the issue of the ownership of the Esat Digifone Consortium has been a matter of considerable importance to the Tribunal, and they have focused on what they see as changes in the so-called ownership and the percentage share of same between the date of which the Esat Consortium submitted its application, the date of the announcement of the winner, and the ultimate award of the licence. And there has been in the course of the hearings extensive reference to the

opinion written for the Department in May of 1996 by

Mr. Nesbitt.

Now, Mr. Nesbitt, in his opinion, expressed views about

these changes of ownership, so-called, and concluded that

the only reason why the Minister could ever be legitimately

concerned about any change in ownership would be if it

compromised the service which the licensee would be

providing. He said it was not tenable to suggest that the

licensee was awarded the licence because of the parties who

owned the licence, but rather the licensee was awarded the

licence because its plans and proposals were the most

meritorious and it provided a funding plan which looked

reasonable. And he was of the view that there was no

reason why any of these matters would be compromised by a

chain in ownership.

Now, as Mr. Healy has said here today, the Tribunal have

sought to suggest that the opinion did not address that issue, of whether the consortium which was awarded the licence was different to the consortium that entered the competition, and they have also suggested, both in cross-examination of witnesses and in your ruling, sir, that the Attorney General confirmed by letter to this Tribunal that no advice had been given on that issue. And I want to come back to that issue in a moment. This has been previously described by the Tribunal as its working hypothesis, but now it is, in fact, their view, and it is -- it seems to be central to the way in which they're examining this issue at this stage.

The Tribunal's view is that the legal advice was sought but not received by the Department from the Attorney General as to whether the changes in the Esat Consortium could be a bar to the award of the licence to the winning consortium.

And it is our view, as you are aware, sir, that the Tribunal has clung to this view, even though there is no evidence to support it, and such evidence as has been adduced fundamentally contradicts the logic of this view.

But because of the approach taken by the Tribunal, the Department was, and remains, anxious to show that it had obtained legal advice on the issue of change within the Esat Consortium before the licence was issued.

Specifically the Department wished to demonstrate that it interpreted the legal advice as allowing the Department to award the licence to the winning consortium even if a change of identity of a 20% investor had occurred, provided this did not compromise the service which was to be provided.

In order to demonstrate to the fullest possible extent to you, sir, that the legal advices contained in the opinion,

the Department took the highly unusual step of waiving
privilege over the opinion written by Mr. Nesbitt and
certain associated other documentation, although these
documents had been provided to the Tribunal many years ago
under the cover of privilege. The Tribunal also requested
-- the Department also requested the Tribunal to recall
Mr. Brennan and Mr. Towey and Mr. Loughrey to give evidence
so as to allow the civil servants to amplify their
responses given by them in relation to their belief in the
effect of the opinion.

The Tribunal, sir, have continued, notwithstanding their
evidence, to maintain the view that the opinion does not
answer the question asked, although the Departmental
witnesses have given evidence that the opinion does answer
the question asked. And, sir, it is of concern to the
Department that, yet again, Mr. Healy has said this morning

in his Opening Statement, that it is a question for you to decide as to whether or not the opinion could be read as providing that advice or not.

Our view, sir, is that in reality the Tribunal's view of what the opinion did or did not mean is irrelevant, and what matters is what the persons to whom the opinion was addressed and to whom the advice was given at that time believed it to mean at that time. And therefore, we say it is not appropriate for the Tribunal to be considering whether or not the Tribunal could or -- the opinion could or should be read as providing that advice, rather it's what the people receiving that opinion on that advice believed it to mean at the time.

Now, sir, as you are aware, Mr. Richard Nesbitt gave evidence, and he indicated that he had a crystal clear recollection of giving oral advice at at least one meeting

attended by Departmental officials, as well as legal assistance from the Attorney General's Office. His evidence was that the oral advice given by him indicated that what happened inside the people making the bid was not something he considered to be relevant. And his evidence was that he believed and so advised that there was no problem in issuing the licence to the entity that was restructured.

Sir, at the conclusion of his evidence-in-chief, counsel for the Tribunal suggested to Mr. Nesbitt that his evidence was, and I am quoting, "not credible." Now, that was a serious suggestion to make, and no evidential ground was laid for it. No basis was put to Mr. Nesbitt as to why his evidence was "not credible". And I am instructed, sir, that this is a matter of the utmost concern to the Department and to the Attorney General. The sworn

testimony of an eminent and respected Senior Counsel has been challenged and rejected by the Tribunal without any basis for so doing. And, sir, with the greatest of respect to the Tribunal, it is our view that the only reason why the Tribunal does not wish to accept Mr. Nesbitt's evidence is because this evidence contradicts and destroys the Tribunal's working hypothesis.

The Tribunal has always sought to suggest that the licence was awarded without legal advice having been given on the issue of whether changes in the makeup of the winning consortium were a reason not to issue the licence. The evidence of Mr. Nesbitt, however, makes it clear beyond argument that this proposition cannot stand. And in this regard, the evidence of Mr. Nesbitt appears to represent what I might call an inconvenient truth for the Tribunal in these circumstances. And it is our view, sir, that the

rejection of Mr. Nesbitt's evidence as being "not credible"

can, in the circumstances, have no basis in logic or law.

The reason I raise this now, sir, is because we have asked

that the two officials from the Office of the Attorney

General who attended these meetings be called to give

evidence. And it is anticipated that they will confirm

that Mr. Nesbitt gave oral as well as written advice to the

Department at meetings attended by the Departmental

officials, as well as Mr. Nesbitt and the legal assistants

in question. It is believed they will say that as a result

of that advice they formed the clear view there was no

reason why the licence should not be granted to the winning

consortium, irrespective of the presence of IIU, which was

a legal irrelevance.

They will also say they read the opinion of the 9th May of

1996 at the time, and we understand their evidence will be

that they read that opinion as also stating that a change in the consortium makeup could never be a reason to refuse the grant of the licence unless such a change would compromise the delivery of the service. And these witnesses will deal with a considerable amount of documentation which has already been provided to the Tribunal as far back as 2002, although most of it again under the cover of privilege, and again the Department has waived privilege in an effort to assist the Tribunal.

But it should be noted, sir, that this is not the first time the Tribunal has heard from these witnesses, having held a meeting with them as far back as October of 2002.

And that's a meeting that will be explored in the course of their evidence. But, sir, bearing in mind the manner in which Mr. Nesbitt's evidence was challenged and the absence of any basis being put to Mr. Nesbitt for the challenge of

his evidence as lacking in credibility, I am instructed to seek from the Tribunal a ruling now that any challenge to the testimony of these two witnesses, Mr. McFadden and Mr. Gormley, will be based on evidence rather than conjecture, and on fact rather than hypothesis, and in our respectful submission, this is the least these witnesses are entitled to as a matter of fair procedures. And I should say, sir, that I am instructed expressly to reserve my entitlement to object in relation to any line of questioning that appears unfair, and to take such other further steps as may appear fit if necessary.

Sir, there is -- we also wish to make the point that we believe that these issues under consideration here appear to be some distance outside the Terms of Reference of the Tribunal which relates to the conduct of Mr. Lowry. The sworn testimony of all the relevant witnesses is clear and

uncontradicted. The decision to award the licence to the winning consortium was taken by the Department following the receipt of legal advice expressly sanctioning this course of action, and it should be noted that this legal advice was also sanctioned by the Attorney General of the day. And that brings me to the other issue which I ask this Tribunal to give me a ruling now, and that relates to the Attorney General's letter of the 20th December, 2002.

And, sir, as you are aware, that letter of the 20th, December, 2002, states:-

"There was a request for advice contained in the Department's minute of the 24th April, 1996, concerning the restructuring of the ownership of Esat Digifone since the date of their application, and the Attorney General's response thereto has already been made available to the Tribunal. Mr. Nesbitt's opinion of 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."

In our respective submission, this could not be clearer.

The Attorney General's Office have, in this letter, which
was signed by the Attorney General, expressed what happened
in unambiguous terms. The request for advice on
restructuring of the ownership of Esat Digifone was dealt
with in the opinion of the 9th May, 1996. But, sir, it
remains extremely disconcerting that the Tribunal persists
with its assertion that this is not the case. And this
assertion has been made in cross-examination to
Mr. Loughrey. And, as you are aware, Mr. Loughrey
indicated on the last occasion that, in effect, he believes
he was misled in his cross-examination into agreeing that a
letter of the type described by the Tribunal existed when

it didn't. But more worrying, sir, your ruling of the 25th February, 2008, perpetuates this misrepresentation. This ruling is a public document, yet it asserts the Tribunal received a letter from the Attorney General indicating that no advice in relation to the effective changes of ownership within the consortium had been received prior to the award of the licence. That's paragraph 9 of your ruling.

Sir, this is untrue. When it was raised on a previous occasion by myself, amongst others, before you, the Tribunal effectively postponed deciding to correct this significant error, but the Department can wait no longer.

And, sir, I don't propose to reveal what is in the provisional findings, but what is not in those provisional findings is any attempt to rectify this damaging misrepresentation. And it should be noted, sir, that the Department has been in ongoing correspondence with the

Tribunal in relation to this matter since its ruling on the 25th February, 2008, and there have been over a dozen letters exchanged in relation to this.

The Tribunal accepts that there is no other letter that existed from the Attorney General of any relevance except that of the 20th December, 2002, but has still refused to correct its ruling and has continued to assert the veracity of that ruling in its correspondence. And it has also failed to correct its ruling by continuing to assert that Mr. Loughrey agreed no such advices had been received.

Again, sir, it is our submission that this is an incomplete and misleading statement which requires urgent correction.

Mr. Loughrey has made it clear that any agreement on his part to a suggestion from counsel for the Tribunal was based on the same misrepresentation by the Tribunal in respect of which he was misled.

And it is clear, sir, that not only is the ruling of February 25th, 2008, unsupported by oral or written evidence, it is directly contradicted by the letter of the Attorney General of the 20th December, 2002, and by the oral testimony of various witnesses.

So, I am also instructed to ask you here today to rule now, sir, that your previous ruling of the 25th February is incorrect and will be amended. And my clients -- while my clients are anxious to assist the Tribunal in any way possible and are anxious to ensure the Tribunal concludes its business as speedily as possible, they are also anxious that the reputation of the Department and that of the Civil Service is protected. The Civil Service have done nothing wrong, and no allegation has been made against them; no witness has suggested they have done anything wrong. And it is our respectful submission that this -- these two

rulings will assist in providing them with fair procedures
and protecting their good name and reputation.

So, I ask you to make those two rulings now, sir, in
advance.

MR. SHIPSEY: Mr. Chairman, perhaps it would be preferable
if parties who wish to make some observations do so before
you rule on individual matters?

CHAIRMAN: We'll proceed, Mr. Shipsey. I am conscious that
there is a danger that we will become distracted. And I
have already noted submissions not dissimilar to what has
just been stated by Mr. O'Donnell, from other legal teams.

And it is certainly a matter to which I have been giving
consideration. But it would be my preference - I mean, I
have allowed Mr. O'Donnell make his application at the
outset - but it would be my preference that we embark,
after I have made some brief remarks in response, on the

evidence of the two officials.

MR. SHIPSEY: I take your ruling, Chairman, in that regard,

but it is important from Mr. Desmond's perspective and from

the perspective of IIU, that I would comment on Mr. Healy's

very short opening and just to express astonishment,

Chairman, that no reference was made in any detail to the

memorandum of the 18th October, 2002, which is a Tribunal

document taken by the then solicitor for the Tribunal of a

meeting between Mr. Healy, Mr. Nesbitt, Mr. McFadden and

Mr. Gormley, in which the evidence by Mr. Nesbitt last July

was repeated by him where, what amounts to Mr. Healy's

working hypothesis and now being put forward as the view of

the Tribunal, was put up to the witnesses for the Attorney

General's Office, and to Mr. Nesbitt, and was shot down at

that meeting. And it is astonishing that Mr. Healy, who

does appear to be the author, insofar as we know, of this

working hypothesis, in opening the matter to you this morning, and to all the witnesses, would not make reference to this memorandum. And also, sir, to make the point that that was a Tribunal document. And to ask you, sir, when you became aware of this memorandum, and as to why this document, which is a Tribunal document, which must have been created after or on the 18th October, 2002, wasn't made available to the parties in this Tribunal?

We have been writing, as you know, sir, since November of 2003 in relation to Mr. Nesbitt's opinion. We ultimately got a ruling which said that we couldn't have it because of privilege, that privilege was waived. But Mr. Nesbitt was cross-examined last July on what we regard as a totally false premise; a premise that he had not given advice orally to the Department and to the Attorney General. And one of the six reasons cited when we pressed for

particulars in relation to that, was that he had not said anything in the intervening years. But you now know, sir, and we need to know when you knew, and certainly the Tribunal legal team knew since October of 2002 that Mr. Nesbitt was of the view that the issue that would allow you refuse is financial standing, not a question of who was involved. That's precisely what Mr. Nesbitt said last July. That memorandum should have been made available to the parties, and it should have been made available to Mr. Nesbitt. And at this stage, and before evidence is heard, Chairman, we, on behalf of Mr. Desmond and on behalf of IIU, would need to know why, and ask you, sir, why that memorandum, which has been in existence, presumably, since October of 2002, was not available and made available to the parties to this proceeding?

MR. HEALY: We have been drawing attention to this in my

opening remarks, which I pointed out that the oral advices were never drawn to the Tribunal's attention by the Department or by any official of the Department either in the course of the letter from the Attorney General's Office, to which Mr. Shipsey refers, or in a private meeting with members of the Tribunal legal team. And I think the evidence will show that that is the case. And it will be interesting to see, and no doubt be happy, the Tribunal would be happy to be told that this advice was given. But it will be recalled that when Mr. Nesbitt gave evidence, he never alluded to having drawn this matter to anyone's attention, and indeed, indicated in the course of his evidence that he couldn't do so because he was bound by confidentiality from doing so.

MR. SHIPSEY: With respect, Mr. Healy is avoiding the question and missing the point. Mr. Healy was at the

meeting in October 2002. Mr. Healy knew what was discussed at that meeting. Mr. Healy must have been aware of the existence of this memorandum. And since October 2002, until Monday of this week, none of the parties to this Tribunal were furnished with that memorandum. It was enormously important and of significance in relation to the origin of the working hypothesis. It should have been made available to the parties, and highly material to the credibility of Mr. Nesbitt in relation to his evidence which he gave in July of last year, and yet, we don't have any explanation as to why that document wasn't made available.

MR. O'CALLAGHAN: Chairman, I would ask that I be given some indulgence by you, sir, just to make a brief submission in line with the submission made by Mr. O'Donnell and Mr. Shipsey.

Sir, you may recall --

CHAIRMAN: Mr. O'Callaghan, I don't want Mr. Morrissey's

contribution reechoed in this forum. I have no control

over Mr. O'Brien's disposition to issue press statements,

but I do control the procedures that take place up here,

and I am not going to have a regurgitation of all those

matters which have been urged before by Mr. O'Brien in

evidence and which will be dealt with in the report.

MR. O'CALLAGHAN: Sir, I have to say that I am offended

that you would think that I would stand up here and just

regurgitate what an individual, such as Mr. Morrissey, who

is an exceptional individual, but who is involved in public

relations, would tell me to say. I want to say to you,

sir, what I have regarded as appropriate that should be

said to you having reviewed the brief of information that

was furnished to me last Monday, and I think I should be

given an opportunity to do that, and I don't think I should

be regarded as a mouthpiece for a PR representative.

CHAIRMAN: I am not suggesting that.

MR. O'CALLAGHAN: Sir, you may recall last June that a

number of witnesses gave evidence about the ownership

issue. And I have furrowed a lonely path, I say, by

bringing to the attention of this Tribunal that the

statement made in your ruling of February 2008 was

incorrect. I am very pleased to see now that the State is

supporting what I said back in June and supporting it

vigorously. I don't wish to go back to what was contained

within the ruling of February 2008, but I do want to bring

to the attention an objection I have arising from the brief

of documentation that was furnished to us last Monday,

because, as has been indicated by Mr. Shipsey, contained

within that is a memorandum of a meeting of the 18th

October, 2002. That memorandum is crucially important, I

say, Judge, because it refers in the heart of it to a

statement by either Attorney General officials or

Mr. Nesbitt that they felt the opinion of Mr. Nesbitt dealt

with the query raised in the minute of the 24th April,

1996. That clearly indicates, Judge, that this Tribunal

was told back in October 2002 that it was the Attorney

General's view that the opinion of Mr. Nesbitt dealt with

the matter.

Now, notwithstanding that, when Mr. Nesbitt came to give

evidence here, he was vigorously cross-examined on two

issues. I do not dispute the fact that Mr. Nesbitt is

entitled to be vigorously cross-examined by this Tribunal,

and nor should he be given any preferential treatment

simply because he is a Senior Counsel, but he was

vigorously cross-examined on two points: The first point

he was vigorously cross-examined on was the oral advice.

But secondly, he was vigorously cross-examined by

Mr. Coughlan as to why it was he never, or his client never

brought to the attention of the Tribunal that they believed

the opinion dealt with the matter. And if Mr. Nesbitt had

of had this memorandum at the time he was answering those

questions, it would have been untenable for Mr. Coughlan to

put such suggestions to him. And I'll just quote even one

of them, sir.

At page 14, he said: "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?

Answer: No, I didn't bring it to the attention of the

Tribunal."

Had this document been furnished, he and other parties

here, would have been able to challenge the Tribunal's view

that this was not given in advice by the State back in

2002. And I have an application, sir, and I have six

points that I think that this Tribunal needs to deal with

at this stage.

And the first of those is that I think that the Tribunal

needs to recognise that the Tribunal was told back in 2002

that Mr. Nesbitt's opinion dealt with the matter.

Secondly, the Tribunal should accept that the minute of the

18th October, 2002, should have been furnished to parties

earlier. In the Opening Statement of Mr. Healy on the 12th

of December, 2002, which was just some two months after

this meeting, Mr. Healy stated, on page 2 he says: "Now,

an opinion was furnished by counsel through the Office of

the Attorney General which addressed the question of change

of ownership after the issue of the licence." It should

have been said in the Opening Statement of this Tribunal
back in December 2002 that it is the view of the Attorney
General's Office and the State that the Tribunal dealt with
the matter.

The third point, sir, I say is that the Tribunal should
provide an explanation as to why this memorandum was not
provided.

Fourthly, the Tribunal should give Mr. Nesbitt an
opportunity to come back in here without both his arms tied
behind his back, so he can answer the questions that
Mr. Coughlan put to him, and put back to Mr. Coughlan that,
in fact, he told the Tribunal in October 2002 that the
opinion dealt with the matter.

Fifthly, the meeting of the 18th October, 2002, is
obviously a crucial meeting, not only in terms of what was
said by Departmental officials about the opinion, but also

we need to know whether there was any statements made at that meeting about oral advice. And for that purpose, I say that all of the parties who were at that meeting should be called to give evidence. And we should inquire whether any other party who was at that meeting has a note of the meeting.

And, finally, if necessary, sir, and I believe the evidence now is overwhelming, that the theory the Tribunal has that in some respect IIU was secretly sequestered in or brought in without being evaluated, is no longer tenable. But if the Tribunal is persisting with its view, the Tribunal should give serious consideration to calling Mr. Gleeson, who will be able to establish, we believe, categorically that there is no basis to the Tribunal's theory.

This theory about the IIU ownership has gone on too long, and it's delayed the Tribunal too long, and it should be

dropped as a theory, sir, and I say that with respect.

CHAIRMAN: I do not propose to give any ruling on

particular minute aspects of matters. All that I will

observe at this juncture are two things:

Firstly, I have been a Judge now in this State in the

Circuit Court and in the High Court for a few weeks short

of 23 years. I would hope that in that period I would have

learned that the basic criterion of justice is that cases,

be they criminal or civil or tribunals, will be decided on

evidence, not on hearsay, not on speculation, not on

working hypothesis. And it is my utter determination that

the second part of my report will be founded unequivocally

on evidence that I have assessed and which I believe will

stand up. It is not to be the case that any such report

will be founded on speculation, on working hypothesis or

anything of that kind. To do so would be to do a major

injustice to persons who may be affected by the Tribunal

report. And it would, in any event, be a dereliction of

the oath of office that I took back in 1987 and

subsequently when transferring to the High Court.

So, I am somewhat bemused at some of the remarks that have

been made, not in these quarters, that to some extent the

Tribunal has been seeking to cobble together some form of

report that will unjustly condemn people on flimsy or

insufficient evidence. I am mystified why it should be

suggested that there is any reason why this should be done,

and it would be an unthinkable concept for anybody who has

been a Judge in this State and who has been requested by

the unanimous resolution of both Houses of the Oireachtas

to attend to these matters.

I do propose in my report in due course, while I will take

on board everything that may transpire in these remaining

sittings, I do propose to address the reasons for the delay

in preparing and finalising the second part of the report.

Accordingly, I hope in those 25 years I have learned to be

big enough and humble enough, if any error has been made at

any stage, to correct it. I am not saying that this is the

case, because I am conscious from my perusal of the papers,

that there are important matters that remain to be

canvassed in evidence with both the witnesses who will be

testifying today and probably tomorrow.

But I will base my report unequivocally on what the

evidence stacks up to give rise to as proper findings. I

am not going to be distracted by some of the controversy

that grows around the place. And while, Mr. O'Callaghan, I

certainly did not intend to suggest that you were a

mouthpiece for any public relations officer, but there is,

perhaps, a prevalence of public relations, of spin and of

other controversy that would not be welcomed in the slightly more deliberative forum of the courts in this country. And I certainly doubt, Mr. O'Callaghan, in the other substantial matter in which you are presently engaged at the moment, I very much doubt that you would have countenanced your client writing to my colleague, the Trial Judge, in that particular matter, as Mr. O'Brien did to me on the 8th February last in a personal letter, stating that the Tribunal was totally biased and that its activities really reaches a new low in Irish judicial history.

I am not going to be distracted by that or by any of the other sideshows that may be bruited about the place. I accept that there are points that will have to be considered carefully and evaluated, whilst at the same time I am conscious that the remaining matters in the evidence of the two forthcoming witnesses that will have to be

carefully heard and assessed. I am not going to give any

ruling at this particular juncture, save to say that

definitively I will report on the evidence and submissions

made and nothing else. Proceed, Mr. Coughlan.

MR. COUGHLAN: Mr. McFadden, please.

DENIS McFADDEN, HAVING BEEN SWORN, WAS EXAMINED BY

MR. COUGHLAN AS FOLLOWS:

1 Q. MR. COUGHLAN: Mr. McFadden, if I might just explain the

procedure I propose adopting. You furnished a Memorandum

of Intended Evidence, I think. Do you have that with you?

I can give you a copy of it now. And also, that's a book

of the documents.

A. Yes, that was served.

2 Q. So, what I intend doing is just taking you through your

memorandum in the first instance, and then perhaps we'll

inquire into certain matters which arise and we'll refer to

documents in due course, is that all right?

A. That's fine.

3 Q. I think, Mr. McFadden, you have informed the Tribunal that

you were called to the Bar in 1975. You joined the

Attorney General's Office in 1981. In April/May of 1996

you were a legal assistant to the Attorney General, and I

think the title is now Advisory Counsel, which position you

have held since that date, is that correct?

A. That's correct.

4 Q. I think you have informed the Tribunal that you were aware

that on the 25th March, 1996, Regina Finn of the Department

of Transport, Energy and Communications, (the Department),

under cover of a letter of the same date as part of the

licence negotiation process with Esat Digifone, sent a

draft licence to the Attorney General's Office for

consideration, is that correct?

A. That is correct, yes.

5 Q. I think you informed the Tribunal that you were aware also

that on the 12th April, 1996, the Department, through

Mr. Fintan Towey, under cover of a letter of the same date,

sent draft regulations to implement Commission Directive

96/2/EC in relation to mobile and personal communications,

together with other specified documents, to the Office of

the Attorney General for consideration. This recent

directive was an important legal -- had an important legal

impact on the mobile licensing process.

Now, I don't intend going into great detail on the

technical aspects.

A. Surely.

6 Q. But this particular directive was something which had come

to your attention in this way for the first time?

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

7 Q. And it did have significant legal implications on the licence, isn't that right, how the licence would be drafted and issued?

A. Very much so from a legal point of view, yes.

8 Q. And it was a matter of great concern, and a lot of thought was being given to it inside the Attorney General's Office, isn't that correct?

A. Very much so, again because -- I mean, the competition had occurred earlier and this directive was brought to our attention, which did impact very much on the licensing process, yeah.

9 Q. It was coming late in the day, as far as you were concerned. You had to deal with it, and I think Mr. Bacon had to deal with it, the late Mr. Bacon?

A. The late Mr. Bacon, that's correct.

10 Q. He was the draftsman?

A. He was parliamentary -- sorry, now known as Parliamentary Counsel, then Parliamentary Draftsman.

11 Q. Now, you say that on the 18th April, 1996, on behalf of the Attorney General's Office, you "briefed Richard Nesbitt, SC, with the above-mentioned draft licence and minute of the 12th April, 1996, and enclosure seeking general advices concerning the validity of the licence and the proposal to grant it pursuant to the proposed new Section 111(2B) of the Postal and Telecommunications Act, 1983. The letter to counsel stated that John Gormley or Denis McFadden would make contact with him to arrange a consultation to discuss some of the issues involved"?

A. That's correct, yes.

12 Q. So what you were doing here was, you had, and I will deal with it in due course, Mr. Nesbitt had provided some advice previously, isn't that right?

A. He had provided significant advice at earlier times, yes, not least on the issue of capping the licence fee, which was a major issue, which you are probably aware of, but other -- in fact, I mean, I am sure you'll come to it --

13 Q. We'll come to it in due course. But he had initially been involved in that whole question of capping the licence fee and the view of the EU in relation to that matter?

A. Correct. And he had also, as you know, he gave an opinion in August '95 and subsequent opinions dealing with the draft licence and the terms, and also from a legal perspective the very important issue of the licensing base.

Because the legislation dealing with telecommunications in '83, I mean things had moved on in the telecommunications world, and really this was the liberalisation of the market which wasn't envisaged probably in the early legislation to the extent that it occurred.

14 Q. He had given an opinion in August of 1995 in relation to the licence and licensing matters?

A. Correct. I think that's in the Book of Documents, yes.

15 Q. Now, you say that on the 22nd April, 1996, a consultation was held in the Office of the Parliamentary Draftsman, which was attended by Departmental officials Fintan Towey and Regina Finn, the late Mr. Bacon of that office. You attended with Mr. John Gormley of the Office of the Attorney General. The consultation dealt with issues relating to the transposition of Commission Directive 96/2/EC, including directive's impact on the ongoing licence negotiations, isn't that correct?

A. That's correct. That meeting would have been probably the first, I suspect, after the documentation had been received. So, it would be an exploratory-type meeting, discussing the various issues that appeared to us to be

involved.

16 Q. Then you say that on the 23rd April, 1996, a consultation

was held in the Office of the Attorney General with Richard

Nesbitt, SC. You recall that Fintan Towey of the

Department attended, as did you, along with Mr. Gormley of

the Office of the Attorney General?

A. That's correct.

17 Q. The consultation lasted from 4.15 p.m. to 5.45 p.m.. The

purpose of the consultation was to discuss issues arising

in relation to the draft licence and Commission Directive

96/2/EC and the draft regulations to transpose the

directive?

A. That's correct.

18 Q. So, again, it related to highly technical matters, isn't

that correct?

A. Technical, yes, but from a legal perspective, very

important, yes.

19 Q. Very important?

A. Yes.

20 Q. Then you say a number of other issues were also discussed.

Fintan Towey raised the question of whether meetings should

be held with unsuccessful applicants for the licence to

supply them with feedback, in view of the fact that a

complaint had been made to the Commission regarding the

licensing process. Counsel was requested to furnish his

opinion on this issue?

A. That's correct.

21 Q. So, it was planned to have a meeting with the unsuccessful

applicants in relation to feedback, but because a complaint

had been made, I think to the Commission?

A. Correct.

22 Q. Your view, or the view, a legal view was sought as to

whether it would be appropriate in those circumstances?

A. I think it was Mr. Towey probably raised the issue, and it was decided to get Mr. Nesbitt's view on that.

23 Q. In other words, whether it would impact on the -- might impact on the --

A. Giving of feedback, yes, that process, because again that would have been -- I mean, this was, the whole process was -- the whole licensing process was a relatively -- I mean, it was a relatively unprecedented process.

24 Q. Yes. So --

A. In communication terms.

25 Q. So, for everyone involved, the Department, you in the Office of the Attorney General, the late Mr. Bacon, and even Mr. Nesbitt, this was a relatively recent development that you were undertaking here?

A. Yes. And as I said, the directive made it even more of a

green field, let's say, work.

26 Q. Now, at paragraph 8 you say that Fintan Towey also raised a

new issue concerning the restructuring of the ownership of

Esat Digifone. He proceeded to set out the issues involved

in some detail. You recall he produced a set of papers

concerning the matter. At the end of the consultation,

counsel took these papers away with him. The new issue on

which Mr. Towey needed legal advice arose out of

correspondence received from the solicitors acting for Esat

Digifone and, in particular, whether the correspondence

showed whether there was any change in the identity of the

beneficial owner of the company which would be incompatible

with the ownership proposals set out in the company's

original application.

So --

A. That's correct.

27 Q.

-- the issue that Mr. Towey raised was, there was a change had taken place, isn't that right, or was about to take place?

A. Correct. I should possibly explain too, that this was a completely new issue. It was an unannounced issue.

Mr. Nesbitt was brought along to that consultation, he kindly came along, and in a sense, it was -- we had mentioned we would have a consultation to assist him in what was a very large legal task of reviewing the draft licence and licensing base and regulations, and Mr. Gormley and myself had an idea of the issues which we would be raising with him, many of which had been discussed the previous day at the meeting with Department officials.

That was the purpose of the meeting, and as I say, possibly why I -- one of the reasons I recall this particularly well

was the fact that Mr. Towey raised this as a new issue.

And so, I won't say it was welcomed when he did. I think

we had enough issues on our agenda, but in fact, he did

raise it as a new issue. So, we listened very carefully to

what the issue was and to try and understand what it was.

That's just to give you background as to how it came about.

28 Q. I'll come back to it when we go to --

CHAIRMAN: I just wonder, while we are at that stage,

Mr. McFadden, effectively you and Mr. Gormley and

Mr. Nesbitt had been working as something of a legal team

on the licence, he had his quite substantial opinion the

previous year?

A. I think that's a very fair comment, Mr. Chairman.

CHAIRMAN: Had you, yourself, from being a lawyer in the

Attorney General's Department, had you become aware of some

political controversy and a rather substantial article in

The Irish Times about the suggested involvement of

Mr. Desmond and IIU the previous month, in March?

A. I can't say that I was particularly aware. I mean, being

-- we deal with a lot of matters which get media publicity,

as you are aware.

CHAIRMAN: It deals with the fringes of politics.

A. Indeed. Well, I'm not quite sure how to respond to that,

but certainly frequently matters we deal with would be in

the political arena. I can't say that I was overly

conscious of media reports at that time. Certainly -- I am

just trying to recall -- I am aware that there were media

reports concerning the ownership issue possibly raised at a

certain time, but not I think -- I can't recall the dates

of that, but it certainly was in the media. But that

wouldn't be a matter that we would necessarily, I think

with deference to your own remark earlier on, it's not

necessarily a matter we'd take too much heed of.

29 Q. MR. COUGHLAN: You may have been generally aware?

A. Yes.

30 Q. But not specifically aware that there was a controversy?

A. Yes.

31 Q. Now, I'll continue on with your memorandum for the moment.

Now, you say that the issue seemed to you to be whether,

having regard to the ownership proposals in the licence

application: 1) Esat Telecom Holdings Limited and its 37.5

shareholding was acceptable as one of the two joint venture

companies. And 2), the 25% shareholding of IIU Nominees

Limited representing the proposed investment of financial

institutions was acceptable?

A. Yes.

32 Q. That's as you understood?

A. Correct.

33 Q. Now, Mr. Towey, it would appear from how you've recorded it

here or given evidence about it here, had come and said:

Look, there was an application or a bid made by a

particular consortium, isn't that correct?

A. Yes.

34 Q. And in the bid, the consortium was stated to be, and he set

out in general terms what --

A. Yes.

35 Q. But that is not the position now, isn't that right, that's

what he is saying?

A. He didn't say that. He was cautious enough --

36 Q. I see.

A. I think he set out, to the best of my recall, he set out

what was contained in the application form and then

referred to correspondence which had been obtained from

William Fry and Co..

37 Q. A letter dated the 17th April, I think, from William Fry?

A. Yes.

38 Q. And perhaps a document which had been prepared by Regina

Finn?

A. That's correct.

39 Q. Which produces the diagram?

A. Now, I didn't have those documents at the meeting. He was

reading from those documents. Nor did Mr. Gormley, to the

best of my recollection. He was reading -- he produced

those documents. As I say, this matter arose probably near

the end of a fairly lengthy consultation. He was reading

from documents and, as I say, he was trying to understand

what the issue was as he read from those documents.

40 Q. Right. So that we can just understand what your

understanding of what you were being asked --

A. Yes.

41 Q.

-- what do you think you were being asked at the time?

A. Well, my understanding was that there had -- he had

indicated what the ownership of the licensee would be as

set out in the application form. He set that out. He then

said that correspondence had been received, which he opened

in legal terms, and set out what that was, the content of

that letter, and also referred to the Departmental diagram,

and explained what he understood the letter and document to

mean and what the -- his question, basically, was whether

the ownership, as set out in that documentation, was --

whether the beneficial ownership of Esat Digifone, the

proposed licensee, whether it was effectively the same or

was there some matter -- would there be a matter of legal

concern about what was disclosed in William Fry and Co.'s

letter.

42 Q. Right. We'll come back to that, so.

A. Yes.

43 Q. Now, you go on to say in your memorandum that during the

discussion you recall counsel expressing the view that the

Minister could only properly be concerned with a change of

ownership if it compromised the provision of the GSM

service. In relation to the involvement of IIU Nominees

Limited, he stated that he did not consider this to be

material and that the Minister could only object to

financial institutions' involvement if it would affect the

proposed delivery of the service or there was a public

policy reason, for example, the institution had some links

to crime?

A. That's correct.

44 Q. Now, you say that at the end of the discussion about the

issue, Mr. Towey requested that counsel would furnish an

opinion on the matter, which he agreed to do?

A. That's correct.

45 Q. You say that you should say at the time Senior Counsel's

view in relation to the involvement of IIU Nominees Limited

appeared reasonable to you, as you understood that the

involvement of the company was purely as an investor, and

the involvement of financial institutions had already been

mentioned in the licence application. Accordingly, you

were satisfied from a legal standpoint, that the

involvement of IIU was not a matter of legal concern as

regards the issuing of the licence to the Esat Consortium.

In this regard, you should say that counsel had a

wide-ranging advisory involvement in the matter of the

competition awarding the second GSM licence from as early

at June 1995.

Well, we can look at that.

A. Yes.

46 Q. Then you say that on the 24th April, 1996, the Department

wrote to the Attorney General's Office in relation to the

matter discussed at the consultations of the 22nd and 23rd

April, 1996. The letter included the following paragraph:-

"I would like to reiterate our requirement for a legal

opinion on the restructuring of the ownership of Esat

Digifone. Relevant papers were provided at our meeting on

the 22nd April. In particular, the question of whether

recent correspondence suggests any change in the identity

of the beneficial owners of the company which would be

considered incompatible with the ownership proposals

outlined in the company's application must be addressed.

Before the ultimate award of the licence, it is now

considered that it would be preferable to seek warranties

in relation both to the beneficial ownership of Esat

Digifone and the financing package for the project. This is considered prudent given the nature of the concession being given to the company. Perhaps you would advise, however, whether such a requirement would be challenged by Esat Digifone as an imposition not envisaged in the competition process or otherwise unreasonable on legal grounds."

Then you say that a letter to Senior Counsel dated 24rd April, 1996, was prepared, which read as follows:

"Re proposal for the Minister for Transport, Energy and Communications to grant a licence to Esat Digifone Limited to be the second provider and operator of a GSM mobile telephony service in Ireland and the Commission Directive 96/2/EC amending Commission Directive 90/3/88/EEC and Minister for the Department of Transport, Energy and Communications dated 24th April, 1996.

"Dear Richard,

"With reference to the above matter and yesterday's consultation, please find attached copy of the above minute received from the Department and its enclosures. The consolidated text of Section 111 is not enclosed, as it does not incorporate the more recent draft of the proposed amendment thereto.

"A copy of the relevant papers referred to in the Department's minute is also enclosed, together with the new draft Article 8 of the proposed licence which is relevant, and your opinion on the issues set out in that paragraph would be appreciated. If you require any additional information or consider that a consultation would be desirable, please let me know."

And I think because both yourself and Mr. Gormley were handling, it would be normal that the letter would be

signed by both?

A. Yes. I mean, because it was such a large project and John,

Mr. Gormley had dealt with certain aspects himself, it was

really -- I mean, we were working on it together, yes, and

also, if one of us was dealing with a particular aspect, it

was important that we both would know what was being done

on that particular aspect. So that would explain.

47 Q. Then you say, in the context of this letter you should say

that you had a request" -- that you had to request Fintan

Towey of the Department to send you a copy of the relevant

papers as you did not have copies. You believe Mr. Nesbitt

took away the papers handed to him by Fintan Towey at the

consultation. Mr. Towey duly faxed you a set of relevant

papers which were enclosed with the letter sent to Senior

Counsel, is that correct?

A. That is correct.

48 Q. So, can we take it so, that you didn't have an opportunity

to examine closely yourself the documents, the relevant

documents, the letter from Messrs. William Fry and

Ms. Regina Finn's chart, if I might describe it as that?

A. Prior to sending it to counsel, no absolutely. Because

that was -- it was discussed at the consultation of the

23rd, and as I said, it was Mr. Towey set out the issue

which was a new issue. He had the documentation which he

had handed, and this is my recollection, that he handed to

Mr. Nesbitt, who asked, I think, at the end of the meeting

could he take the documentation home with him? And so,

when the request came in, the written request for advice

the following day, I hadn't got the papers and I telephoned

Mr. Towey and asked him would he fax me the papers, because

I hadn't got them.

49 Q. And you sent them on to Mr. Nesbitt?

A. Correct. Sorry, I sent it with the letter.

50 Q. That's what I mean?

A. Sorry, yes.

51 Q. And can I take it that at this stage you hadn't given them any huge consideration yourself?

A. That is correct. I mean, my understanding of the matter, of the issue was derived from, at that time would have been from what was discussed at the consultation of the 23rd, and it was quite fully discussed at that. But I mean, I hadn't the documentation at that meeting, that is correct.

52 Q. Now, you say that in the context of this letter, the letter we have just referred to --

A. Yes.

53 Q.

-- you should say that you had to request Fintan Towey of the Department to send you the relevant documents because

you hadn't had those yourself, and that while you understood that Mr. Towey does not have a detailed recollection of the meeting with counsel which was held on the 23rd April, 1996, you were in no doubt that it happened as you have stated. It is clear from his letter of the 24th April, 1996, that Mr. Towey, at the time of writing it, recalled discussing the matter of restructure of the ownership of Esat Digifone with counsel, and this discussion could only have taken place on the 23rd April, 1996. You also note from his additional witness statement that Mr. Towey refers to being of the view at the meeting earlier than or after his opinion on the 9th May, 1996, and that Richard Nesbitt did not believe that any wish by the Department to tightly control ownership changes could be sustained?

A. That's correct.

54 Q. Now, again, we'll come back to it with the documents, but

you say that you are absolutely certain that the new issue,

this new issue, which understandably yourself and

Mr. Gormley were not overjoyed about, you had enough work

to do on the licensing matter, isn't that correct?

A. That's correct.

55 Q. That this arose on the 23rd April, 1996?

A. There is -- sorry, there is no doubt about that, because

the only meeting with counsel since I think probably

sometime in '95; I mean, it was the first meeting, and as

you have set out in the, read out in the earlier part of

the statement, the consultation really was to deal with the

matters which, in respect of which Mr. Nesbitt had been

briefed regarding the licence and -- so, I mean, there is

no doubt whatsoever about that date, but I can understand

Mr. Towey had been at a meeting the previous day as well,

which I have recorded there.

56 Q. You have indeed. And the only reason I want to ask you

about it and we'll come back to some of Mr. Towey's

documents --

A. Yes.

57 Q.

-- you were of the view, and I think Mr. Gormley in his

Memorandum of Proposed Evidence, believed that the issue

arose as a new issue on the 23rd. That is the ownership

issue?

A. Yes.

58 Q. Mr. Towey, in his letter and in his memorandum of the

meeting of the 22nd, records it being raised with you at

the meeting on the 22nd?

A. I have no recollection of that, and I don't believe it was.

It certainly wasn't discussed -- if he mentioned it, I have

no recollection of it, but it certainly was not discussed in any detail at the meeting of the 22nd. And I think the Tribunal has a copy of my own handwritten note, and I must apologise for my handwriting to anybody who has had to try and read them, but you'll see there is absolutely no mention of that at that meeting.

59 Q. Well, if you might just go back to paragraph 13 of your own memorandum. You say that on the 24th April, the Department wrote to the Attorney General's Office in relation to matters discussed at a consultation on the 22nd and 23rd April. The letter included the following paragraph:-

"I would like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat Digifone. Relevant papers were provided at our meeting on the 22nd April."

A. Yes.

60 Q. So...

A. That is from the Department's minute, yes, and that is obviously Mr. Towey feels that -- well, I have explained my understanding of that and --

61 Q. The only thing I'd draw to your attention, and it's just -- could it be that you're incorrect, that it arose for the first time on the 23rd? That's all I am asking.

A. My clear recollection is that it was the 23rd. The issue was definitely not discussed on the 22nd. I am certain. That's my definite recollection of the matter.

62 Q. So, you have a definite recollection it was arising for the first time on the 23rd. Mr. Towey's minute records it as having arisen as an issue for the first time on the 22nd?

A. Yeah. Well, as I said, my recollection of that is very clear, and I have explained it as well. I mean, as I said, I had to actually ask for the documentation on the, I think

it was probably the 24th. I may not have got it till the 25th, but I had to ask for documentation on the 24th because I didn't have it.

MR. O'DONNELL: Hold on, sir, I think it should be pointed out that Mr. Towey's evidence, Day 360, Questions 13 to 15 said: "Of course we met and discussed this on the 23rd as well." So, to simply suggest that Mr. Towey confined himself to the 22nd is incorrect. It is also clear that he said in his evidence: "I don't have a specific recollection of a discussion at that meeting, but I believe I may have had discussions with Senior Counsel, I don't know when, so I can't exclude that it was then," being the 23rd.

So, again, I just want to make clear that Mr. Towey has not tied himself to the 22nd as being the only date on which this issue was discussed. He clearly, in evidence, said it

was discussed on the 23rd as well, and I think it should be made clear to this witness that Mr. Towey didn't so confine himself.

MR. COUGHLAN: And I don't think the witness understood me to say that.

A. No.

63 Q. MR. COUGHLAN: The matter that I was exploring with the witness was that Mr. Towey says it arose for the first time on the 22nd. I think you understand that?

A. I do.

64 Q. And your recollection is that it didn't; that it arose for the first time on the 23rd, as a new issue?

A. Very much so. And it was discussed, as I say, very fully at the meeting of the 23rd. Now, I am not going to speculate, but I have no recollection of mentioning it on the 22nd. It definitely wasn't discussed in any detail at

that meeting, definitely.

65 Q. But there can be no doubt but that you received -- I think letters are referred to as a minute, are they?

A. Sorry, I think a confusion sometimes arises on that, yes.

Minutes would be called -- in the Civil Service.

66 Q. But did you receive a minute from Mr. Towey on the 24rd recording that, didn't you?

A. Requesting the --

67 Q. Yes. "Relevant papers were provided at our meeting on the 22nd"?

A. Yes, very much so. That's a direct quotation from the minute of the 24th, yes.

68 Q. Now, if we continue with the memorandum. It says on the 30th April, 1996, Fintan Towey of the Department faxed a copy response to William Fry Solicitors' letter of the 17th April, 1996, to you for observations. You discussed the

draft with John Gormley at 5.15 p.m. on the date and notified Fintan Towey of suggested amendments on the 1st May, 1996. The Office of the Attorney General was never furnished with a copy of any response to this letter.

Now, we'll look at the letter in due course, but just in general terms, it is an inquiry being made of William Fry's in relation to the change of ownership, isn't that correct, in general terms?

A. In general terms it's -- the letter is seeking further information -- sorry, not further information, it was clarification of the then ownership structure of Esat Digifone. And I think that possibly arose from the discussion on the 23rd where it was said prior to the grant of the licence, you'll need to know exactly what the exact share ownership structure is. That would be --

69 Q. Why did you need to know that? Sorry, I just --

A. In the sense, just confirmation of what it is. Just literally legal -- or confirmation from the solicitors acting, that that is the exact as -- because they set out in their letter of the 17th, and there was a discussion, then, with Regina Finn, I believe, and I think it just arose from a general statement that we would need to -- that the Department would need to know exactly what the share structure of Esat Digifone was.

70 Q. But --

A. Because the letter itself is, of William Fry's letter is, I am not sure that you'd define it as a definitive closing sale letter, it's setting -- it's somewhat discursive and explanatory, and it was really -- so, we would have reviewed the letter of the 1st May as really something looking for a confirmatory, as I say, equivalent to a closing date-type confirmation exactly before the grant of

the licence.

71 Q. Do you know why it was sent to you and Mr. Gormley?

A. I suspect for just legal vetting.

72 Q. What legal vetting? What was involved?

A. Well, I think amendments to it, and I looked at it there recently, I think were fairly insignificant. Probably just because at that stage counsel's advice hadn't been received and the ownership -- the final advice, the written advice.

--

73 Q. The ownership issue was still live?

A. No, counsel's written advice. I mean, counsel's written advice of the 9th had not been received at that stage.

Article 8 was still in flux, which, as I am sure we'll come

to in evidence, the Article 8 provision, of the draft

licence deals with ownership, that was still in flux, that

was still being drafted by the Draftsman. And as I say,

the letter of the 1st May, we viewed it as a letter
basically seeking a clear statement, a definitive
statement, final statement of the shareholding of the
proposed licencee. I think that's the -- how it would have
been viewed. And it was sent -- I don't believe it was
sent for any other reason than just for us to look at it
and vet it, so to speak.

74 Q. But what vetting was required? That's what I am trying to
establish.

A. Presumably it was a legal-type letter and they felt that
the legal people should see it.

75 Q. But, if your evidence is -- if your recollection is
correct --

A. Yes.

76 Q.

-- advice had been given on the 23rd --

A. Yes.

77 Q.

-- that it was all right?

A. Correct.

78 Q. So, as far as your office was concerned, on that particular

issue, there was no -- nothing to follow up with the

consortium?

A. I am not sure that's really how I'd like to describe what

was happening. There was a consultation on the 23rd, as I

have set out, where the matter was discussed orally.

Subsequently, Mr. Towey requested a written advice on the

matter. So, until the written advice was obtained and

submitted to the Attorney General, I mean effectively the

matter was still in play, I suppose.

79 Q. I see.

A. The formal opinion. But certainly counsel, to go back to

the meeting of the 23rd, which I presume you'll be dealing with later, there was clear views expressed at that meeting in relation to the issue.

80 Q. Right.

A. And as I say, I presume you'll be going back to that.

81 Q. But, can I take it so, that it's your view that until written advices were received, the matter was still in play, to use your own expression?

A. I think advices were given on the 23rd and I think, as is witnessed by the documentation, a written opinion of counsel was sought, and insofar as we were awaiting for the written opinion, that is a fact, that we were waiting for that opinion.

82 Q. I know that. But to use your own expression, was the issue still in play until you received the written opinion?

A. To the extent that I mentioned. In other words, that until

we received the written opinion, which as I said, we viewed as being confirmatory of the advice given on the 23rd, until that opinion was received, clearly we would have to await the opinion, and until it was received, I would have regarded the matter as open within the structures of the office, because the opinion would have to go to the Attorney General.

83 Q. And it would appear that if Mr. Towey was sending you a letter, or a draft of a letter that the Department proposed sending to the solicitors, Messrs. William Fry, that it would appear that it must also have appeared to be in play in the Department until advices were received, isn't that right, because they were seeking more information?

A. I think, in fairness, the letter of the 1st May relates largely to Esat Telecommunications Holdings Limited.

84 Q. It does.

A. And the letter of William Fry of the 17th, if you look at it, and the diagram that accompanied it, it's a relatively, how would you describe it? I mean, for a lay person reading it, it wouldn't be maybe the easiest to follow. As regards that company, because it was a vehicle -- I mean, it's quite a complicated structure. I think Communicorp, it was a Denis O'Brien company, and they were stripping away the broadcasting element --

85 Q. They were taking the radio element out of it?

A. Correct. But the telecommunications, which was the important bit, was still there. But I mean, the actual construction of Esat Telecommunications Holdings Limited, you know, it was something which would have to be confirmed, I suppose, and I think that's really largely what the letter of the 1st May was dealing with rather than -- I am not sure if you are going to come to the question

of the IIU involvement, which was legally a more

straightforward issue, I think.

86 Q. Now, you say that while there was a meeting on the 3rd May,

1996, which was also attended by counsel, this was to the

best of your recollection to discuss the drafting of the

terms of the licence only. You do not believe that there

was any discussion of restructuring or changes in ownership

at that meeting?

A. That's to the best of my recollection, yes.

87 Q. Now, you say that it is pointed out that Senior Counsel

advised in detail on terms of Article 8 of the draft

licence which dealt with ownership of the licence,

management, operation, etc.. The article raised somewhat

similar issues to the issues raised in Fintan Towey's

letter of the 24th April, 1996, and various drafts of the

article were forwarded to Senior Counsel for his advices.

Now, just, again, we'll come to it, but when you talk about

Article 8 and ownership of the licence, that's the

ownership of a licence, not a proposed licence, isn't that

right, Article 8?

A. Yes, but I think -- I mean, you must bear in mind that we

were dealing with the drafting of the licence as well, and

we would have regarded the pre-ownership -- sorry,

pre-grant ownership and post-grant ownership as being

obviously very closely related, because I mean, if there

was a substantial change in ownership prior to the grant,

there wouldn't be much point, from the Department's point

of view, of controlling the changes into the future. So,

they were closely connected. And also, in fact, you

probably see from the earlier drafts of Article 8, the

earlier drafts actually specify the companies by name,

whereas the actual final draft that Mr. Nesbitt -- he

actually advised extensively on a number of drafts right up, I think, until the 10th May, almost, that the final draft is not -- it's changed significantly from the early drafts. But as I say, from the early drafts you will see that the pre-grant ownership is obviously very relevant.

So I mean, I wouldn't have seen them as two completely separate matters, the pre and post-ownership issues.

88 Q. Could I just ask you to pause there for a moment.

A. Yes.

89 Q. Did you consider, at this time, I know you were very busy

on the licence, and I know that for yourself and

Mr. Gormley and, perhaps, for the late Mr. Bacon as well,

or perhaps not as much for him, but this new issue that

Mr. Towey brought, or the new problem, as he saw it, that

did you look, at that time, at the tender document or the

RFP to look at the rules of the competition, at that time,

do you remember?

A. No, but I would have been familiar with them from an earlier time. Certainly as regards the consultation on the 23rd, I don't think there was great reference made to them.

But my recollection is that the -- all that was required from applicants was a disclosure of their ownership proposals and the -- sorry, the ownership structure of the proposed licensee, and --

90 Q. I think it was mandatory, wasn't it? It was paragraph 3, it was "full ownership details of the proposed licensee must be given," or words to that effect, isn't that right?

A. I haven't it in front of me now, but yes. But certainly the application of Esat's seemed to comply with that.

91 Q. Yes, nobody said it didn't. And it disclosed Mr. O'Brien's company, Communicorp?

A. Yes.

92 Q. Telenor and four institutional investors, isn't that right?

A. Correct. Proposed investors, as I understand it.

93 Q. It was a proposed licence as well?

A. Absolutely, yes, but proposed investors.

94 Q. Can I ask you this question: The one thing that was not in

the application was Mr. Dermot Desmond or IIU, isn't that

right, as a proposed -- as a makeup of the consortium of

the proposed licensee, isn't that correct?

A. They were not named as proposed financial investors at that

time in the application, correct.

95 Q. Now, if I continue. On the 9th May, 1996, Mr. Nesbitt sent

by fax his opinion of the same date, which dealt with

suggested amendment to the Esat licence and draft Statutory

Instrument, and also contained general advices. On receipt

of the opinion, you read it carefully. You were conscious

that counsel had been requested to advise inter alia on the

aforementioned issue of the restructuring of the ownership of Esat Digifone.

I think you informed the Tribunal that you were of the view that the second paragraph of the second page of the opinion dealt with the issue. It set out what counsel believed to be the relevant criteria for determining whether change in ownership of the licensee, which was set out in the documentation briefed to him, should be of concern to the Minister or could be legally challenged. In your view, the opinion confirmed the views expressed by counsel at the consultation held on the 23rd April, 1996.

You say that in addition, the covering letter which accompanied counsel's opinion stated inter alia: "I remain of the view that the Minister should not drag his feet in issuing the licence. It was my view that counsel would not have given this advice if he had concerns about the

restructuring of the ownership set out in the papers sent

to him with the letter dated the 24th April, 1996."

Now, we'll come to the opinion in due course, but just for

the moment, the opinion makes no reference to IIU,

Mr. Dermot Desmond, does it, in its body?

A. The request for advice doesn't refer to IIU.

96 Q. No, no, I beg your pardon, I beg your pardon.

A. Sorry, yes. No, the opinion doesn't refer specifically to

IIU, yes.

97 Q. What was sent in the relevant documentation to Mr. Nesbitt

was Mr. Owen O'Connell's letter from Messrs. William Fry of

the 17th April, 1996, isn't that right?

A. That's correct.

98 Q. Which does refer to IIU?

A. Correct, yes.

99 Q. And refers to IIU having, essentially, a beneficial

interest in 25% of the consortium, isn't that right?

A. That's correct.

100 Q. Of the proposed licencee. And Ms. Regina Finn's chart is probably very good because it --

A. Helps to understand --

101 Q.

-- it sets out probably in some easier form, but perhaps a

little inaccurate in one or two things, but it clearly

refers to IIU, Mr. Dermot Desmond, isn't that right?

A. Correct, yes.

102 Q. The 25%?

A. Yes.

103 Q. And 37.5% and 37.5% for the other purchasers?

A. The joint venturers, yes.

104 Q. Now, there is no reference in the opinion, is there, to IIU

37.5%, 25%, is there?

A. Factually, no, there is no specific mention of that.

105 Q. And there is --

A. Of those things.

106 Q. Sorry, I beg your pardon. And factually there is no

reference in the covering letter to IIU, Mr. Dermot

Desmond, 37.5% or 25%, is there?

A. No.

107 Q. And whilst we'll come to the covering letter as well where

you quote, at paragraph 22 of your memorandum, from

Mr. Nesbitt's letter: "I remain of the view that the

Minister should not drag his feet in issuing the licence."

There was another issue in the background, wasn't there,

and it was the question of the Persona complaint, and

people were giving consideration as to whether Persona

would seek to enjoin the Department from issuing the

licence, isn't that right?

A. Yes. I am not sure of the extent of privilege on some of

this matter, but yes, there was certainly a --

108 Q. Now, if you go to paragraph 23 of your -- you say that on

the -- and just to recap for a moment on your state of

mind, is that you could understand this opinion because you

were privy to oral advices which you had understood, is

that correct?

A. Correct. And I had an understanding of it myself as well

in general terms, of issues.

109 Q. Yes. And you say that on the 10th May, 1996, John Gormley

and you made a submission to the then Attorney General

concerning:-

1: Proposal of the Minister for Transport, Energy and

Communications to grant a licence to Esat Digifone Limited

to be the second provider and operator of a mobile

telephony service in Ireland.

2: Stamped draft of regulations entitled "European

Community's Mobile and Personal Communication Regulation

1996" to give effect to Commission Directive 90/3/88 EEC of

the 28th June, 1990, and Commission Directive 96/2/EC of

the 16th January, 1996, and

3: Stamped draft of licence proposed to be granted under

subsection 2 of Section 111 of the Postal and

Telecommunications Act, 1983, No. 24 of 1983 as amended by

the above-mentioned regulation when made, and

4: Advice of Richard Law Nesbitt dated 9th May, 1996. The

submission sought the sanction of the then Attorney General

to transmit the stamped draft regulation and stamped

licence and a copy of Mr. Law Nesbitt's advice to the

Department under cover of a minute in the terms of a draft

attached to the submission.

Then you say that: "I should perhaps state here that if I

had any concern or doubts about the legal validity of issuing the licence to the Esat Consortium, I would not have made the submission in question to the Attorney General. I wish to make it clear that I was happy as a result of the oral views of Senior Counsel, which he expressed at the consultation of April 23rd, 1996, and his written legal advices as described above, that it was appropriate that the licence issue to the consortium in question."

You say that it was your view, which was also that of Senior Counsel, that the involvement of IIU was legally irrelevant provided it did not compromise the ability of the consortium to deliver the service as promised.

Now, could I just ask you, does that particular phrase appear in the opinion?

A. Which phrase?

110 Q. "The involvement of IIU was legally irrelevant provided it did not compromise the ability of the consortium to deliver the service promised."

A. No, it does not appear in the opinion. But that was my view when I was preparing the submission.

111 Q. So -- we'll come to the submission in due course, but I think you have recounted on the previous, what you submitted to the Attorney General, isn't that right, the then Attorney General, what you flagged?

A. Yes.

112 Q. And what you were seeking sanction, or I don't know what the term --

A. Sanction, yes.

113 Q. Sanction is the term?

A. Yes.

114 Q. You were seeking sanction to transmit the stamped draft

regulations and stamped licence and a copy of Mr. Law

Nesbitt's advices to the Department under cover of a minute

in the terms of a draft attached to the submission. So,

you prepared a draft minute/letter and you attached the

documents you have flagged here, isn't that correct, or you

flagged certain documents for the attention of the Attorney

General?

A. Yes. I mean, principally what we were looking for was

sanction to release the draft regulations and draft licence

and Mr. Nesbitt's opinion.

115 Q. Yes, which dealt with same, isn't that right? We'll come

to a document --

A. Well... Yes, his opinion -- we were looking for sanction to

release his opinion and the draft regulations and draft

licence.

116 Q. And that's what you flagged to the Attorney General?

A. Sorry, no, I mean the submission -- are you -- I mean you'll be coming to that, you'll be coming to that. But I mean, essentially what we were looking for was sanction to release those documents; that's the draft regulations transposing the Directive, the draft licence and Mr. Nesbitt's opinion.

117 Q. And you say in your memorandum here that -- we'll just continue on. You say that you also attended a meeting with the Tribunal counsel in October, 2002 at which you confirmed the position as outlined in the Attorney General Office's written response. "I was then and remain of the view that the opinion of counsel dealt with the issue in question. My impression at the time of the meeting was that the Tribunal counsel was -- that the contents of this written response appeared at the time to be accepted."

A. Yes.

118 Q. Is that the written response issued by Mr. Rory Brady, senior counsel, when he was Attorney General you are talking about?

A. Was that not in 2003 I think?

119 Q. Well --

A. I mean there was so much correspondence now.

120 Q. Which written response are you talking about so here?

A. I am not sure -- The -- I mean you probably have the documentation there.

121 Q. I don't.

A. Well, the Tribunal had, I think, raised the issue of where was the response of the request for advice on the 23th?

And I believe that it was indicated that the opinion of the 9th May, 1996 dealt with the matter. And subsequently, to the best of my recollection, the Tribunal asked that

Mr. Gormley and myself attend a meeting with Tribunal

counsel, which we did, and which particular letter, the date of that letter somebody might be able to assist me, but it is a letter either from the Attorney General's Office or the Attorney General which, at a very early stage, pointed out that it was the view of the Attorney General's Office or the Attorney at the time that the opinion of the 9th May dealt with the query contained in Mr. Towey's minute of the 24th April, 1996.

122 Q. And present at that meeting were?

A. Yourself.

123 Q. I think I wasn't there.

A. You were there. You were there.

124 Q. If you look at the minute, I think the people who were present --

A. Sorry, I distinctly remember you were there, Mr. Coughlan.

You were there. And I remember in fact the question you

asked me because you asked me was there any further -- you asked me a question in relation to the submission, was it submitted to the Attorney General, the opinion? And it was around that aspect of the matter you raised a question.

125 Q. Well, recorded, and I know what I was doing at the moment, but it doesn't matter --

A. Well...

126 Q. Recorded at the meeting were Mr. Gormley, Mr. Denis McFadden, Mr. Richard Nesbitt, Mr. Matt Shaw. And present for the Tribunal were Mr. Davis, Ms. O'Brien and Mr. Healy.

A. And you were there as well.

127 Q. I see. That's your recollection?

A. I am certain you were there. Ms. O'Brien was there.

Ms. O'Brien was there and Mr. Coughlan was there.

128 Q. All right.

A. And sorry, Mr. Healy was there as well.

129 Q. I see.

A. And sorry, I mean the other people are named.

130 Q. Now, you say that on the 13th May, 1996 the Attorney

General sanctioned the aforementioned drafts. Those, asked

together with the advice of senior counsel, were forwarded

with the sanction of the Attorney General to the Department

under cover of a minute, the terms of which were settled by

him.

A. That's correct.

131 Q. Had you flagged to the Attorney General the request for

advice about the restructuring of the ownership of Esat

Digifone?

A. It was contained in the papers submitted, but it wasn't

flagged, it wasn't specifically referred to.

132 Q. That's fair enough. So, when we come to it we see that the

Attorney General wrote a note at the end --

A. Yes.

133 Q. -- where he indicated he gave it cursory examination, isn't

that right, and he suggested some -- he indicated it was

highly technical and difficult, and he makes no reference

in that note at all to any question of change of ownership;

isn't that right?

A. Either forward or backwards, no, he does not, no, no.

134 Q. So, whilst it may be contained in the papers that was

submitted to the Attorney General, it was not something

that was brought to his attention by way of flagging?

A. Not specifically, no, but the opinion, as I say --

135 Q. I know the opinion was there.

A. Yes, we would be of the view, yes.

136 Q. Now you say that on the 14th May 1996, there was a meeting

with Department officials which you attended with senior

counsel and John Gormley. The meeting was called to

discuss the giving of feedback to unsuccessful licence applicants. "Although I do not have a complete note of the meeting, I have recollection that the issue of change in the ownership of Esat Digifone was discussed." To the best of your recollection, Mr. Nesbitt expressed similar views to those contained in his opinion of the 9th May, 1996 and at the consultation held on the 23rd April, 1996. However, it was in the context of how clarity might be provided to disappointed losers that this conversation took place. By the time the issuing of the licence had already been sanctioned on the 13th May, 1996 by the then Attorney General who had, before so doing, been provided with Mr. Nesbitt's opinion along with your draft minute.

137 Q. And that's the end of your memorandum?

A. Yes.

138 Q. Now, just for a moment, just to clarify. You say that when

you attended the meeting, Mr. Nesbitt was also at the meeting, isn't that correct?

A. Sorry?

139 Q. Sorry, I beg your pardon, the meeting of the 18th October, 2002.

A. With the Tribunal counsel?

140 Q. Yes.

A. Yes.

141 Q. And Mr. Shaw?

A. And Mathew Shaw, yes. Sorry, and Mr. Gormley as well.

142 Q. And Mr. Gormley, yes. Now, you say that -- I was looking for the document that you say that you confirmed the response of the Attorney General.

A. I mean, that's in correspondence with the Tribunal.

143 Q. I just want to identify it if I can. Sorry, I was just trying to clarify the actual document.

MR. O'DONNELL: I think what happened that on the 9th July documentation was sent by the Department to the Tribunal in response to a request for same, and that on the 30th September, additional documentation was sent by, again by the Chief State Solicitors Office to the Tribunal. And those documents, the documents that were furnished to the Tribunal, which we think were furnished in July, included the opinion of Mr. Nesbitt.

MR. COUGHLAN: Yes, I think -- I'll just clarify the matter. I know documentation was, in the first instance I think, furnished, and the Tribunal was informed -- this was legal documentation I think, in the first instance the Tribunal was informed that, or asked for them back on the basis that they had been, they were privileged and then the arrangement came into being, I think, whereby --

MR. O'DONNELL: Sorry, I think the Tribunal was given the

documentation but told that they were privileged. They weren't demanded back or, if they were, there was no suggestion that the Tribunal weren't allowed to keep copies of them. Because --

MR. COUGHLAN: I am not suggesting that. I am just trying to clarify what --

MR. O'DONNELL: Sir, in the letter, and I wasn't aware that this issue was going to arise, but in a letter of the Attorney General's Office to Mr. Shaw, it is clear they say that pages 1 and 2 of Mr. Nesbitt's advices of the 9th May appear to deal with the matters raised in the Department's minute of the 24th April, 1996, and there is nothing on the file to suggest that the Department thought otherwise.

So, that minute from the Attorney General's Office to Mr. Shaw was then sent to the Tribunal, and I think, I can't be certain whether it was sent on the 9th July or the

30th September, but it was certainly sent no later than the
30th September. So the effect of that is that by the 30th
September at the latest, the Tribunal knew that the
Attorney General's Office were of the view that the opinion
of Mr. Nesbitt of the 9th May, 1996 appeared to deal with
the matters raised in the Department's minute of the 24th
April; that's Mr. Towey's minute.

MR. SHIPSEY: Chairman, sorry, could I just intervene
there? Mr. O'Donnell has been referring to dates in
September and in July. If he is talking about 2002, I am
not aware of documentation being furnished to the other
parties dealing with this issue in 2002. I am aware of the
correspondence which emanated from the Tribunal dealing
with the Sunday Business Post article, but if there is
correspondence where the question is raised in 2002 and
answered, that's clearly something that we should have, and

I would ask for some clarification from the Tribunal as to

whether there is documentation in 2002.

MR. O'DONNELL: This was sent to the Tribunal in September

2002.

MR. O'CALLAGHAN: I support Mr. Shipsey's application.

MR. COUGHLAN: I certainly will. That's why I was trying

to get clarification myself.

MR. O'DONNELL: It was sent to you. It's addressed to Mr.

Davis. It encloses the copy of the minute from Mr. O'Daly,

so you have had it for eight years.

MR. SHIPSEY: Perhaps, sir, over lunch --

CHAIRMAN: I'd rather we proceed with the witness.

144 Q. MR. COUGHLAN: Now, I think you and Mr. Gormley first

became involved in the second GSM sometime around April of

1995; isn't that correct?

A. Correct.

145 Q. And I have a load of documents which -- there was further correspondence that we received on Tuesday afternoon, but essentially in the first instance, I think the Department wrote to the Office of the Attorney General, isn't that correct, and were indicating that Messrs. Andersen, the consultants, would provide the service of producing a draft licence, or words to that effect?

A. Yes.

146 Q. And I think, then, there was some correspondence between, I think it was probably Mr. Russell, I think, probably at the time, and the Department, and eventually both you and Mr. Gormley were designated to be the officials who would provide advices to the Department; isn't that correct?

A. To deal with matters.

147 Q. Who would deal with matters?

A. Yes.

148 Q. And the first significant issue was the question of the capping of the licence fee; isn't that right?

A. Well...

149 Q. Significant.

A. I am not sure if I'd portray it that way. I mean, the issues surrounding -- there were a lot of legal issues surrounding the, because as I said earlier, this was a somewhat novel process and so there were a number of issues which had to be looked at, the licensing base was one, and that is a particularly -- at the time it involved a considerable amount of legal research to establish whether the existing licensing base was adequate and how it would have to be amended and also, whether the type of licence which the Department wished to grant could be granted under the terms of existing legislation. So it was -- there was a number of issues surrounding it, and a draft licence was

furnished at an early time. Then, as you point out, the

question of --

150 Q. Furnished by the Department?

A. Pardon?

151 Q. Furnished by the Department.

A. Absolutely, yes.

152 Q. Now, Mr. Nesbitt's first significant involvement arose in

relation to the capping of the licence fee, is that

correct, or EU intervention, if I put it like that?

A. I think you have been furnished recently with an opinion in

August.

153 Q. I know that. That's subsequently I think. I think he had

furnished some advice --

A. Yes, the capping would have been, yes, in '95 as well and

that was, as you say, a very significant issue, a very

significant issue.

154 Q. And he furnished an opinion in August of 1995 --

A. Correct.

155 Q. -- dealing with licence matters. This was again in relation to licensing; isn't that right?

A. Yes.

156 Q. And at that time, when he was being asked for his opinion in 1995, I think he was furnished with a number of documents?

A. Yes.

157 Q. He was furnished with the tender or RFP document; isn't that correct?

A. Yes.

158 Q. He was furnished with whatever, various regulations where appropriate?

A. Yes.

159 Q. He was furnished with the draft licence and matters of that

nature, and he provided an opinion in relation to
licensing, included in that was a question of what controls
or impositions the Minister could impose in the licence in
respect of future change of ownership; isn't that correct?

A. That's correct.

160 Q. And I think there would have been consultation around that
time, is that correct, or a consultation?

A. Yes, certainly in respect of the capping issue there would
have been, and there were others, I believe. Now I can't,
off the top of my head, answer that.

161 Q. I think there would have been a consultation, or I think
Mr. Towey may have been involved in the consultation?

A. Sorry, the Department people certainly, yes, certainly,
yes.

162 Q. And I think there would have been little doubt that in
respect of what matters could be imposed in a licence,

Mr. Nesbitt had a view that there were certain limitations imposed upon the Minister in respect of any conditions that could be put in the licence, isn't that right, in respect of future change of ownership?

A. Yes, indeed. I mean, we can refer to the paragraph in his opinion if you wish. He had a view that arbitrary conditions couldn't be imposed as regards, and that they basically -- basically the provision of the service would be the central concern of the Minister, that the changes of ownership wouldn't impair --

163 Q. I am not going to dispute, or it doesn't matter in one way.

A. Sure.

164 Q. But one of the matters -- in fact interestingly enough, but it's only as an aside, one of the matters in respect of a future change of ownership that he expressed at that time, but remember, I know everyone's view was evolving in

relation to this, as you say, you were in green field

territory, but that one of the matters was -- I'll just

read page 4. Nothing turns on this, but one of the matters

-- "the identity of the licensee is only important firstly

for the purpose of..." -- page 4 of Tab 1 of the opinion

of August of 1995.

Do you see the "Assignment of Licensee/Identity of the

Licensee"?

"The identity of the licensee is only important for the

purpose of establishing its ability to provide the service

in question from a capital and possibly technical point of

view, and secondly to ensure that a competitive market

place continues to exist i.e. to stop a concentration of

services in the hands of a monopoly."

So, at that time Mr. Nesbitt's view was that the identity

was important to know from a capital and possibly technical

point of view.

A. Well, I think if you -- if I may just bring you to the rest of the paragraph. Just nearer the end he says "I take the view that the Minister attempted to impose arbitrary conditions material to changes in ownership of any licensed company which were not necessary for the fulfillment of the objectives of the Act and the provision of a second mobile telephony operation, such conditions could be subject to attack. Clearly the Minister is entitled to insist on information about changes and prescribe by way of condition, changes which will be unacceptable and lead to the loss of the licence."

I think the opinion relates clearly to the law as it was at the time and, as I said earlier this morning, the impact of community legislation was huge and really things changed and particularly, in fact, on the issue of ownership, and I

think in the Tribunal papers that we were furnished with,

you will see a letter from the DGIV, the Competition

Directorate, Dr. Ungerer, who was head of the section, he

indicates very clearly that Commission Directive 96/2/EC,

that the conditions which can be imposed on a licensee are

basically only those relating to what are known as the

essential requirements, which are the integrity of the

network -- they are listed in the Directive, and ownership

really wouldn't be one of the essential requirements. The

critical thing insofar as the Commission would be

concerned, of course their policy was to introduce, to

liberalise the market, but thereto would regard matters

which would compromise the service perhaps as something

which would be a legitimate concern of a licensing

authority. Mind you, I hasten to add that the Commission

basically wouldn't -- they weren't demanding a licensing

regime. There could have been perhaps in some countries if they so wished they could have had an open access to networks, but that wasn't the case in Ireland. But I would just say in that regard, that Dr. Ungerer's letter was included in the brief, one of the briefs sent to counsel.

And I suspect it was a matter that he gave consideration to. It was certainly something we were conscious of in the Office of the Attorney General that the scope for imposing conditions on the new licensee, there was a question mark, let's say, over that, and again I don't want to -- I mean, this matter was of course subject to privileged advice and so on recently, and it's sensitive. But the --

165 Q. I don't want to explore it in too much detail.

A. But just that I am making the point that very much the Commission would have had a view that the power to impose conditions on a licensee was a restrictive power, and very

much that those conditions would relate to the provision of a service. And that's very much in line, I would think, with the view of Mr. Nesbitt.

166 Q. And this was all to do with conditions imposed on a licencee; isn't that correct?

A. Correct. If I might just mention in that regard too, I mean the view also was at the time that Esat Digifone had an entitlement to a licence in a sense because they were -- I mean the argument could be made that they had won the competition and they were basically negotiating the terms of the licence for the competition which they had won.

167 Q. Where is that stated?

A. No, I am just saying --

168 Q. That's an argument, you say?

A. As most legal opinions are, yes. I mean that was -- So there would be a question, then, as I say perhaps as to the

power to restrict -- even under EU -- but as I say it's a

separate, it's a legal matter which I wouldn't really --

169 Q. What about the competition? What governed the competition?

A. Pardon?

170 Q. What governed the competition? Was it the RFP? The rules

were set out in the RFP; isn't that correct?

A. Correct.

171 Q. And everyone entering the competition, because it was a

competition, were entitled to expect that the rules would

apply to all; isn't that correct?

A. Very much.

172 Q. And applying the rules, full details of the proposed

licencee, it was mandatory to give that information; isn't

that correct?

A. That's correct.

173 Q. And it was to that entity the licence would ultimately be

granted -- sorry, Mr. O'Donnell has shook his head.

Mr. O'Donnell has shaken his head to indicate no.

CHAIRMAN: Well, we are nearly at lunch. Let's not have a tiff at this stage.

A. Sorry, can you just repeat the question?

MR. COUGHLAN: The RFP were the rules governing the competition?

A. Yes.

174 Q. Everybody could expect that the rules would apply to everybody in the competition?

A. Yes, the competition rules, yes, of course.

175 Q. And one of the rules of the competition was that you must give us full ownership details of the proposed licensee; isn't that right?

A. It was one of the requirements certainly, yes, as issued, yes.

176 Q. A mandatory requirement of the competition?

A. Yes, it was a requirement, yes.

177 Q. And in the event of somebody coming through the

competition, it was to that entity the licence would be

granted, isn't that correct, under the rules of the

competition?

A. I am not sure if you can refer me -- the winning consortium

was the entity to which it would be proposed --

178 Q. Yes, sorry we are in agreement. The winning entity, the

winning disclosed entity; isn't that correct?

A. As disclosed in the application, yes.

179 Q. There is no disagreement.

A. Yes. And we viewed that as Esat Digifone. Obviously

that's who the proposed licensee was and the joint

venturers were basically Mr. O'Brien's company and Telenor

AS, they were the joint venturers, and there was a third

equity investor, percentage which was indicated in the application form, and that was opened by Mr. Towey at the meeting of the 23rd, which I presume you'll be referring to again and, as I say, that -- at that meeting it was set out that there were financial investors, institutional investors, it was proposed to place 20% of the shareholding in the company, that had been disclosed in the application form, and the question was -- from William Fry and Co.'s letter, they indicated now that that institutional investor was IIU Limited and essentially the question was whether or not that was of legal significance. And that was the matter that was discussed with Mr. Nesbitt at the meeting of the 23rd, and he expressed a very, very clear view, I'll call it, that that was not a material change. And as I say, that was discussed at that meeting.

180 Q. What I want to ask you is this: That the rule of the

competition indicated that you had to disclose who the proposed licensee would be; isn't that right?

A. Disclose details, yes.

181 Q. Full ownership details?

A. Yes.

182 Q. Just answer the question.

A. Yes.

183 Q. And in the event of a competitor being successful, that competitor would be entitled to the licence following certain negotiating in relation to licensing matters; isn't that correct?

A. Correct.

184 Q. Now, you know that Mr. Dermot Desmond, or IIU, were not disclosed as being part of the ownership structure of the proposed licensee in the application; isn't that correct?

A. If I can revert to my knowledge of that. Originally it was

from the meeting of the 23rd, Mr. Towey opened the application form to the meeting, he read from it, and that indicated that financial institutions had indicated a willingness to take up to 20% as institutional investors.

It was basically equity finance. And the issue, as we saw it was, from a legal point of view was there any issue arising from the now -- IIU at that time had become an actual shareholder in Esat Digifone, they were a financial institution, as we understood it, who were taking up that 20%. It had been indicated in the application form that 20% would be placed with financial institutions. So the question which was -- and it was discussed at the meeting of the 23rd -- was that of legal significance? And as I say, that's when Mr. Nesbitt dealt with that issue. It was dealt with when he said that in his view it wasn't of legal significance. He said the only grounds upon which the

Minister could disagree, or sorry, could oppose the involvement of a financial institution would be on public policy grounds, and he gave the example if the institution had connections with crime or something. It wouldn't have necessarily sprung to my mind but that was the example he gave. But he was very clear in his view that that was not a change of legal significance.

185 Q. And that is your recollection that this advice was given on the 23rd April, 1996? You are absolutely --

A. I am saying that was the view that Mr. Nesbitt expressed, definitely.

186 Q. On that day?

A. At the consultation of the 23rd April.

187 Q. Right. And do you know that Mr. O'Donnell put it to Mr. Fintan Towey that Mr. Nesbitt gave no advice, no advice on this issue on the 23rd April, 1996?

A. I mean, I am aware that there is some confusion over dates.

Certainly he gave --

MR. O'DONNELL: He'll have to be allowed answer the

question. He has been badgered twice -- sorry, I withdraw

the use of the word "badgered". He has been asked the same

question twice about how he came to the conclusion that the

change to IIU is not of legal significance; he has given

the answer twice. He has to be allowed answer the

question. I was concerned he was being interrupted when he

was giving an answer that was inconvenient for

Mr. Coughlan. When Mr. McFadden has tried to expand, again

he has been cut down. I do think Mr. Coughlan -- maybe

it's because of the proximity of lunchtime, I don't know

what it is, but I think Mr. McFadden should be allowed to

answer the questions without being interrupted.

MR. COUGHLAN: Mr. McFadden, the question I asked you was

were you aware that Mr. O'Donnell had put it to Mr. Fintan

Towey that Mr. Nesbitt gave no advice at the meeting on the

23rd April, 1996? Are you aware of that?

A. That he put that question?

188 Q. No, he put it to Mr. Towey here as a fact, he put it that

there was no advice given on the 23rd.

A. And what was the response to that?

189 Q. Sorry, this has been put, this has been put by counsel for

the Department that Mr. Nesbitt did not give advice on the

23rd. Were you aware of that?

A. I can't say I am. I am aware that Mr. Towey has some

difficulty recalling the meeting of the 23rd April.

190 Q. No, I asked you the question: Were you aware that

Mr. O'Donnell put it to Mr. Towey --

A. I don't believe I was, but if he did, he did.

191 Q. And are you aware that Mr. Nesbitt gave evidence that he

gave no advice at the meeting on the 23rd April, 1996?

A. I am aware of that now, yes. But again, I am aware that he has said that he gave oral advice, and if you look at the calendar, there aren't many times -- I am not speculating on that. The fact of the matter is that he gave advice.

That's -- that's --

192 Q. No, I am asking you a specific question. Are you aware that he has given evidence that he did not give advice on the 23rd April, 1996?

A. I am aware that he -- sorry, I am not aware -- I am aware, yes, that he has indicated that he has no recall of that.

I think that's -- I mean I haven't been furnished with that in writing. No -- I am aware that there is an issue of recall of dates, I am aware of that.

193 Q. No, Mr. Nesbitt was quite specific and Mr. O'Donnell was quite specific in putting it to Mr. Towey that no advice

was given on the 23rd April, 1996. But you say that your recollection is crystal clear that it was; is that right?

A. Well I didn't say crystal. My clear recollection is yes, that he expressed that view. Now, in deference, there was a formal request for written advice came in the next day, but certainly that view was clearly expressed, there is no doubt about that in my mind.

CHAIRMAN: That it was both the identity of the new person emerging, IIU, and also the change in configuration, 20% going up to 25%, is that what you recall being raised?

A. Yes.

CHAIRMAN: And much of the thrust of Mr. Nesbitt's advice was that this was not of sufficient materiality to be fatal to --

A. That is correct, that was the view he expressed

Mr. Chairman, yes.

CHAIRMAN: We'll leave it at that until a quarter past two.

MR. SHIPSEY: Chairman, before you rise, I wonder -- I know

you did indicate that we could deal over lunch with any

documentation that wasn't furnished, I just would remind

the Tribunal that we wrote, on the 2nd March, looking for

all documents touching upon Mr. Nesbitt's opinion which the

Tribunal had. So I would like some assurance by two

o'clock that what is to be furnished to us is in fact

complete because we now know there is a document that we

didn't get and I would like to have that assurance by two

o'clock if we can.

CHAIRMAN: I'll ask Mr. Brady to do the best he can to

satisfy you on that basis, Mr. Shipsey.

MR. SHIPSEY: Thank you very much.

THE TRIBUNAL ADJOURNED FOR LUNCH.

THE TRIBUNAL CONTINUED AFTER LUNCH AS FOLLOWS:

MR. COUGHLAN: Sorry, sir, over the lunch break the Tribunal has located the letter which was referred to by Mr. O'Donnell this morning. And the Tribunal wishes to apologise that this letter was not circulated when privilege was waived last year. The only explanation that I can offer in relation to it, is that it was not on the set of papers dealing with the Attorney General's Office, but was placed on a file because it was an attachment attached to a letter sent by Mr. Shaw to the Tribunal.

I'll deal with it right now.

It's not a letter to the Tribunal, it's a covering letter from Mr. O'Daly of the Attorney General's Office to Mr. Shaw, which came as an enclosure. And I'll deal with it right now.

MR. O'CALLAGHAN: Chairman, while Mr. McFadden is coming to the witness-box, can I just clarify one matter? You

mentioned before lunch that a letter had been written by my client to you directly. It could have been interpreted that in some respect your comments were being critical of the legal team. And I just want to inform the Tribunal that neither I, nor Mr. Kelly, nor Mr. Lehane, nor my solicitors were aware of that letter being written.

DENIS McFADDEN CONTINUED TO BE EXAMINED BY MR. COUGHLAN

AS FOLLOWS:

194 Q. MR. COUGHLAN: Now, Mr. McFadden, just the attachment. I

think you have Mr. Shaw's letter -- sorry, I beg your

pardon, maybe you don't. Maybe I'll hand you up a copy.

It's the document referred to this morning.

(Document handed to the witness.)

this is, I think, the other letter that you were referring

to in your statement?

A. Yes.

195 Q. Is that correct?

A. Indeed.

196 Q. And if we just -- it's a letter -- sorry, first of all,

there is a letter from Mr. Shaw to Mr. Davis, and it reads:

"Dear John,

"I refer to my letter to you dated the 9th July, 2002,

enclosing documents from the Office of the Attorney General

relating to the Department's request for advice contained

in their minute of the 24th April, 1996. Unfortunately,

when writing to you, I failed to refer to important

observations made by the Office of the Attorney General in

relation to the aforesaid documents. In this regard,

please find enclosed a copy of a minute from Mr. Liam

O'Daly of the Office of the Attorney General, dated 8th

July, 2002, to me, which contains the relevant

observations.

"The documentation furnished by the Office of the Attorney General and their observations thereon is what that office, (including Messrs. Gormley and McFadden), can furnish or say material to the issues that have been raised by the Tribunal in relation to the Department's said request for advices of the 24th April, 1996.

"In the event that the Tribunal requires any further clarification or still wishes to meet with Messrs. Gormley and McFadden, please let me know and I will make the appropriate arrangements forthwith."

If you turn over, this is Mr. O'Daly's letter to Mr. Shaw.

And it's

"Re: The Moriarty Tribunal.

"I refer to your minute dated 27th June, 2002, enclosing correspondence dated the 27th May, 2002, in relation to certain papers provided at a meeting of the 22nd April,

1996."

Now, that would appear that Mr. O'Daly was of the -- or can

I take it, Mr. O'Daly was not involved in the day-to-day

advice in relation to the second GSM?

A. The original? No, no at all, no, no, no.

197 Q. Mr. O'Daly was, at this stage, gathering information, isn't

that correct, to respond to your question?

A. Correct.

198 Q. So, it would appear that Mr. O'Daly must have been informed

that certain papers were provided at a meeting of the 22nd

April, 1996. I just draw that to your attention. I am not

making any big point about it. It's just, again, in terms

of your recollection that the first time the matter came to

your attention was on the 23rd April, 1996, whereas

Mr. O'Daly is here referring to the matter having been

brought to the attention, not discussed, but brought to the

attention on the 22nd April, 1996, which seems to be

consistent with Mr. Towey's letter of the -- anyway --

A. I really don't think that's an issue, because the

discussion with counsel took place on the 23rd, and it

certainly wasn't dealt with by us on the 22nd. There is no

question about that.

199 Q. Sorry, I beg your pardon?

A. The issue of the ownership issue was not dealt with on the

22nd April. That's -- that was a drafting meeting with

the -- with Mr. Bacon.

200 Q. No, I am not suggesting that it was dealt with, but that it

was raised first as an issue on the 22nd?

A. I don't know where Mr. Towey has said that, that's

definitely -- I have no recollection of that. And I am

firm on that.

201 Q. Where do you think Mr. O'Daly would have got that

information from?

A. I suspect it's from the minute of the 24th, which refers, as I say, incorrectly, to a meeting having taken place on the 22nd. It's an erratum. I mean, he probably -- that's, I suspect, where it came from, because if you actually look at the request for advice of the 24th April, it refers to the papers having been given on the 22nd.

202 Q. Well --

A. At our meeting of the 22nd he refers to. And it definitely wasn't, there is absolutely no doubt in my mind about that.

203 Q. If I could just turn to Mr. Shaw's letter and the final paragraph.

"The documentation furnished by the Office of the Attorney General and their observations thereon is what that office, (including Messrs. Gormley and McFadden), can furnish or say material to the issues that have been raised by the

Tribunal in relation to the Department's said request for advice of the 24th April, 1996."

So, it would appear that Mr. O'Daly must have been receiving assistance from you and Mr. Gormley for the purpose of providing this particular minute to Mr. Shaw?

A. As the officers in the office, we would be the people who he'd have to consult with obviously, yes.

204 Q. Now, we'll continue.

"By way of assistance to the Tribunal, this office has examined its files in relation to this matter, and I herewith enclose for immediate transmission to the Tribunal, subject to the Department waiving legal privilege in their respect, the following documents listed hereunder:-

"1. Copy of letter from Denis McFadden to Richard Law

Nesbitt dated 18/4/96.

"2: Original minute dated 24/4/96 from Fintan Towey,

Department of Transport, Energy and Communications to

D McFadden, J. Gormley, Office of the Attorney

General.

"3. Copy of letter from John Gormley and Denis McFadden to

Richard Law Nesbitt dated 24/4/96.

"4. A copy of papers believed to be papers provided at a

meeting on the 22/4/96 referred to in Mr. Towey's

minute of the 24/4/96, (No. 2 above).

"5. Fax dated 30/4/96 from Fintan Towey to Denis McFadden

with proposed amendments as agreed with John Gormley

on the 30/4/96 and orally communicated to Fintan Towey

on the 1/5/96 marked and recorded thereon.

"6. Copy of letter dated 3/5/96 from John Gormley and

Denis McFadden to Richard Law Nesbitt.

"7. Copy of Mr. Law Nesbitt's opinion dated 5/5/96,

sent by fax.

"8. Original submission dated 10/5/96 to Attorney General

from John Gormley and Denis McFadden with Attorney

General's direction dated 12/5/96 thereon.

"9. Copy of letter dated 10/5/96 from Denis McFadden to

Richard Law Nesbitt.

"10. Fax letter dated 13/5/96 from Richard Law Nesbitt to

Denis McFadden.

"11. Copy letter dated 13/5/96 from John Gormley to Denis

McFadden to Secretary of Department of Transport,

Energy and Communications.

"The following points were made in relation to the

documents:-

"1. Pages 1 and 2 of Mr. Law Nesbitt's advice on the 9th

of May appears to deal with the matters raised in the

Department's minute of 24/4/96, and there is nothing

on file to suggest that the Department thought

otherwise.

"2. In relation to the draft letter sent by fax on the

30/4/96 (Document No. 5), the Department does not

appear to have furnished this office with any reply

received from Mr. O'Connell or indicated where there

was one.

"3. Article 8 of the proposed Esat licence which deals

inter alia with the ownership of the licence was

drafted by E. Bacon of the Parliamentary Draftsman's

Office in consultation with Department officials.

Mr. Law Nesbitt advised fully in relation to the

draft.

"I trust that this documentation from our files is what is

required by the Tribunal. Please convey to the Tribunal

that if this office can be of any further assistance, they

should not hesitate to contact you.

"I enclose herewith directions of the Attorney General dated 3rd July, 2002, in relation to the correspondence which you forwarded to this office on the 1st July, 2002, (letter to Richard Law Nesbitt, SC, of 1st July, 2002.)

You will note the Attorney's views endorsed thereon.

"I will be on annual leave..."

MR. SHIPSEY: Sorry, Mr. Chairman, at the risk of sounding

like a repeating record; we did, before lunch, request all

of the letters that were furnished that were relevant, and

there is, even within this one letter, there is reference

to "directions of the Attorney" and the "Attorney's views

endorsed thereon". And we don't seem to have been

furnished with that letter or the Attorney's directions

furnished thereon.

CHAIRMAN: Can you help in that regard, Mr. Coughlan, and

Mr. Brady?

MR. COUGHLAN: I'll look at that -- I understand it's in the books.

MR. SHIPSEY: Which books, Mr. Coughlan? We were furnished with a book just after lunch, and that only has documents exclusively dealing with 1995, not with 2002. I appreciate this may have come from the Attorney, but it was enclosed with his letter, as you can see, sir.

MR. COUGHLAN: Sorry --

CHAIRMAN: I take your point, Mr. Shipsey. I am very anxious to see --

MR. COUGHLAN: Sorry, I am told it's Tab 22.

MR. O'DONNELL: No, Tab 22 is the submission made in 1996 by Mr. McFadden and Mr. Gormley to the Attorney General.

MR. COUGHLAN: We will investigate it. Mr. O'Donnell and myself have had a conversation. We will both look at this.

It may still be privileged, I am just not sure, and we'll

check it out.

205 Q. Now, this response by Mr. O'Daly resulted from an initial

request made by the Tribunal on the 27th May, 2002, and I

am going to hand you a copy of that particular letter.

I'll put it up on the overhead projector anyway.

Now, I appreciate that this was not addressed to the Office

of the Attorney General, it was addressed to Mr. Shaw,

you'll see that. And it reads:-

"Dear Mr. Shaw,

"I refer to recent correspondence, particularly yours of

the 15th May last enclosing a minute dated 30/5/2002 from

Mr. Aidan Hodson, Principal Officer of the Department. I

note that Mr. Towey does not recall any written response to

his letter. Having read the opinion of Mr. Nesbitt, dated

9th May, 1996, it would appear that Senior Counsel did not

address the specific question raised" --

MR. O'CALLAGHAN: Chairman, I don't have this letter.

206 Q. MR. COUGHLAN: I'll begin again.

"Dear Mr. Shaw,

"I refer to recent correspondence"... etc.

"I note that Mr. Towey does not recall any written response

to his letter. Having read the opinion of Mr. Nesbitt

dated 9th May, '96, it would appear that Senior Counsel did

not address the specific questions raised by Mr. Towey in

his letter (third paragraph), and one assumes, therefore,

that a specific question to that effect was not formally

raised by the Office of the Attorney General.

"In the third paragraph of Mr. Towey's letter of the 24th

April, 1996, he refers to the requirement for a legal

opinion on the restructuring of the ownership of Esat

Digifone. He mentions relevant papers having been provided

at a meeting on the 22nd April. He draws attention to the fact that his query concerns whether 'Recent correspondence suggests any change of the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application.' I would be much obliged to know if you could identify the papers referred to as having been provided at the meeting of the 22nd April, together with the recent correspondence mentioned by Mr. Towey.

"I would be much obliged to hear from you at your earliest convenience concerning the above matters."

Now, there was a little interchange of correspondence and then this particular letter, Mr. O'Daly's letter arrived at the Tribunal a little later than the previous documentation. But, there can be no doubt but that it has been recorded in correspondence that the Tribunal, having

read the opinion of Mr. Nesbitt, it would appear that

Senior Counsel did not address the specific question raised

by Mr. Towey in his letter, and Mr. O'Daly's response is to

that, do you understand?

A. Yes.

207 Q. But if you go to the final paragraph of Mr. Shaw's letter

of 30th September, 2002: "The documentation furnished by

the Office of the Attorney General and their observations

thereon is what that the office, (including Messrs. Gormley

and McFadden), can furnish or say material to the issues

that have been raised by the Tribunal in relation to the

Department's said request for advice of the 24th April."

Now, did you inform Mr. O'Daly that oral advices had been

given on two occasions?

A. My understanding is that requests were made as to where the

opinion in response to the letter of the 24th, where was

the opinion which was given in response to the letter of the 24th, and that is the opinion of the 9th May. I mean, there is no dispute about that. And that opinion, I mean I am aware that the Tribunal is focusing on IIU, but the query in the letter of the 24th is actually a broad question on ownership. It's not -- the fact that IIU is not mentioned in the letter per se.

208 Q. No, I understand. And I understand that there is a broad issue raised in Mr. Towey's minutes of the 24th, I agree and I understand. But there is a specific request, isn't there, in relation to the question of ownership vis-a-vis the bid?

A. Vis-a-vis the application?

209 Q. The application.

A. Whether there is -- whether the details set out in William Fry's letter of the 17th April is incompatible with the

details in the Esat application, that was the request for

advice that was received on the 24th. And as I say, the

details -- William Fry's letter is quite -- I am not sure

if it didn't -- it's quite a lengthy letter.

210 Q. Yes, it is. I'll come to it in due course. I just wanted

to deal with this particular letter first.

A. Yes.

211 Q. But what Mr. Shaw has informed the Tribunal in this letter,

"...that the documentation furnished by the Office of the

Attorney General and their observations thereon, is what

that office, (including Messrs. Gormley and McFadden), can

furnish or say material to the issues that have been raised

by the Tribunal in relation to the Department's said

request." And what I asked you there was, did you inform

Mr. O'Daly at that time that you had received or that

Mr. Nesbitt had given oral advices, leave aside the date,

but as you say, on the 23rd and the 14th, did you inform

Mr. O'Daly of that?

A. He certainly would have been aware of a consultation on the 23rd.

212 Q. I asked you a question --

A. At which the matter was discussed.

213 Q. We know that. I asked you, did you -- how did Mr. O'Daly know that?

A. How did he? He would have -- I mean, to respond to the Tribunal's request, he would have presumably asked for myself and John Gormley to assist. I mean, that had occurred on one or two occasions when there was another occasion, I think, when there was a newspaper report and there was senior people in the office again raised queries at the Tribunal's request, and they would have been sent to us, as the officers who were dealing with the file, for

material, for a response, as they say, in the public

sector.

214 Q. Did you tell Mr. O'Daly, when he was preparing this minute,

that you had received oral advice from Mr. Nesbitt on two

occasions in relation to this matter?

A. What I would have said, if I can answer it in this respect,

is that -- and this is the position and we'll be coming to

it -- we believed the opinion of the 9th May was the, let's

say, formal response, the formal written response to the

request for advice on the 24th. What the Tribunal is

querying is where was the response to the request. If it

said there was no response to the request on the 24th, and

it was our, and is our view that the opinion of the 9th May

deals with the formal request for advice that is contained

in the 24th April, and as I say, we can discuss the opinion

in due course. But -- and as I say, I know your focus is

on IIU, our focus -- that was part of the issue which was raised by the minute of the 24th. But it isn't actually expressly referred to in the minute of the 24th. And I might just at this point just mention, in respect of the brief that went out to Mr. Nesbitt under cover of a letter of the 24th, we don't set out the issues --

215 Q. No.

A.

-- at all, because they had been discussed the previous day. And what we simply did was send the papers on which, in fact, as I said, I believe he had already, but we sent on those papers because it had been discussed. It would be very unusual to send out a minute to counsel without actually dealing in some detail with the question that was -- upon which advice was being requested. So, I mean again, if you just want to refer to that minute where we

sent it out to counsel, as I say, we -- again, it just reflects the fact that we had discussed the matter on the 23rd. But the Tribunal's inquiry was in relation to where was the advice that was sought on the 24th. And that advice is the advice of the 9th May. And we can come to it -- how we understood that advice, I know we'll be coming to it.

216 Q. The question I asked you: Did you tell Mr. O'Daly, when he was preparing this minute for Mr. Shaw, that you had received oral advice on the 23rd and on the 14th?

A. I don't think it was gone into in that detail, quite frankly. As I said, we were dealing with a query as to where the response to the minute of the -- the request for advice on the 24th April, where is the -- that's what the Tribunal said, "Where is the advice?" And we gave the material, as I say, to Mr. O'Daly through our own channels,

that the opinion of the 9th May was the opinion which dealt with that advice. That has always been the position of the Office of the Attorney General. It's been reviewed internally in our office and that's always been the position. And as I said, that has been indicated in my statement. I came down to the Tribunal and I said that, as did Mr. Gormley.

217 Q. Is the answer that you did not inform Mr. O'Daly that you'd received oral evidence (sic) at that time?

A. Correct, I wasn't asked that question. And as I say, the question I was responding to and Mr. Gormley, I presume, will be put -- the question we were asked to deal with was where is the advice furnished by counsel in respect of the written request on the 24th April, '96, and that is the opinion of the 9th May, 1996.

218 Q. But, Mr. McFadden, Mr. O'Daly was endeavouring to assist

the Tribunal?

A. Yes, as was I. I came down here too --

219 Q. The Tribunal had expressed the view that, having read the

opinion, that it didn't deal with the matter. Wasn't that

the time to inform Mr. O'Daly, so that he could inform the

Tribunal: Look, if you are having difficulty with the

opinion, Mr. McFadden and Mr. Gormley received oral advice

which supplements over and above what appears in the

written documentation?

A. Sorry, we understood the request from the Tribunal was to

indicate where was Mr. Nesbitt's advice in response to his

Letter of Instructions of the 24th April, 1996. And the

answer to that question is, his opinion of the 9th May, and

that is still our view, that that dealt with the matter.

Now, additionally, subsequent to this letter, both myself

and Mr. Gormley and Mr. Shaw and Mr. Nesbitt attended with

Tribunal counsel, where the matter was gone into again, and

I distinctly recall reading out the relevant portion of the

opinion of the 9th May to Tribunal counsel, and stated that

that is where the response to the request for advice of the

24th April is contained. And that was our interpretation.

Now, I accept, and I am aware of the fact that here at the

Tribunal various interpretations are being put on the

opinion. But we have a clear view, which was informed, I

hasten to say, by the discussion of the matter,

particularly in regard to IIU, on the 23rd, where

Mr. Nesbitt had indicated this general principle as regards

changes of ownership which may be of concern to the

Minister as being ones which would affect or compromise the

service. We saw that as reflecting the views of the

Commission as well. We didn't think -- some people may

have regarded it as an unusual line, in fact we didn't. We

understood that line.

220 Q. And when you attended a meeting with Tribunal counsel, and

Mr. Nesbitt was present also --

A. Yes.

221 Q.

-- nobody informed the Tribunal that oral advices had been given, isn't that correct?

A. Again, what was -- what the -- what took place at that meeting, we can reflect on it if you wish, it focused on the opinion of the 9th May, and there was no detail, as has occurred at the Tribunal here, a detailed examination of the surrounding circumstances. That meeting focused on the opinion of the 9th May, and I distinctly recall I actually read out the relevant portions of the opinion to Tribunal counsel at that and said that's where we believed the response to the request submitted to counsel was dealt

with.

222 Q. Was there any reason why Mr. O'Daly could not have been informed, or the Tribunal informed then that there had been oral advices given?

A. Well, certainly if we believed that the Tribunal didn't accept our interpretation of the opinion, I would have been -- or if that question was ever put to us, I would have been delighted to go into that, but our understanding was that the Tribunal, after the meeting in October, I believe it was, 2002, my impression -- I know initially a position was put to us querying the opinion, I gave my interpretation of it. Subsequently Mr. Nesbitt was engaged, I think by your colleague, Mr. Healy, at some length, and I can go into that if needs be. And at the end of that discussion I left that meeting and I discussed it with my own colleague, Mr. Gormley. We were of the

impression, perhaps now as -- but things have changed, but we were of the impression that our explanation had been accepted by Tribunal counsel. So, that's the background to that. And it would certainly have been always our intention to give every assistance to the Tribunal.

223 Q. Oh, yes, yes.

A. But I'm trying to explain that if the matter had been gone into now, where we were dealing with a situation arising -- I mean, I am aware, I am not referring to any findings, but we are here exploring the background to how the opinion was obtained and the circumstances surrounding it. And that's why I am here today.

224 Q. Very good. Now, just another general question: When did you become aware, because as I understand the thrust of your evidence, and perhaps Mr. Gormley will give similar evidence, that -- although you don't appear to emphasise it

to the same extent, that IIU was all right and 25% was all right?

A. Yes. Well, the meeting of the -- the consultation on the 23rd April is when that issue is discussed. And as I said to you, I saw it as somewhat discrete to the general ownership issue raised in the minute of the 24th. But as regards IIU, that was the matter which was discussed specifically -- sorry, in more detail, let's say, at the meeting of the 23rd. And Mr. Nesbitt had a very clear view of that. And essentially from a legal perspective, I saw it as relating to whether it was a material change, and his view on it was very clear. He basically was of the view that it was not significant or material. And as I said in this morning's evidence, he did mention this question that the only grounds, and I distinctly remember it, because it didn't spring to my mind immediately on listening to the

matter, he said that the only legitimate grounds that the Minister could object to the involvement of IIU would be if there was - or a financial body/institution - would be on public policy ground. Now, we had earlier in the discussion mentioned this general principle of any change of ownership which would compromise delivery of the service, and as I say, that was something, having regard to Dr. Ungerer's letter which -- it may have sounded unusual to the Department people because they felt they had fairly unrestricted powers to impose conditions

225 Q. To take control?

A. Exactly. And in fact his opinion, if you read it, as I say, to -- if you were looking at it outside the context of the directive, you may have some questions about it as being an overly liberal view.

226 Q. But when did you become aware that the Department required

the share configuration to be restored to 40:40:20?

A. We weren't informed of that.

227 Q. You weren't informed of that at all?

A. No.

228 Q. Were you aware even just before the signing off of the licence?

A. Well, as you are aware, Mr. Nesbitt attended on the final day. I never received formal notification or Mr. Gormley -- the office was never formally notified of that.

229 Q. Because the view from Departmental witnesses, from Mr. Loughrey and Mr. Brennan, was that it had to be 40:40:20 to be in accordance, or in conformity or compatibility, or whatever word you wish to use, with the application?

A. Indeed.

230 Q. That that had to be so. That's the view, and they said you

didn't have to be a lawyer to understand that?

A. Well, they were looking at it from a different perspective,

I think. I mean, Mr. Nesbitt was asked a legal -- for a

legal opinion. I think they, presumably, were looking at

it from a different perspective. They probably wanted to

ensure the greatest degree of compatibility possible. From

a legal perspective, the issue of what changes are material

is a different issue. I mean, it arises in public

procurement law, I know quite frequently. But even as a

matter of pure law, and as it was discussed that day and,

as I understood it, on the 23rd, it was a question of

whether the change was a material change. And to me, and

this was my own view, but Mr. Nesbitt was asked as a

commercial expert, a commercial lawyer and a Senior

Counsel, it was his view that was being canvassed, but my

own view was that the involvement of IIU as a financial

institution, having regard to the terms of the application,
was not a material change in ownership.

231 Q. I see.

A. So -- and that was -- he, as I said Mr. Nesbitt expressed a
very clear view on that. He didn't hesitate at all at the
consultation. But equally, it was his oral view, and if
you were, as I say, to revert to where we started off, the
opinion, his opinion of the 9th May, in my view, is --
covers the involvement of IIU; while it's not expressly
dealing with it, it deals with changes of ownership. And I
was satisfied, as I presume Mr. Gormley as well, that that
opinion adequately covered all aspects of the request for
advice contained in the 24th April.

232 Q. I suppose, if you could put it this way: A question was
being asked inside the Department, because we see that they
are coming up towards the granting of the licence,

preparing to take the matter public, and the type of

question that's being asked is: Is this the same

consortium which applied for the licence, isn't that right?

A. Yes, correct.

233 Q. And I suppose the answer to that is that it wasn't the same

consortium, but you are saying that that was immaterial,

would that be a fair way of --

A. No, I wouldn't accept that. I think you would have to look

at the application form and what was set out in the Esat

application form. That's what was open to us, I mean they

were our instructions.

234 Q. I accept what you were working with was your instructions,

I know you had a limited number of documents. You didn't

have the whole --

MR. O'DONNELL: He was trying to say something, if you

could just let him finish.

A. The issue for us was the issue raised at the consultation on the 23rd April. Mr. Towey, at some length, went through the documentation, and in fairness, explained it in understandable terms to me, the issue. And as I say, in relation to IIU, the question was whether or not their involvement was incompatible with the ownership details as set out in the application form. And my understanding at the time, as indicated at the meeting, was that the application, because I haven't the papers in front of me, I have already said that; my understanding was that the involvement of financial institutions had been flagged in the application that certain banks had been named as probable investors for 20% investment equity, basically, but they weren't the joint venturers, and I think that's what -- I can't speak for -- I presume that's what influenced him, that this was merely financing equity. It

didn't go to the operation of the licence.

235 Q. MR. COUGHLAN: Of course --

A. Or control of the licence, I should say, as well.

236 Q. You, of course, were unaware of how Mr. Desmond and IIU

became involved in the consortium, isn't that correct, at

that time?

A. Absolutely. In the sense that -- I mean, it wasn't

referred to us. It wasn't opened. The only knowledge --

the first knowledge we had of this matter was on the 23rd

April and, as I say, I have explained the information that

was conveyed to us. But that was the extent it was.

237 Q. And you, of course, were unaware that not only was

Mr. Desmond/IIU entitled to 25%, beneficial entitlement to

25% with the consortium, but that he was also underwriting

Esat's, or Communicorp, Mr. O'Brien's vehicle?

A. That he was underwriting it?

238 Q. Yes.

A. No, I mean that I am not aware of that at all, no.

239 Q. And you were unaware that there had been a concluded agreement to that effect on the 29th September, 1995; you were unaware of that?

A. I mean, I have to point out that our involvement is we respond to a request for legal advice, and the request for legal advice that I understand, is the request raised -- it's orally raised on the 23rd and no -- absolutely -- I mean, to me it was a new issue, and the only information we were given were the -- at the meeting Mr. Towey opened the documentation that I subsequently asked him to furnish, because we didn't have it, which he did, he faxed that to us and we forwarded it to counsel. That's the only documentation.

240 Q. So, can I take it so that you were unaware that potentially

IIU/Mr. Desmond, if Mr. O'Brien's vehicle was unable to meet its financial requirements, would have effectively controlled 62.something percent of the company, you were unaware of that?

A. Totally unaware, yes.

241 Q. Or, that that was the state of affairs which existed whilst the competition was still running as of -- that was the situation as of the 29th September, 1995, you didn't know any of that?

A. We had no involvement in that. Because I reiterate, the functions are in general, we responded to -- we were involved in the drafting of the licences and any specific legal issues that were raised for advice.

242 Q. Could I ask you when did you first bring to anybody's attention your recollection of the meeting of the 23rd, roughly?

A. The matter at the meeting of the 23rd became relevant subsequent to the finding of the Chair in relation to privilege where it became apparent that the Tribunal, I think I am right, said that the Tribunal didn't, or had an issue, let's say, with the opinion of the 9th May, and then a Government decision was taken to waive privilege on that opinion and it became, it came into focus at that stage again as an issue as to that opinion and the surrounding circumstances -- sorry, the circumstances in which the opinion was given. So, it would have been gone into again at that stage. But, as I say, that's when this thing would have been reviewed yet again in that sense.

243 Q. But when did you inform somebody that there had been oral advices given?

A. Internally that would have been, I think it would have been after the finding, the Tribunal finding, the Chairman's

finding in relation to the issue of privilege, when it became apparent that the Tribunal -- I am not really sure if I am correctly quoting the Tribunal ruling, but that there was an issue in relation to Mr. Nesbitt's opinion, and it would have been at that time again that the matter was reviewed in the office. And I think then subsequently, when the hearings and the witnesses were called again, as I say, the matter was looked at again, obviously.

244 Q. But when did you inform somebody that you had a recollection of oral advices on the 23rd and the 14th -- 23rd April and the 14th May, 1996?

A. I'd say it was probably -- I think the ruling was in '08, I think, am I right? February '08. So it would have been around that time internally in the office when the matter was again gone into.

245 Q. And who did you inform?

A. I presume it would have been Mr. O'Daly, I think, in the office, I would have -- yes, I presume. It would have been in the context, I would have -- as I said, it would have been in the context of this whole issue of the, going to Government to seek to have privilege, which was a major step, I hasten to add.

246 Q. Of course there was an arrangement in place with the Tribunal, isn't that correct, before the waiver of privilege?

A. Well, sure -- yes, there was, of course, yes.

247 Q. And it was always open to the Department or you, through Mr. Shaw, to inform the Tribunal that Mr. Nesbitt had given oral advices, isn't that correct, without giving any waiver of privilege?

A. No, but can I revert to what I am saying, what I said, that until such time as we saw the findings of the Chairman on

the issue of the lifting of privilege, we certainly were --

we were under the impression that the Tribunal had accepted

the, our explanation in respect of the opinion of the 9th

May. This whole thing really only arose again when it

became apparent that the Tribunal had a definitive view

that Mr. Nesbitt's opinion, or sorry, I should say that

they had an issue with the opinion, and it's in that

context that the whole surrounding circumstances were again

examined. And, as I said, that's when the meeting of the

-- because it was certainly relevant to the opinion, I

accept that, but we still regarded always the written

opinion of Mr. Nesbitt and the covering letter as being his

responses, his formal written response to the request for

advice which was received on the 24th April.

248 Q. But in view of the issue that you identified --

A. Yes.

249 Q.

-- you say that you informed Mr. O'Daly sometime, what?

2008?

A. In the context, yes, of the lifting of privilege, which as

I said, and I think -- and the Chairman is aware, that it

was a huge decision to lift privilege on that opinion, yes.

250 Q. But there was no need to lift privilege, was there, to

communicate with the Tribunal on that issue?

A. But that only became an issue subsequent to the finding of

the Tribunal. It was never an issue beforehand. We were

under the impression that the explanation furnished to the

Tribunal by myself and counsel, and Mr. Nesbitt at the

Tribunal meeting and subsequently I think arising from -- I

think there was subsequent correspondence with the Attorney

General's Office, I think, possibly where it was indicated

that the opinion dealt with the issue raised on the 24th

April, '96. So, as I say, it only became -- in the office
the surrounding circumstances for the opinion really only
were refocused on -- or they were really focused on
following the Tribunal's finding in February 2008.

251 Q. That finding was to --

A. Uphold the claim --

252 Q.

-- uphold the claim of privilege notwithstanding what
counsel had said?

A. Correct.

253 Q. That was the finding, is that right?

A. Correct.

254 Q. Now, what about the remainder of 2008 and the commencement
of hearings last summer dealing with this whole question?

Did you inform -- or, sorry, did you inform anybody that
you had evidence to give that there was oral evidence given

-- that that was oral advice given, I beg your pardon?

A. My recollection is that when privilege was lifted, that the

issue then of recalling witnesses arose, and certainly in

that context I would have said, and I believe Mr. Gormley

and myself during the course of the -- during the matters

relating to the new hearings of the Tribunal, that we had

mentioned to them that -- we had mentioned to Mr. O'Daly, I

presume Mr. O'Daly I presume that -- about the consultation

on the 23rd. I mean, absolutely, yes. That would have been

in the course of discussions relating to the lifting --

seeking the Government decision to lift privilege and the

calling of witnesses subsequently to the Tribunal for

further hearings.

255 Q. So, sometime last year?

A. Correct.

256 Q. The beginning of last year you informed Mr. O'Daly then?

A. Correct.

257 Q. And you had a clear recollection?

A. Of?

258 Q. Of the actual dates at that time?

A. Of the consultation?

259 Q. Of the dates of the consultation?

A. Oh, yeah, absolutely. I mean, that was the first time that

counsel had come into the office to discuss the requests

for advice. I mean, it's something I wouldn't have

forgotten or get confused about, because I mean, I was,

along with Mr. Gormley, we were managing the file. And as

well as that, I made a contemporaneous note, in fact, as to

when counsel was there. I accept, I know it's been

referred to here already, this is the "Trips" note I think

it's referred to, but it's not a full note, but I mean, we

can go into that meeting in further detail. It was a long

meeting, it dealt principally with the, as I said, with the question of the transposition of Commission Directive 96/2, and also questioned how that impacted on the licensing negotiation process and the production of the transposition regulations which, as I said, was a major legal -- that raised major legal issues.

260 Q. And the only note of it is the -- the "Trips" note?

A. Yes, absolutely.

261 Q. Now, could I -- that particular consultation was very important, leave aside the new issue that was raised all together, the very important meeting?

A. In the sense of assisting counsel to give his advices, yes.

262 Q. And some documentation that's just been handed out, I am not going to go through it in any great detail, but it is from the commencement of your involvement in the GSM up to the furnishing of the opinion of Mr. Nesbitt in August of

--

A. Yes.

263 Q. And every time there is a meeting involving you, you and

Mr. Gormley and the Department relating to these matters,

it usually ends up in a fairly detailed note being prepared

on the Department side, and likewise on your side, because

obviously it's important for the purpose of assisting the

Parliamentary Draftsman, I presume, or assisting and

obtaining advice from counsel, is that correct?

A. Well, I won't accept the compliment that my notes would

consist of a comprehensive note because they -- I am afraid

they weren't. I mean -- sometimes I'd be leading in those

meetings and I wouldn't actually -- I wasn't formally

note-taking. It's been my experience that departments tend

to note-take more extensively than I would.

264 Q. What I am saying is, after these meetings you tended to

prepare a fairly detailed minute?

A. For the early meetings, yes. Because we were coming into the process and I wasn't quite sure where it was, and there were notes prepared. But you will see there are other notes there which are not comprehensive. I never -- I mean, I wasn't formally note-taking at any of the meetings, so...

265 Q. No, no, it's giving a flavour of the result of the meeting that's what you tended to do, isn't that right?

A. At the early meetings, yes, because if you saw the early -- where it was coming into the office, I had to identify, along with Mr. Gormley, we had to identify what exactly the office's involvement was and set out the parameters, and I used the phrase "green field" this morning, green field project. When the original requests for advice came in, I mean, it struck both of us that this was going to be a

substantial legal project and -- so the early notes were, I suppose, just recording where that project was going to lead and what was involved.

266 Q. I suppose I'd ask you to look at a few documents now, and we can just --

A. Yes.

267 Q. Now, I think the first document is the opinion --

A. Yes.

268 Q.

-- of August of 1995?

A. Fine. What tab is that?

269 Q. Tab 1. It's the one we have referred to already.

A. Yes.

270 Q. Now, I think Tab 2 is just a note, you are forwarding that opinion of Mr. Nesbitt's, isn't that correct, to the

Secretary of the Department? You did that in December 1995

-- Tab 2. It's a fax, and behind that you will see there

is --

A. I am sorry, that may not be in mine.

271 Q. Is there nothing behind it?

A. Tab 2 is my memorandum of my statement.

272 Q. Sorry, I beg your pardon. No, I beg your pardon, if you

move on beyond the statements, do you see --

A. Oh, sorry, yes, I see it now. Excuse me, yes. Yes, I see

it there, 5th of December, yes.

273 Q. Tab 3.4 is the memorandum from Ms. Regina Finn. This was

raising technical matters in relation to the licence, isn't

that correct?

A. I am afraid I am getting a bit -- Tab 4 is a minute of the

25th March.

274 Q. Yes.

A. Yes. Yes, that was the -- is that from Regina Finn?

That's the licence -- that would have been sent to

Mr. Bacon, presumably, for drafting.

275 Q. Yes, that's the licence, isn't that correct?

A. Yes.

276 Q. And Tab 5 is on the 12th April, 1996, when Mr. Towey sent

over the Directive 96/2/EC, isn't that correct?

A. That's correct.

277 Q. Then behind that, at Tab 6, is the Commission Directive,

isn't it?

A. That's the original which was amended by 96/2/EC.

278 Q. Then Tab 7 is yours to Mr. Nesbitt of the 18th April, 1996.

"Dear Richard,

"With reference to the above matter, the Attorney General

has requested that you be furnished with the documentation

listed below for your perusal:-

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

Digifone Limited.

"2. A copy of a minute of this office dated the 12th inst.

and it's enclosures concerning the Commission

Directive.

"3. A copy of Commission Directive and a copy of statutory

Instrument No. 45 of 1992."

All, again, technical matters dealing with the licence?

A. Yes. Well, the actual licence -- I mean, it's the

transposition regulations and the draft licence is the

entire documentation effectively, yes.

279 Q. Now, behind Tab 8 is a handwritten note of yours re

consultation held at the Attorney General's Office on the

22/4/1996, isn't that correct?

A. That's correct.

280 Q. Now, would it be possible -- would it be easier for you to

read your writing than me to read it? I am not sure?

A. I can certainly try and go through it.

"Consultative process -- under section 11 -- contrary to directive -- Eircell will be licensed under new section.

" -- Put in provision that applies to applicants after the date of regulations.

" -- Appeal procedure -- competition did not provide an appeal procedure.

" -- Granted under a different section -- de minimus V, all applicants must apply again."

Because I think the competition documentation referred to a particular section that was going to be amended, so -- these are really related to -- well, they're drafting largely.

"Article 90(3): Legal basis where directive could be challenged."

That never happened that I am aware of. I think it was

canvassed as a possible view. I mean, it can always

happen, but I am not aware that it did happen.

"Process of consultation with Commission re validity of

licence. Yes, if time permits.

"Article 3D 96/2 -- derogation.

"Article 18 -- windfall gains."

Now, I looked at that myself there recently and I am not

quite sure -- "windfall gains."

"Monopoly gone since February '96. Must transpose."

Well, this, again, we were obviously just discussing 96/2,

and that had come into force in February '96, so there was

an application under EU law for the State to transpose the

directive.

"Consolidated sections," well, again, there is a reference

to that, I think, subsequently. We were trying to get a

consolidated version of Section 111 of the Post and

Telecommunications Act, 1983, which was the section under which the licence was going to be granted, although it was actually subsequently amended to take into -- well, not alone for that reason, but to give effect to Commission Directive 96/2. And regulations were subsequently -- I mean, they are the regulations that are submitted to the Attorney in May, the final draft.

And then at the bottom I have: "If reasons are given to unsuccessful applicants, can they reapply under the new provision and demand a licence? Can the Minister licence under Section 111(2B) without making all reapply?"

Again, apologies, Chairman.

281 Q. Now, Mr. Towey made a note of that meeting as well, and I'd just ask you to have a look at it.

A. Absolutely.

282 Q. It's in book -- sorry, it's Book 43, Tab 192.

Now, Mr. Towey records: "Ms. R. Finn and the undersigned met with Mr. D. McFadden, Mr. J. Gormley and Mr. Bacon at the Office of the Attorney General on the 22nd April, 1996, the purpose of the meeting was to discuss:-

"A: The disclosure of information to unsuccessful applicants for the GSM licence, and

"B: The transposition of Directive 96/2 and its impact on the award of the GSM licence to Esat Digifone."

That seems to be common to both notes.

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

to debriefing sessions by the following day. The

Department agreed to provide a brief for Senior Counsel on the procedure to be followed at the session.

"3. With regard to the transposition of Commission

Directive 96/2, the Attorney General's Office was

particularly concerned about the applicability of the
appeal procedures of the directive to the GSM competition
if the GSM licence is awarded pursuant to a Statutory
Instrument to transpose the directive. It may be possible
to provide in the Statutory Instrument that applications
received prior to the adoption of the directive are not
subject to the appeal procedures. Alternatively, the
licence could be granted under Section 111(1) and (2) of
the 1983 Act and the SI could provide that it is deemed to
be awarded under the proposed new legal base for mobile
licences. The Department expressed a preference for the
award of the licence pursuant to an SI transposing the
directive, but would not press this course if the Attorney
General's Office advised against on the grounds of
increased exposure to legal action. The fact that it would
be preferable to licence Esat Digifone and Eircell on the

same legal basis was also pointed out. It was agreed that these questions should be addressed to Senior Counsel. In the mean time, the AG's Office agreed to provide the first draft of the regulations to the Department the following day.

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

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

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

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

of the conditions with the directive."

So, they all seem to be matters that are essentially common

to both notes, isn't that right?

A. That's correct.

283 Q. Now, then Mr. Towey, his note is:-

"5. The Department also gave to the Office of the Attorney

General a copy of an extract from the Esat Digifone

application outlining the ownership of the company,

together with an internal Departmental document and a

letter from William Fry & Co., Solicitors, concerning a

restructuring of the Esat element. The Department

indicated that clarification would be necessary of any

change in ownership structure of Esat Digifone relative to

that outlined in the application."

Now, the first portion of his note is a reasonable

recording of what happened at the meeting insofar as it

compares with your note, isn't that correct?

A. Yes. Well, I mean, it's more discursive. Mine is more personal notes, yes.

284 Q. Could it be that you just did receive that documentation on the 22nd, but you have no recollection of it?

A. Definitely not. I mean, we didn't receive it, but I just notice that that minute is made on the 24th.

285 Q. Yes.

A. Which -- and that's in respect of a meeting on the 22nd.

286 Q. Yes.

A. So, I am not sure --

287 Q. Well, the way we were told was this would be dictated and signed, do you see that?

A. Well --

288 Q. So you are saying you definitely didn't?

A. Definitely not. I hadn't -- I mean, I hadn't -- I mean, I

hadn't the papers, and in any event, there is no suggestion

there that the issue was opened up at that meeting.

289 Q. That's --

A. And the papers, certainly I had no papers.

290 Q. Sorry, I am not -- I take your point about that, that it

was opened up to discuss. I am saying that that is when

you were first furnished with papers and asked about it?

A. But, sure, I didn't have the papers. I mean, I have given

evidence of that and, in fact, we even furnished the

Tribunal with the fax where the papers were forwarded to

us. And, as I say, my recollection of that is that

Mr. Nesbitt took the papers, that he wanted to take the

papers with him from the consultation on the 23rd, and I

mean I have said that in the discussion I had no papers, I

was listening to Mr. Towey, who set out the issue. And as

I say, my own note is a contemporaneous note, obviously,

it's in -- but I wouldn't have necessarily -- in fairness,

I wouldn't have recorded it, so I am not relying on my own

note, but -- I wouldn't necessarily have recorded that, I

mean, but all I can say is, I mean I know if he dictated it

contemporaneous, I am not sure whether you have asked him

that question, but... he certainly provided the papers.

He spoke from papers on the 23rd, and opened them to the

meeting, so to speak. And, as I say, subsequently I

requested him, on the 24th, when the written requests for

advice came in, I said: What papers -- can you let me have

a copy of the relevant papers referred to in your minute?

He faxed them over to me, and they are the papers I

included in the brief to counsel.

291 Q. If Mr. Nesbitt had taken them away, why was there need to

send them?

A. I believed he took them away, and in any event, I was

formally briefing him, so I would enclose the papers. I
wasn't going to say -- it's just my belief that he did take
them, that's my recollection, that he took them away from
the meeting. But I mean, again, that's just a
recollection. I mean, I wouldn't have sent out a brief
without papers or requests for advice. It would be --
although I accept and I have said that, that the minute of
the 24th to Mr. Nesbitt is a much shorter minute than we
would normally send to counsel, and that arises from the
fact that the matter was discussed. We knew -- I mean,
that minute, it's referring to the consultation on the
23rd, which is the only consultation that had been held in
-- I am not sure of the date, the previous time Mr. Nesbitt
had come to the office for a consultation, but it certainly
wasn't in the previous few months anyway.

292 Q. Right. Well, is it possible -- I am just trying to explore

-- is it possible that you had got papers, that you had given them to Mr. Nesbitt without examining them and then you had to get more papers, could that have happened?

A. Sorry, I don't understand. Is it possible --

293 Q. You see, Mr. Towey says that he handed over papers on the 22nd.

A. Yes.

294 Q. I know you were dealing with other matters on the 22nd?

A. Yes.

295 Q. Serious and difficult matters?

A. Yes.

296 Q. Could it be that you did get papers from him, that you handed those over to Mr. Nesbitt the next day and you had to get more from Mr. Towey, is that possible?

A. I mean, I have given my clear evidence that I didn't have papers at the consultation and it was Mr. Towey opened the

documentation, he had the documentation and was reading from it, and my recollection is Mr. Nesbitt asked to take them with him. And when the requests for advice came in, I had no papers, and that's definitely -- I have no doubt in my mind about that.

297 Q. Now, we do have a note, Mr. Towey's note, that documents were handed over on the 22nd?

A. Yes.

298 Q. But there is no note, or sorry -- there is a note for the 23rd, but there is no note recording advices being given orally, isn't that right, or papers being handed over?

A. It's actually interesting that Mr. Towey did a note on the 24th and he doesn't refer to the consultation on the 23rd, which I find a bit unusual.

299 Q. In fairness, he does.

A. In the meeting of the --

300 Q. I am going to Tab 11. No, in fairness.

A. But certainly my note, I mean as regards my note, I don't

-- I wouldn't suggest in any way that it was a note of the

meeting, and it probably reflected the detail of the

meeting.

301 Q. I'll come to it. I am not --

If you go to Tab 11.

A. Tab 9?

302 Q. Tab 11. This is a minute from Mr. Towey to you and

Mr. Gormley, dated the 24th April, 1996.

"Dear Mr. McFadden/Mr. Gormley,

"Further to our meeting on the 22nd and 23rd April, I

enclose the following: -

" -- a report of the Department's assessment of the

compatibility of the conditions of the graft GSM

licence with Directive 96/2 and

" -- a consolidated text of Section 111 of the P&TSA, 1983,

incorporating amendments contained in SI 45 of 1992

and amendments proposed in the transposition of the

Commission Directive 96/2.

"I have also, as requested, consulted internally on the

question of consulting the European Commission in relation

to the terms of the licence. The Department is of the view

that apart from the time constraints, it may not be prudent

to invite the Commission's scrutiny at this point. The

question of compliance with the provision of Directive 96/2

will, no doubt, fall to be examined in detail by the

licensee in due course, possibly in consultation with the

Commission.

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

opinion on the restructuring of the ownership of Esat

Digifone (relevant papers were provided at our meeting on

the 22nd April)."

So...

A. That's clearly an erratum, and I think it's also going back

to the reference in Mr. O'Daly's letter that that's where

that's emanating from. The consultation with the counsel

was on the 23rd.

303 Q. But he acknowledges it in his letter. In fairness to both

of you, just to try and clear this up. He refers to -- he

had two meetings, there is no doubt about that?

A. Yes, but only one with counsel.

304 Q. No, I understand that. But he is saying that the papers

were handed over on the 22nd?

A. I mean, I have given my evidence on that.

305 Q. Then I'll just continue with his letter so.

"In particular, the question of whether recent

correspondence suggests any change to 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."

We know that's the matter that advice was being sought on?

A. Yes.

306 Q. If you go to Document 12 I think, Tab 12, I think you wrote to Mr. Nesbitt "Re proposals for the Minister for Transport, Energy and Communications, grant of licence to Esat Digifone to a second provider, and Commission Directive 96/2, and Minister of the Department of Transport, Energy and Communications dated 24th April, 1996." That's Mr. Towey's minute.

A. Yes.

307 Q. "Dear Richard,

"With reference to the above matters and yesterday's consultation fee, please find attached a copy of the above

minute received from the Department and its enclosures.

The consolidated text of Section 111 was not enclosed, as

it does not incorporate the more recent draft of the

proposed amendment thereto. A copy of the relevant papers

referred to in the third paragraph of the Department's

minute is also enclosed, together with a new draft of

Article 8 of the proposed licence which is relevant, and

your opinion on the issues set out in that paragraph would

be appreciated."

So, it looks -- and then if you go to the next document,

you will see that sent up to the office, to your office, I

beg your pardon, is the fax of the, what we describe as the

relevant documents re the matters raised in paragraph 3 of

Mr. Towey's minute to you of the 24th.

So, can you assist the Tribunal of -- which you receive --

you receive them on the 25th, do you see the stamp?

A. Yes.

308 Q. So, what documents were sent to Mr. Nesbitt on the 24th?

A. I think I typed that letter myself and I hadn't the documents. I think that's the answer to that, and I had to await the documents and I didn't alter the date. I think that's the simple explanation to it, to the best of my recollection. That was my typing. I believe that's the explanation. But even if it had been typed by one of the clerical officers or one of the typists, it would have -- I would have held the letter until I got the documents. But I actually think that I possibly typed that myself.

309 Q. But you say it's not possible that you had them from the 22nd?

A. I mean, I can -- I'm absolutely a hundred percent certain about that. There is absolutely no doubt in my mind.

310 Q. You might just go to Tab 17. That's a note of yours, I

think, is it?

A. It is, yes.

311 Q. And it's: "Consultation with" --

A. I can read it, if you wish? "Consultation with Richard Law

Nesbitt conference room.

3/5/96 -- 12 p.m..

Present: Fintan Towey, Eugene Dillon, Regina Finn, D McF,

JFG, and Richard Nesbitt.

"Esat -- a competitor not an applicant."

312 Q. What does that mean?

A. That's good. This was a drafting discussion, and I think

there was an issue as to whether the regulations applied to

-- the appeal procedure applied to applicants for licence

before the regulations came into force. And the people who

would have been involved in the application for the second

GSM are competitors rather than applicants. So, I think --

I saw that note, I mean looking at it and that's what I

believe that possibly --

313 Q. That's what they were, they were competitors, isn't that

right? Sorry --

A. For the second GSM licence, yes. And I think, in fact,

there is a provision in the regulations dealing with the --

this application in the appeal procedure provided for in

the new licensing regulations, that this application in

that provision as regards competitors for the second GSM

licence.

314 Q. I think there were applicants for the licence, and once its

licence was granted they were competitors of --

A. No, I think -- for the competition I presume they would

have been competitors. Applicants would be under, an

application under the new regulations. I mean, the

regulations we were transposing weren't confined to the

second GSM in a sense. I mean, they were -- so you would
make an application for a licence. Certainly the people --
it was the GSM competition -- sorry, the competition for
the award of the second GSM licence, so I presume people
who partook in that could be reasonably described as
competitors rather than applicants. I don't think it's a
point I necessarily would have made myself. I am not quite
sure, maybe it was. It's a drafting meeting, and I am
afraid these type of things exercise draftsmen.

315 Q. Now, on Tab 18, on the 3rd May --

CHAIRMAN: There is nothing else material in that
particular note, Mr. McFadden, that's anything to do with
what we are inquiring to at present?

A. No, indeed, Chairman.

316 Q. MR. COUGHLAN: You, again, sent a letter to Mr. Nesbitt,
and you refer to the "reference to the above matters and

this office's letter of the 28th. Please find enclosed

revised draft of the licence and regulation to implement

Commission Directive 96/2/EC.

"If you require further information or we can be of any

assistance, please let us know."

So you are sending him on more technical information and

documentation?

A. Yes, the revised draft.

317 Q. And then I take it that you were unaware of any contact

that may have been taking place between the Department and

Mr. Owen O'Connell or anyone who was connected with the

proposed licensee?

A. Absolutely, we weren't involved in any direct contact at

all, no, or I was unaware --

318 Q. The only time was when you were asked to review the letter

I think of the 30th April or the 1st May, which was

seeking --

A. But I think possibly they -- now, I wasn't aware

particularly of in a sense I wasn't informed, but whether

they were in consultation. We were at an earlier stage, we

provided advice in relation to the release of a draft

licence to competitors, and I suppose subsequently I am not

sure the Department may have released a copy of an

indicative draft to Esat Digifone, but certainly we didn't

advise in relation to that, other than we would have

cautioned that any licence was indicative, and we actually

had another counsel at a certain stage settle that form of

words.

319 Q. And then, at Tab 19, you received a fax from Mr. Nesbitt

with the covering letter and an opinion enclosed, isn't

that correct?

A. Correct.

320 Q. And you point to -- looking at the opinion, first of all I

think deals with the draft licence, isn't that correct,

under subheading "The draft licence"?

A. Correct.

321 Q. If we just look at the introduction.

"I have not the opportunity of considering the complicated

issues which arise relating to the introduction of a

Statutory Instrument to take into account the effects of

Commission Directive 96/2/EC and to settling the terms of

the draft 'Esat Digifone telecommunications licence' which

the Minister wishes to issue.

"The draft licence:

"I have dealt with the draft licence by taking the draft of

the 2nd May, 1996, and indicating where I think it should

be amended. The balance of the document can remain in its

current form. Attached to these advices are the amendments

I suggest. You should also include in the licence the subheadings that exists in the articles. I did not trouble to repeat them in the amendments that I have suggested.

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

"The amendments I have suggested to Article 8 are more substantial. Article 8 imposes conditions material to the ownership of the licence and the management of the licence service, most particularly the ownership of shares in the licensee company. I view these matters as being particularly sensitive and an area where the Minister's hand is substantially tied. The Minister agreed to give the licence in question prior to the introduction of the Commission Directive 96/2/EC. However, as a matter of law

I am forced to conclude that if the licence documents include the terms and conditions which are not sustainable

under the directive, the licensee, in my opinion, is free

to apply to the courts to have such non-conforming

provisions struck down.

"If one analyses why the Minister is concerned about the

ownership of shares in the licensee, the only legitimate

concern he can have is that if there is a change of

ownership the service that has to be provided will in some

way be compromised. I do not think that 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 plan and

proposals were the most meritorious and it provided a

funding plan which looked feasible. There is no reason why

any of these matters have to be compromised by a change in

ownership. However, I do accept that there is a

possibility that this might occur. It is also a real issue

in the mind of the public.

"In the circumstances, I propose changing Article 8 quite

fundamentally. What I have proposed is that the licence

conditions to be personal to Esat Digifone, the

restrictions on transfers and assignments of interest in

the licence and assets remain, and that the Minister

include in the licence provision which will allow him add

additional conditions to the licence should Esat Digifone

wish to issue shares to the public or by private placing

and give to the Minister the right to veto any proposal to

issue shares or transfer the ownership of existing shares.

However, the right must be prescribed, and I have done this

by only allowing the Minister to act if he forms the

opinion that the proposals will be to the detriment or will

compromise all or any of the matters which the directive

indicates are proper concerns for the Minister when issuing

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

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

"In relation to Article 15, I have suggested an amendment.

It is largely cosmetic.

"Article 17 holds the licensee to the provision of a service which develops in accordance with the promises he made in his submission at competition stage. I am

concerned that the penalties that are imposed on failure to deliver as promised are likely to be subject to attack falling outside what the Minister can do, given the recent Commission Directive. However, I understand why they are being imposed and simply flag these as provisions in the licence which could be subject to attack.

"As I have already stated, I am gravely concerned about the terms of Article 18. I am aware that Mr. O'Brien promised such a windfall gains provision in his submission and should be held to his promise, but I'm equally satisfied that such an arrangement falls well outside what is permitted under the recent Commission Directive. I have left it in the terms as drafted, but again point out that if challenged it will be in difficulty.

"In respect of the proposed Statutory Instrument, I have caused this to be retyped, and where I have made amendments

I have over-lined the sections in question. Essentially since the implementation of Commission Directive 96/2/EC, which amends directive 90/3/88/EC, the State is obliged to offer available radio frequencies to prospective communication service providers. The frequencies are to be licensed by open non-discriminatory and transparent procedures.

"The proposed Statutory Instrument amends Section 111 of the Act by inserting two new subsections (2B) and (2C) for the provision of mobile and personal services and mobile and personal communication systems is subject to licence by the Minister. What the Statutory Instrument does not do is to provide a mechanism by which the Minister will alert people to the available frequencies or provide the practical arrangements which need to be put in place for the processing of applications by persons who want to

operate such services or systems. It would be prudent for the Department to consider how this is to be done, because otherwise there will be complaints by persons who would like to operate such a scheme that are not being advised as to the availability of frequencies and have not been provided with procedures whereby applications can be submitted. This will not stop people making applications, but it does call into question how open non-discriminatory and transparent the procedures really are. Frankly, I do not know enough about the availability of frequencies to make any sensible suggestion at this stage. However, it is something that needs to be considered urgently and to be the subject matter of a set of regulations.

"The ability of the State to limit the number of licences for the mobile and personal communications system is restricted to certain specified non-economic reasons in the

public interest and the lack of availability of frequency spectrum. Restrictions have to be proportionate to the aim to be achieved. It is also clear that the directive seeks to outlaw restrictions on operation in respect of establishment of their own infrastructure, the use of infrastructure provided by third parties, and the sharing of infrastructure and other facilities and sites.

Interconnection must be permitted and restrictions on interconnection lifted.

"Finally, access to the public network must be guaranteed.

Obviously interconnection requires conditions, but these must be based on objective criteria which are transparent, non-discriminatory and compatible with the principle of proportionality. Clearly, the Department should think about setting out a set of interconnection conditions of general application to allow prospective licence applicants

know what lies in store for them. Rather than repeat the amendments I have made to the Statutory Instrument, I suggest you take time to consider the draft I return, and I can deal with any questions that arise.

"Nothing further occurs at present."

And it's signed by Mr. Nesbitt. And it's the 9th May, 1996. So that's the opinion you received?

A. That's correct.

MR. O'DONNELL: When you were reading the second paragraph, page 2, you read "Because of the parties who owned the licence," and it should, in fact, read "The parties who owned the licensee." It's line 22 of page 129 of the transcript. "I do not think it is tenable..."

MR. COUGHLAN: "... because the parties" -- sorry, it should be licensee. Sorry, I beg your pardon.

322 Q. If I might ask you to return to your Memorandum of

Evidence, please?

A. Yes. That's tab?

323 Q. Tab 2.

A. Yes.

324 Q. Now, I think if you go to paragraph 20, I think you have

said that on the 9th May, 1996, Mr. Nesbitt sent by fax

legal opinion of the same date which suggested amendments

to the Esat licence and draft Statutory Instrument, and

also contained general advices. "On receipt of the opinion

I read it carefully. I was conscious that counsel had been

requested to advise inter alia on the aforementioned of

issue of restructuring of the ownership of Esat Digifone.

"21. I was of the view that the second paragraph of the

second page of the opinion dealt with the issue. It set

out what counsel believed to be the relevant criteria for

determining whether changes in ownership of the licensee,

which were set out in the documentation briefed to him,
should be of concern to the Minister or could be legally
challenged. In my view the opinion confirmed that the
views expressed by counsel at the consultation held on the
23rd April, 1996."

And then we go on and deal with the covering letter in a
moment.

A. Yes.

325 Q. Now, could we go through this particular -- just to --

A. Yes.

326 Q. There existed no licensee at this stage, isn't that right?

A. Correct. But it was certainly a view expressed by counsel

that Esat Digifone had an entitlement to a licence, which I

think is relevant, it's relevant in different advices, but

--

327 Q. Sorry, I beg your pardon, where does it say that in the

opinion?

A. I am just wondering is it in the covering letter that he says -- "My reasoning in this regard is that the Minister is committed to grant a licence. He is now in between two competing interests, he is committed." But, as I say, I may have a difficulty with privilege, but in a different context. Esat Digifone had won the competition for the grant of the second licence and they would -- I mean, the view was that they would have had a strong -- they had an entitlement, which probably they could have, if they had to possibly go to the courts to seek to ask the Minister to grant the licence. As I say, that's a different -- it's a different legal issue, but it certainly would have been regarded that as the winner of the competition that they had an entitlement to a licence. And I think that's what Mr. Nesbitt is saying in his covering letter there, and I

think it possibly -- it's relevant to his general advice in relation to the issue of the licence but, certainly they were the winner of the competition. What we were doing effectively was finalising the terms of the licence which was being given to them. There was nobody else on the pitch, so to speak.

328 Q. Well, I'll discuss that with you in a moment, but if I could first look at this. And we accept that there was no licensee as of this time until the licence was granted, there is no licensee until the licence was granted, isn't that correct?

A. Formally, correct.

329 Q. And the second paragraph is dealing with -- is concerned over the change of ownership of a licensee and what conditions could be?

A. Well, I think this is possibly where maybe some explanation

of our understanding is required. We, as I said, regarded this -- the process as being the finalising of a licence which was to issue to Esat Digifone. Secondly -- that's the first point. The second thing is in relation to what is differently referred to as the -- but the ownership issue, let's call it, can even be gleaned from my requests for advice to Mr. Nesbitt on the -- I am not quite sure of the date again in April --

330 Q. 24th?

A. 24th. Where we would have seen Article 8 as being connected -- the pre and post-ownership issue as being related, clearly, for the reason I said this morning, that it would be somewhat farcical if we were trying to restrict ownership going forward if we were giving the licence to an entity which was not the same as the entity that had won the competition. But, again, without going back over all

our earlier discussion. To us the joint venturers were still there, and the people, the consortium who won was there. What we were doing was finalising the terms of the licence which the Minister, as Mr. Nesbitt there - I think he dealt with it in another place as well - which he was committed to grant.

331 Q. The introduction to the opinion is that "I have now had the opportunity of considering the complicated issues which arise relating to the introduction of a Statutory Instrument to take into account the effect of Commission Directive 96/2/EC and to settle the terms of the draft Esat Digifone telecommunications licence which the Minister wishes to issue."

A. Correct.

332 Q. Now, there is no mention of ownership there.

A. There is not, but I think in his covering letter again

Mr. Nesbitt refers on some general advices. And we must go

back to the meeting of the 23rd and the fact that

Mr. Nesbitt had a -- he was advising generally. I think

the Chairman mentioned this morning that essentially it was

almost as though he were in a team, in a legal team, he was

part of the legal team advising on the licence, so he had a

general view. And as regards ownership, he would have been

aware that we were involved with an issue pre-grant of

licence and an issue post-grant of licence. It's actually

somewhat further complicated by the fact that, as I

mentioned I think this morning, Dr. Ungerer's letter on the

Commission's position on the EU law aspect of it, which

muddied the waters even further, in the sense that there

was a question whether that directive would have applied to

the licensee in waiting even as regards changes in the

makeup of a consortium. So, certainly when we came to

reading this opinion, as I say, we were aware that

Mr. Nesbitt had discussed the content of William Fry's

letter and the accompanying application form, the diagram,

which was furnished, and in the light of our discussion,

where he was giving clear advice on the IIU issue, and he

had also mentioned his criterion, principal criterion for

determining whether or not a change of ownership would be

of legal significance, or one which the Minister should be

concerned with. And his view in relation to that was that

if it didn't compromise the service which was to be granted

as set out in the winning bid in this case, because the

joint venturers were still there, it was their business

plan which had won, and if that wasn't compromised, his

view was that the Minister couldn't have a legitimate

objection to any change in ownership.

So, that had all been gone into. We were aware of that.

He had expressed his view at the meeting of the 23rd. We also were conscious of, as he was from his brief, I presume, and I think he actually mentions it, I am not sure, the Commission position in relation to the interpretation of Commission Directive 96/2, which again made it clear that the only condition -- well, it was the view of the Commission that the only conditions which could be inserted into a licence would be those which related to the essential requirements. And, in fact, Dr. Ungerer in that statement said that even an existing licence which contained conditions which conflicted with the terms of the directive, that those conditions would be void. And to reflect back on just what I said, Esat effectively were a licensee in waiting.

But, in relation to this opinion, as I say, we were reading it. We knew Mr. Nesbitt had an intimate knowledge of the

whole matter of ownership. In my briefing note the connection between Article 8 and what is referred to here as the ownership issue, that connection was always there.

As I said, it would be illogical to try and restrict ownership going forward.

So, when we looked at this, I'll say it myself, I mean

Mr. Gormley will give evidence, but when I read that, I saw

that as reflecting not alone Mr. Nesbitt's view, also

reflecting the thinking of the Commission on the matter,

and I saw it as dealing with the pre--- any changes that

took place beforehand, which in effect had been dealt with

at the consultation of the 23rd, because his view as

regards IIU involvement was that it wasn't material, and

there weren't really any other significant ownership issues

that we were aware of.

So, the criterion that he set out in that opinion there,

and reflected, as I say, by what he said on the 23rd, and
we were satisfied that it dealt with any ownership issues.

It gave the Department the advice necessary for them to
determine whether a change of ownership was legally
relevant. And that's certainly how we interpreted it.

That's how I interpreted it, I speak for myself. That's
how I interpreted it.

333 Q. Well, could we go back to paragraph 2, so?

A. Yes.

334 Q. It is undoubtedly talking about Article 8, isn't it?

A. Well, I mean, I have just explained my understanding. I
don't believe it does, no, I don't accept that --

MR. O'DONNELL: Sorry, sir, with respect, this witness is
called to give evidence of what he believed the opinion
said, and he has now said it on a number of occasions this
morning and this afternoon, and in asking for a preliminary

ruling this morning we made this point, and the Tribunal is aware we have made it in correspondence and submissions also. What the Tribunal thinks now that that opinion means is irrelevant for an inquiry into what, as a matter of fact, did or did not happen. What matters is what the people who received that opinion believed it meant, and what they did on foot of that belief. And it is simply wholly inappropriate to pursue a line of questioning of this witness, and other witnesses, to say: You couldn't have believed it meant that, because it doesn't say that. The fact is that they did. And unless Mr. Coughlan is going to put to this witness that he is making this up or that he is telling a lie about this, then it is an inappropriate line for him to be pursuing with this witness, and Mr. Gormley. And that's why I made my objection at the start this morning, Judge, that -- or sir,

that I did not want points being put to witnesses that were not based in fact. And what Mr. Coughlan is putting is his view of what the opinion meant. But, with respect, that is irrelevant to a tribunal which is inquiring into what happened as a matter of fact. And I am asking the Tribunal to rule that that line of inquiry not be pursued any further. This witness has given sworn testimony that he interpreted the opinion in a particular way, and that's his view. And there is no evidence to counter that.

Mr. Coughlan may say: Well, I, if I read it, wouldn't have read it like that. But the answer to that is, without being terse, so what? That's what Mr. McFadden believed at the time, and he has given his evidence, and why should he be persuaded to change it in what is supposed to be an inquiry to try and ascertain facts rather than try to establish that Mr. McFadden got the wrong end of the stick?

CHAIRMAN: There must, Mr. O'Donnell, be a balanced inquiry, and I take note of the various points you made this morning, but nonetheless, it would be remiss of the Tribunal to abandon the couple of lines of inquiry that require some assurance in my mind, before I can pronounce safely in favour of everything, matters such as the fact that it does appear that Mr. Towey acted somewhat at variance with the perceived advice to the effect that both a change in percentages and a change in personnel was perfectly acceptable, matters such as the length of time before the matter came to attention. And while I take your point, that in the context of this matter having been examined fairly exhaustively with previous witnesses before Christmas, I think it's scarcely necessary that we traverse all that ground again, but I think some limited inquiry into the actual content of the opinion and what it may mean

on its face is something that's necessary for me to

discharge my remit.

MR. O'DONNELL: Sure, I understand -- obviously I am not

trying to impede you in any way in relation to that. But

the relevance of what the opinion might mean to a hundred,

a thousand lawyers or people who read it is -- it's

missing, so far as I am concerned. What matters is what

the people who got it believed, and what they did as a

result of that belief back in 1996. And for Mr. Coughlan

to pursue, again with this witness, as he has pursued with

other witnesses, that they couldn't -- how could you -- in

effect, putting it to them almost as matter of scorn, how

could you believe that the opinion says this, when it

clearly doesn't refer to IIU by name or so on? The fact is

that they did. The fact is that Mr. Gormley is going to

say the same thing. The fact is that the other witnesses

have said that they believed that it answered the questions that they put to them, and that nobody went back looking for more information or for further answers. And I think it is inappropriate and wasteful of Tribunal time, if I might be so bold, to constantly put the same question to this witness when he has given his view. It's not a matter -- it's not a negligence action where the Tribunal has to consider whether or not Mr. McFadden got it wrong, or Mr. Gormley got it wrong, or Mr. Towey got it wrong and misinterpreted the opinion. The fact is that they said -- they have said and continue to say that they interpreted the opinion as answering the question. And unless there is hard evidence that that's a lie, that that's simply not true, I think that the Tribunal has covered that element of inquiry, and it seems unnecessary, and I would say bordering on the oppressive, to continue to ask the witness

this line of questioning.

So, I am not trying to cut the Tribunal off. I appreciate

that it wants to look at this matter, but I feel that it

shouldn't look at it in endless detail and this constant

rehashing of this kind of question to this witness. He has

given his view.

CHAIRMAN: Would you accept, Mr. O'Donnell, that in an

ideal world, since there is no doubt, I think we are all

agreed that Mr. Towey asked precisely the right question,

as precisely as any solicitor could have done, in an ideal

world it would have been preferable had the opinion or the

covering letter specifically referred to the matters on

which the additional matter on which Mr. Towey sought

advice, rather than all of us seeking to construe a perhaps

possible rolled up plea in the matter?

MR. O'DONNELL: But there is no need for the Tribunal to

seek to construe anything. The Tribunal's function, in my respectful submission, is not to seek to construe a document in a particular way and then see if people did or didn't construe it that way. The Tribunal's function, in my respectful submission, is to find out what did people think when they got the document back in 1996. And unless there is evidence that they are telling lies, that they are making things up, and that wasn't put to Mr. Nesbitt, though he was challenged without basis as being incredible, and it hasn't as yet been put to Mr. McFadden, and we'll be -- I have something to say if it is. But unless there is some evidence and some challenge to the truthfulness, the veracity of these witnesses, what is the point in asking the question: How would I construe that document? It is a matter of fact that these witnesses have said that they believed the opinion answered the question that was asked.

And whether you think it, in my respectful submission, or Mr. Coughlan or I or Mr. Healy, is irrelevant in a tribunal of inquiry. It's not -- I'll say it again -- it is not a negligence action to try and establish whether or not the opinion could have been phrased more felicitously, could have been answered in a better sequence. And, in my respectful submission, that's not a role for the Tribunal to embark upon.

CHAIRMAN: But would you not accept it would preferable if there was explicit reference to this matter to set all our minds utterly at rest?

MR. O'DONNELL: There are all sorts of things that I suspect if people were doing it now they would have done differently than the way they did it back in 1995. I suspect better notes would have been kept. I suspect more attention would have been made to meetings. More attention

would have been paid to the types of questions asked and the nature in which those answers -- nobody expected in 1996 that they were going to be embroiled in a tribunal of this sort where this type of microscopic examination was going to take place. And it just seems to me to be artificial to be constantly asking witnesses: You couldn't have -- how can you read the opinion as reading A, when it clearly, in our view, reads B? It doesn't matter. It doesn't matter what we think of it now. What matters, and should, in my respectful submission, matter to the Tribunal, is what they thought of it then and what they believed in it then. And unless Mr. Coughlan is saying: You couldn't have believed that, and here is evidence that you didn't believe it, because you wrote a letter saying something else, unless there is absolutely hard evidence, this, in my respectful submission, is a line of inquiry

that should cease.

CHAIRMAN: I think your thesis is a little radical,

Mr. O'Donnell, but I have indicated that I do not think it

would be necessary to cover all the ground that was covered

with previous witnesses, and I anticipate that matters may

resume on a somewhat speedier basis tomorrow. And in the

context of it now being a quarter past four --

335 Q. MR. COUGHLAN: Just before we rise, sir, could I just

inquire of Mr. McFadden; you have said that when you read

this opinion, you had an understanding of what

Mr. Nesbitt's view was, which you had gleaned from the oral

advices he had given on a previous occasion, isn't that

correct? It all came together for you?

A. Correct, that's my understanding. And, as I say --

336 Q. Well, could I just, and this is not in any way to denigrate

you, but counsel on behalf of the Department has put it to

witnesses, has put to Mr. Towey, and Mr. Nesbitt has given evidence that no such oral advices were given on the 23rd April, 1996?

A. Well, I have given my evidence, and I was the officer dealing with the file, and I have no -- I wouldn't have come here today to say an untruth. I mean, I have given my account of what occurred on the 23rd. I have absolutely no doubt about what I -- the evidence I have given today.

337 Q. I am not suggesting an untruth. I am suggesting your recollection could be faulty based on, based on what the Department are saying is the position?

A. I am giving evidence of what I -- I attended the meeting with counsel. And I have given you my understanding of what took place. I have expressed what Mr. Nesbitt said. I pointed out how that meeting took place. That the documents were presented by Mr. Towey and opened by him.

The Chairman says frequently counsel will be briefed on a more formal basis, but this was a large legal process, a lot of issues were arising, and that's how this particular one arose. It was raised orally initially at the consultation on the 23rd, and Mr. Nesbitt expressed his views. And, as I said, we interpreted his opinion of the 9th May and the covering letter as reflecting the views expressed by him, and he certainly had no -- he expressed no legal concerns on the 23rd. And again, he came in with an opinion which, and I have explained our interpretation of it, and I believe his view of the ownership issue was influenced very much by the European Commission interpretation -- sorry, of Directive 96/2, and, as I said, certainly my interpretation of it was coloured by the consultation of the 23rd, and also by his covering letter wherein he is advising the Minister to proceed to grant a

licence. And Mr. Nesbitt is an eminent commercial Senior Counsel, as I say, a specialist in company law, European laws matters he has dealt with. His clear advice with his covering letter is there. This, in my view, reflected principles that he had set out at the consultation of the 23rd, and I have dealt -- the IIU issue, I think, can be somewhat distinguished in any event, because I don't believe it necessarily -- a change of ownership, that was a somewhat discrete matter.

MR. O'DONNELL: Sir, I should say that again I am concerned that a somewhat selective question is being put to this witness, in that it is true that Mr. Nesbitt said that he did not -- it was put to him because it was anticipated that he would say this, that he did not give this advice on the 23rd, but he does say that he gave this oral advice, although he puts it given at a different date. But he does

say he gave this advice that it was not material, that it was not relevant that IIU was involved. He does say that he gave that advice orally, and he said that he gave it at a meeting at which Mr. McFadden and Mr. Gormley were present as well as Mr. Towey. And, you know, to suggest that in some way he is at odds with Mr. Nesbitt, that there is a total conflict, there isn't a conflict. There is what Mr. McFadden described correctly is a confusion over dates. But there is no confusion over the central issue, which is that oral advice was given which was accepted and acted on by the legal officials in the Attorney General's Office, and that the legal officials who read the opinion believed, as did Mr. Towey, that it answered the question asked. And whether we think it answers the question that was asked or not, is irrelevant.

So, I am again concerned that in a fact-finding inquiry,

that a selected question is being put to this witness in furtherance, in my respectful submission, what appears to be the thesis or working hypothesis or view of the Tribunal, rather than simply leaving it open to him to answer an open question, if I can put it that way. They are my concerns.

CHAIRMAN: I am sure Mr. McFadden, who has coped ably with many questions today, will be able to do so in the balance of his evidence tomorrow. Does eleven o'clock suit you?

MR. O'CALLAGHAN: Chairman, could I just say before you go, I find myself in the unenviable position that tomorrow I'll be questioning Mr. McFadden. But I still haven't got all the documents. The letter from Mr. Davis that was put on the screen dated 27th May, 2002, referred to correspondence from the 15th May, 2002, and strangely a note of the 30th May, 2002, three days later. I need those documents to

question this witness.

CHAIRMAN: Well, I'll see that's addressed, Mr.

O'Callaghan, as a matter of urgency, and that they be faxed to your solicitor immediately, anything...

MR. SHIPSEY: Chairman, there is actually six documents that we have identified from that which has been provided referring to other documents which haven't, and perhaps if we could give the list of those six documents and they could be provided?

CHAIRMAN: I think that should be done between the respective legal advisors. And I would obviously expect that the maximum endeavours be made to see that nobody is left short for their examination tomorrow. Very good.

Thank you.

THE TRIBUNAL ADJOURNED UNTIL FRIDAY, THE 19TH MARCH, 2010,

AT 11 A.M..