

THE TRIBUNAL RESUMED ON THE 22ND OF MARCH, 2010, AS FOLLOWS: DENIS McFADDEN WAS EXAMINED BY MR. O'CALLAGHAN AS FOLLOWS: Q. MR.

O'CALLAGHAN: Good morning Mr. McFadden. Mr. McFadden, I appear for Denis O'Brien, and obviously I want to ask you questions about the evidence you have given at the end of last week. Mr. McFadden, I think your evidence can be categorised as covering two years: 1996, when the advice was sought and you say given; and 2002, when you were interacting with the Tribunal, isn't that correct?

A. Yes. Q. And what I want to do, Mr. McFadden, is I want to start just looking at the 2002 evidence, and then we'll go back and look at the 1996 evidence, you understand what I'm doing?

A. Yes. Q. Now, we know, Mr. McFadden, that there was interaction between the Tribunal and the State, including the Attorney General's Office, in 2002, isn't that correct?

A. Yes. Q. And some correspondence has been made available to my team in respect of that interaction. And what I want you to do, is just look at some of that correspondence to begin with please, Mr. McFadden. And the first letter I'd ask you to look at is the letter from Mr. Davis, the Tribunal's former solicitor, to Mr. Shaw dated the 15th March, 2002?

A. Yes. Q. And you have a copy of that there. Would you agree with me, Mr. McFadden, that it is apparent from this letter that there was previous communications between the Department and the Tribunal in respect of this ownership issue?

A. Sorry, can you bear with me while I read the letter? This is the 15th March, 2002, from Mr. Davis to Mr. Shaw. Q. And I am just asking you to confirm that it's apparent from the first paragraph that there was obviously previous communication or correspondence between the Tribunal and the State?

A. Certainly the reference to the letter of the 24th April, 1996, I presume is Mr. Towey's request for advice. Q. And the first sentence in the letter refers to: "Dear Mr. Shaw, "Further to the transmission by you of certain documentation previously withheld from the Tribunal on grounds of privilege, I wish to refer to a letter dated 24 April, 1996, from Fintan Towey." So there was obviously communication between the Tribunal and the State previously in respect of this matter?

A. Well, I presume that's correct. Q. And this letter, if you look at what it contains and what it seeks, is that, in effect, it's a request for documentation, but on the second page it's also a request for a narrative account of any response or advices from the Office of the Attorney General, isn't that so; the penultimate paragraph on the second page seeks that confirmation?

A. Well, I presume that's correct. Q. And this letter, if you look at what it contains and what it seeks, is that, in effect, it's a request for documentation, but on the second page it's also a request for a narrative account of any response or advices from the Office of the Attorney General, isn't that so; the penultimate paragraph on the second page seeks that confirmation?

A. A narrative account, yes. Q. And the response to that request, Mr. McFadden, would you agree, is the letter from Mr. Hodson, dated the 13th May, 2002, which is three pages from the back of the small booklet of letters you are looking at?

A. I am looking for a letter of Mr. Hodson's? Q. It's the 13th May. It comes after -- it's about the third letter after the letter I have just opened to you.

A. Sorry, yes, I have it. Q. You have that?

A. Yes, I have it. Q. And although this is a letter from Mr. Hodson to Mr. Shaw, it is, in effect, the response of the Department to the issues raised by the Tribunal in the letter from Mr. Davis we have just looked at, isn't that correct?

A. Yes, it would appear to be. Q. And if I could just open up the last paragraph of Mr. Hodson's letter of the 13th May, 2002. And he says: "I have checked the files and have spoken to Fintan Towey on the questions raised in the Tribunal's letter. Mr. Towey does not recall any written response to his letter, and I have been unable to find a direct follow-up in the files, other than the legal advice from Richard Law Nesbitt, SC, dated 9 May, 1996, which refers to ownership issues." Would you agree with me, Mr. McFadden, that that response from Mr. Hodson does indicate that the response to the letter of 24 April, 1996, is contained in advices from Richard Law Nesbitt?

A. Well, Mr. Hodson, as I would read it, he says: "And I have been unable to find a direct follow-up in the files other than legal advice from Richard Law Nesbitt, SC, dated 9 May, 1996, which refers to ownership issues." Q. I think would it be fair to categorise this response as Mr. Hodson saying, "I can't find a direct response to the letter of the 24 April, 1996, but the advices of Mr. Nesbitt appears to deal with the ownership issues," would that be a fair appraisal of this note?

A. Well -- "Mr. Towey does not recall any written response to his letter and I have been unable to find..." He is saying that Mr. Towey does not recall a written response. "And I have been unable to find a direct follow-up in the files other" -- "a direct follow-up", I presume that's by them. Q. But would you --

A. "Other than legal advice ... which refers to ownership issues." Q. Would you agree with me that he clearly believes that the advices of Richard Nesbitt deal with ownership issues?

A. Well, he's certainly of the view that ownership issues are referred to in the opinion. Q. And it's plural, issues as opposed to an ownership issue?

A. Yes. Q. And he continues: "Mr. Towey suggests that the matters" - and I emphasise the plural again - "raised in his letter 24 April, 1996, may have been subsequently pursued and dealt with in the context of the finalisation of provisions of the licence, in particular Article 8, and in the certification of ownership, which was obtained before issue

of the licence." I know it is unfair to ask you to say what Mr. Hodson is referring to there, but your interpretation of that last sentence, Mr. McFadden, do you agree that it seems to indicate that the issues raised in the letter of 24 April, 1996, may have been subsequently discussed during the finalisation of the provisions of the licence?

A. And dealt with in the context. Q. Yes.

A. Yes, that would, I think, be a fair interpretation. Q. Would you agree with me, Mr. McFadden, that this note from Aidan Hodson of the 13 May, 2002, contains within it broadly a statement that the opinion of Richard Nesbitt dealt with the ownership issue?

A. I think you can make a case that it does. I mean, it's difficult for me to comment on Mr. Hodson's letter. He clearly is referring to the opinion of the 9th May. Q. Can I now ask you, Mr. McFadden, to look at the next letter, which is a follow-up to Mr. Hodson's letter, which was sent on to the Tribunal. And this is a letter dated the 27th May, 2002, from Mr. Davis to Mr. Shaw. You have a copy of that letter, Mr. McFadden?

A. The 27th May? Q. 27th May, 2002.

A. Yes. Q. If I can just refer to what the Tribunal is stating. In the first paragraph they refer to Mr. Hodson's note that we have just looked at, isn't that correct?

A. That's correct. Q. In the second paragraph - I just want to open this - we get an account of what is, at that stage, the Tribunal's view about the opinion of Mr. Nesbitt. And Mr. Davis says: "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 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." So, at that stage, in May 2002, the Tribunal are stating that it would appear to them that Mr. Nesbitt's advices don't deal with the issue, isn't that correct?

A. Yes. Q. And then in response to that letter, Mr. McFadden, is the note prepared by Mr. O'Daly, which appears to be prepared sometime, I think, in early July 2002, and that's a note from Mr. O'Daly to Mr. Shaw. Do you have a copy of that there, Mr. McFadden?

A. Is this the undated letter? Q. It is the undated letter, that's correct.

A. Yes. Q. It appears at the bottom that the date is the 3rd July, 2002, but I am not sure about that, and nothing hugely turns on it, Mr. McFadden.

A. Fine. Q. But it's apparent from the first paragraph of Mr. O'Daly's letter, is it not, that he is dealing

with the correspondence dated the 27th May, 2002, from the Tribunal?

A. "I refer to your minute dated the 27th June enclosing correspondence dated the 27th in relation to certain papers provided at a meeting of the 22nd." Yes. Q. And can I ask you, were you involved in assisting Mr. O'Daly in the preparation of this reply?

A. I think I mentioned this to Mr. Coughlan, I would have had to have been because, as the file holder, both I presume Mr. Gormley and myself would have been asked to deal with -- to furnish material for a reply, I suppose is what we normally would do. Q. Can I refer you to the second page of that letter to Mr. O'Daly?

A. Yes. Q. And in the middle of it, at (i), he says: "Pages 1 and 2 of Mr. Law Nesbitt's advices of 9.5.96 appear to deal with the matters raised in the Department's minute of 24.4.96, and there is nothing on the file to suggest that the Department thought otherwise." Now, reference was made last Friday that the use of the word "appear to deal with" may be a sign of the customary politeness of Mr. O'Daly, but it also could refer to simply repeating what's contained in Mr. Davis's letter, isn't that so? Because Mr. Davis, on the 27th May, 2002, said: "It would appear that Senior Counsel did not address this specific question"?

A. But I think the verb "appear" is used a lot by lawyers, it's a commonly used verb. Q. And would you agree with me, Mr. McFadden, that here, in July 2002, the Office of the Attorney General is stating its view that the opinion of Mr. Nesbitt dealt with the ownership issue?

A. Very much so. As I said, insofar as I would have been involved in providing material for the reply, that was very much my view and Mr. Gormley's view. So, that's the view that I presume would have been relayed to the Tribunal. Q. And that view was relayed to the Tribunal in Mr. Shaw's letter of the 30th September, 2002, isn't that correct? I don't know if you have a copy of that in front of you, Mr. McFadden?

A. Yes, I have. Q. And just the last paragraph, Mr. Shaw says: "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 24 April, 1996. In the event that the Tribunal wishes 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." Can I ask you, Mr. McFadden, at this stage in September 2002, had a meeting been requested by the Tribunal with officials from the Attorney General's Office?

A. Had we requested a meeting? Q. No, had the Tribunal sought a meeting?

A. I wouldn't -- from that response there, I would say definitely not, it wouldn't appear to have. Q. The only reason I mention it is because on the third-last line of Mr. Shaw's letter there is a reference "If the Tribunal still wishes to meet with Messrs. Gormley and McFadden." But you have no recollection of that, Mr. McFadden?

A. I mean, I'd need to see the correspondence that went before it to say if that had ever been suggested, but certainly it would appear what was happening here was that the Attorney General's Office was indicating in response to a request by the Tribunal, where the requests for the opinion of the 24th April, 1996, was dealt with, and certainly the response of the Attorney General's Office would have been that it was dealt with in the opinion of the 9th May. And we always, obviously, would have been willing, without question, to come down at any time to assist the Tribunal. Q. And I think that's repeated both in Mr. O'Daly's note and in Mr. Shaw's note here, that the Attorney General's Office was happy to assist the Tribunal in whatever way in respect of these issues?

A. Of course we would, yes. Q. Now, can you confirm to me, then, Mr. McFadden, that as of the 30th September, 2002, the Tribunal had been informed, first through Mr. Hodson's note, and secondly through Mr. O'Daly's note, that it was the view of the State that, broadly speaking Mr. Nesbitt's opinion dealt with the issue of ownership?

A. Well, I can certainly speak in respect of the Attorney General's Office and, as I say, there has never, that I am aware of, been any correspondence from the Attorney General's Office that suggests that the opinion -- that the

request for the advice on the -- Mr. Towey's request for advice was dealt with other than in the opinion of the 9th May of Mr. Nesbitt. That has always been, to best of my knowledge, the position of the Office of the Attorney General and the Attorney General himself. Q. Now, the response from Mr. Shaw went to the Tribunal on the 30th September, 2002, and we now know that there was a meeting that you had and others had with the Tribunal on the 18th October, 2002, isn't that correct?

A. That's correct. Q. And do you know how that meeting was arranged, or is it simply the case that Mr. Davis contacted the Department and the Attorney General's Office and indicated that a meeting would be of convenience?

A. Well, my recollection is I had relatively short notice. I was told, I think, the day of -- we were requested to go down. I don't believe the request was directed to me personally or to Mr. Gormley, but we would have been informed of it. Q. Could I now ask you, Mr. McFadden, to go to the large Book of Documents that you were looking at last Friday, and Tab 37 of it.

A. Yes. Q. And you have that note of Mr. Davis of the meeting of the 18th October, 2002?

A. Yes. Q. Can I ask you, when did you first see this minute?

A. Mr. Davis's minute? Q. Yes.

A. It was contained in a Book of Documents which was sent by the Tribunal to, I am not sure was it Mr. Shaw, but we were furnished with a similar folder to this -- Q. Well --

A. -- before we came down. Q. We received it on last Monday, which is the 15th March, 2010, which I think is the date upon which the Tribunal circulated the relevant documents. Would it be fair to say that's the date you received it as well?

A. Yes. Q. Okay. What I want to do, Mr. McFadden, is just ask you some questions first about the document and then about the meeting itself. And could I just open the first four lines of the substance of the note where it says: "Changes in membership of consortium -- exercising the minds of members of the PTGSM? Was this the same consortium? FT minute 24/4." So, would you agree with me, Mr. McFadden, that the meeting, and the document records that the meeting was about what we call here the ownership restructuring issue?

A. Yes. Q. And just after that there is "JH" and it says: "Opinion does not deal with the query raised -- deals instead with future problems." Would you agree with me that this document records that Counsel to the Tribunal was expressing, at that meeting, that the Tribunal did not believe the opinion dealt with the query raised?

A. Yes, that's the case. Q. And if I could ask you to go down to the bottom part of that note, the third-last paragraph, and there is a reference in the middle of it to, "They felt the opinion dealt with the query raised in the minute of the 24/4." Do you see that, Mr. McFadden?

A. Yes. Q. Do you agree with me that this minute records that the Tribunal was told, on the 18th October, 2002, that it was the view of the Attorney General's Office and Mr. Nesbitt, that the opinion dealt with the matter?

A. Yes, I mean I mentioned this in response to Mr. Coughlan last week. There is no doubt about that. I mean, I was asked where in the opinion of the 9th May, 1996, of the Attorney General's opinion, where did that deal with the request for advice set out in Mr. Towey's letter of the 24th April? And I pointed to what we now refer to as the second paragraph in the second page, and I actually read it out, I actually read it out verbatim to the people at the meeting. Q. But the document itself is an important document, do you agree, because it records the Tribunal being told in October 2002, we say for the third time, that the opinion of Mr. Nesbitt dealt with the matter?

A. Yes. I mean, there is no question that, as I say, the position that the Attorney General and the

Attorney General's Office was indicated at that meeting, there was no question about that. Q. And would you agree with me that this document makes it untenable for anyone to suggest that the Tribunal was not

told by the State what it, the State's, view of the opinion was prior to June 2009?

A. Well, again, I don't want to stray -- I think it's really a matter for the Chairman. But as far as I am concerned, there is absolutely no question but that the question: Where was Mr. Towey's request for advices dealt with? I myself indicated clearly, as I have said now a number of times, where that was dealt with in my view, and that was the Office view. Q. Mr. McFadden, in your Memorandum of Intended Evidence, at paragraph 25, and I don't need you to look at it, but in paragraph 25 you informed the Tribunal that you had met the Tribunal back in October 2002, isn't that correct?

A. Yes. Q. At the time you made that statement in your Intended Witness Statement, were you aware that this document existed?

A. Absolutely not, no. Q. Your Witness Statement is neither signed nor dated. Can I ask you, when was it prepared?

A. It was prepared in response to correspondence from the Tribunal. We were requested to prepare statements internally in the office. I can't say what date it was, but it was in response to correspondence with the Tribunal. Q. And can I ask you, was it dated at any stage, no?

A. Well, it certainly accompanied a letter; it was sent back with a letter which would have been contemporaneous, I presume, or -- Q. But this minute that we're looking at at Tab 37, this was only made available to you, is that correct, Mr. McFadden, after you referred to the meeting in your intended evidence?

A. Oh, absolutely. Oh, there is no question about that. And there is a reason why I mentioned it in my opinion -- sorry, not my opinion, in my statement. Because there was -- I think it was raised in Tribunal correspondence from the Tribunal as to -- there was a suggestion that we were more or less just raising something now. Q. Could I ask you now, and we'll come back to the note of the meeting in due course, but I just want to ask you generally about the meeting, and you have indicated that you were told about this meeting at relatively short notice, isn't that so?

A. Well, I was personally told, I am not sure whether the request arrived, but, yes. Q. But this was a meeting conducted by the Tribunal during its private investigative phase, isn't that so?

A. That's, I think -- yes, I presume -- Q. You and the other individuals who were attending and were not from the Tribunal were there for the purpose of assisting the Tribunal?

A. Of course, yes. Q. And I am correct in stating that the people there on behalf of the Attorney General were yourself, Mr. Gormley, Mr. Nesbitt and Mr. Shaw, solicitor, isn't that so?

A. That's correct. Q. And can I ask you, was Mr. Nesbitt there as Senior Counsel representing the Tribunal -- or representing the Department at this Tribunal, or was he there as a witness of fact, in effect, to give evidence about his opinion?

A. My understanding was he was there as the author of the opinion, and I mean, we were there to assist the Tribunal, that was the purpose we were there for. Q. Before the meeting commenced, did you know what the meeting was to be about, Mr. McFadden?

A. I am not quite sure. I'd need to see the correspondence from the Tribunal. We were certainly going -- I presume we had some idea. Q. And can you describe to the Chairman the nature of the interaction at the meeting; what was the discussion about and who was leading the discussion for the Tribunal, and indeed, for the Attorney General's Office?

A. Well, certainly as I mentioned to Mr. Coughlan when he was asking me about this, my memory is that we were called in to one of the Tribunal's rooms and we all took our place. There was quite a number of people there I thought for the meeting. I listed them in my note to the then Attorney General, and I think at a relatively early stage I was asked the question: Where was the request for advice of Mr. Towey of the 24th April, 1996, where was that dealt with in the opinion of the 9th May? And as I said,

and I'll not repeat, I indicated where in the opinion I believed it was dealt with. And I think fairly quickly it moved more towards Mr. Nesbitt. I think Mr. Healy took up the questioning with Mr. Nesbitt about the opinion. Q. You mentioned in your evidence last week that counsel for the Tribunal had a certain view of the opinion of Mr. Nesbitt. What was that view, Mr. McFadden?

A. Well, I got the -- I described to Mr. Coughlan what I understood was happening. Mr. Healy certainly seemed to be

testing the opinion, possibly; he was querying whether it in fact did deal with the issue. I think that's probably the best way to portray it. But it would be similar to two colleagues discussing a matter, I suppose, and bouncing around questions. Q. But did the Tribunal have a positive view of this opinion or were they --

A. No, as I said, it struck me -- it was Mr. Healy -- I mean, what the Tribunal view, as such was, it wasn't suggested it was the Tribunal view. I mean, there was Mr. Coughlan, Ms. O'Brien and Gerry Healy were the three counsel that were there for the Tribunal. It wasn't suggested: Well, we don't believe -- they were asking the question. I had answered the question put to me and, as I say, the next phase of the meeting that I recall was the conversation between Mr. Healy and Richard Nesbitt, and I'd describe that as being probably Mr. Healy testing the opinion. Q. And what was the Tribunal counsel's view of the opinion? You mentioned that in your evidence last Thursday or Friday?

A. Well, I got the impression that he wasn't -- he was querying whether it dealt with the opinion or not. That's what I would say. Q. Was he criticising the quality of the opinion or was he assessing specifically the ownership aspect of the opinion?

A. I'd say he would have had a view, possibly -- I mean, I think he had a view of the quality, if you want to say that, of the opinion, and he proceeded to discuss then and question the detail of the opinion. Q. What was Tribunal counsel's view of the opinion, of the quality of the opinion?

A. Well, I don't think he thought it was a great opinion. Q. How was that communicated to the representatives from the Office of the Attorney General at the meeting?

A. Well, I think he may have used a somewhat impolite colourful description of it, but he certainly -- the point was that he was putting forward a view. He certainly didn't think it was a great opinion, let's say. But I think -- I took that to be in a jocular sense. I didn't -- I didn't take it to be a serious Tribunal position, if that's what you are asking me. Q. No, I am not.

A. It wasn't put to me or to Mr. Nesbitt that it is our view that this is not -- this opinion doesn't deal with the matter raised. It was, as I described it, it struck me more as two colleagues discussing a legal opinion and bouncing around questions about it. That certainly is how I would portray it. Q. And what colourful description was ascribed to the opinion at the meeting?

A. As I say, it was possibly a colourful -- at this remove, I am not sure if the Chairman --

CHAIRMAN: I have no great fear, Mr. McFadden. A. Yeah, well I think he might have described it as, I am not quite sure, it's slightly embarrassing, but like... MR. O'CALLAGHAN: Don't be embarrassed.

A. Let's say another word for manure, I'd say. Q. MR. O'CALLAGHAN: There are many other words for manure, Mr. McFadden?

A. Yes. Well, one beginning with "S". Q. Okay.

A. But really, I wouldn't like -- I am not going to -- I don't particularly want to emphasise that. I don't think it was -- as I said, it was a cordial meeting and it was an interchange between colleagues, an exchange of views between colleagues on an opinion. So I don't want to stray from -- that's what it was, and Mr. Healy did proceed to ask questions about the opinion. Q. I am not suggesting that this is the Tribunal's view, but it is important from my client's point of view to get an understanding of what, at this stage, in October 2002, was the attitude of Counsel to the Tribunal representing the Tribunal of the opinion.

A. What was Mr. Healy's view of it? Q. I don't want to personalise this to Mr. Healy, but I want to just find out specifically what Counsel for the Tribunal said of this opinion? The word referring to manure and it begins with "S"?

A. Yes. Q. There are two words that begin with "S" that can refer to manure, can I have the one?

A. I think he may have said it was shite, but I really don't want to emphasise that, but I think it's, you know, I don't think that's -- I think that's the word that was used. But as I said, I described -- I think it was a conversation between colleagues, and I am sure many colourful phrases and descriptions are used between colleagues on a daily basis. Q. You record in your own note, Mr. McFadden, that at the end of the meeting you seemed satisfied that the Tribunal counsel had come around, is that a fair assessment of what you say?

A. Certainly leaving the meeting, which again I describe as being a cordial meeting, I was certainly of the view that Counsel for the Tribunal, counsel were satisfied that we had given them the information that they had sought and that they were content with that, and certainly there was no heated exchange where they said, "This opinion doesn't deal with the matter," and where we -- as we would have, engaged with them if they had suggested it hadn't, because we had a very clear view, it was the Attorney General's opinion, and we would have very strongly defended that position if it had been contested. But in fairness, Mr. Nesbitt had himself answered queries, detailed-type queries that Mr. Healy had raised. Q. And what was Mr. Nesbitt's reaction to the initial scatological assessment of his opinion?

A. As I described it, it was colleagues together. I mean, Mr. Nesbitt was well capable of dealing with any comments or any queries that were raised. Q. And you believe that at the end of that meeting, Mr. McFadden, that the Tribunal accepted Mr. Nesbitt's assessment of his opinion and where it dealt with the ownership issue?

A. I -- certainly it was my impression very much that they did accept. I mean, Mr. Nesbitt is a distinguished commercial lawyer and he was the author of the opinion. And whilst, as I said, a colleague may have bounced questions or raised questions with him, he had answered those and, as I say, I would have expected deference to be given to Mr. Nesbitt in view of his expertise in the area, and certainly that was the impression I had. My impression leaving the meeting was very much that we had satisfied the Tribunal in respect of the query they had raised. Q. Can I ask you: Did the Tribunal raise at all at this meeting whether any oral advice had been furnished?

A. As I mentioned to Mr. Coughlan the other day, the focus of the meeting was the opinion of the 9th May. And that would be understandable because -- and it remains the position that the opinion of the 9th May is regarded as being the opinion that deals with ownership issues. There may be -- as I say, the view may be formed or it may be suggested that it doesn't, but it was strongly the view of the Office and the Attorney -- sorry, it was strongly the view of the Office and the opinion was submitted to the Attorney General, who endorsed that view, that that was the opinion in relation to ownership matters. Q. So it's not the case, Mr. McFadden, that in some respect you and the other representatives from the Attorney General's Office were being coy by not mentioning oral advice, it simply was the case that oral advice wasn't raised as an issue at this meeting?

A. That is absolutely the case. As I said, the meeting focused on the opinion of the 9th May, to the best of my recollection. Mr. Coughlan did ask a question was there any other submission made to the Attorney General? And I would have said no, because that wasn't the case. I mean, we would focus very much in the Office as to what the opinion of the Attorney General on a matter is, is where he would have sanctioned an opinion or given a direction, as we call it, in relation to a matter. Q. Mr. McFadden, can I ask you again just to look at the Tribunal's note of the meeting at Tab 37. And it's been opened already by Mr. Coughlan. But do you accept that this gives a broadly accurate account of the meeting that took place on the 18th October, 2002?

A. Well, except for the fact there is no reference to the, to what I have said I said myself and where I read and identified the portion in the opinion of the 9th May which deals with the issue. Q. Okay. And there is -- obviously this note records interchanges between Mr. Healy and Mr. Nesbitt, isn't that so?

A. That's correct. Q. And just, I have already opened where there is the reference to JH, and then underneath that there is the reference to: "Once you know who is applying for the licence it doesn't matter who is behind the person who is applying for the licence." That's obviously a comment from someone there representing the Office of the Attorney General, isn't that so?

A. Sorry now, refer me to that, sorry. Q. There is the first reference to JH, and what's beside that appears to be an issue raised by Counsel for the Tribunal, where he says: "Opinion does not deal with query raised --

deals instead with future problems." And then what's underneath that appears to be a reply by somebody from the Attorney General's Office or Mr. Nesbitt to that?

A. I'd say that was Mr. Nesbitt. Q. Okay. And Mr. Nesbitt, in effect, was saying once you know who is applying for the licence it doesn't matter who is behind the person who is applying for the licence?

A. Yes. Q. And then there is the reference to: "If Escobar was involved," that is a gentleman what has been mentioned once or twice before. He is now deceased. But do you recall who referred to Mr. Pablo Escobar at the meeting?

A. I can't specifically say, but certainly the idea that it was a matter -- the answer is no, if that person was involved, and I presume he would be regarded as somebody who wouldn't be suitable to be involved with a licence in Ireland, and the answer would be -- would he be acceptable? And the answer is no. But you could object as a matter of public policy. And you see, that is reflecting -- I mentioned at the consultation on the 23rd Mr. Nesbitt had said that one of the -- the only grounds on the basis that a financial institution could provide the money on that basis, the only grounds that would be open to objecting to the involvement of a financial institution would be a public policy ground. Q. And underneath that there are two further references to statements that appear to be made by Mr. Nesbitt. "RN: Issue that would allow you refuse is financial standing -- not a question of who is involved.

RN: There were two known entities and one unknown." Is the note accurate in terms of stating those were words that were said by Mr. Nesbitt at the meeting?

A. "It's irrelevant whether 20% was held by 10"? Q. Yes.

A. That would be Mr. Nesbitt. Q. Then there is a reference: "Nobody came back to the AG's Office following the opinion to raise any further queries -- no follow-up on ownership issue." Do you recall who said that or what that records?

A. I think again, possibly, that was Mr. Nesbitt. Q. And we have opened the next sentence, and the sentence after that is: "RN: Irrelevant whether 20% was held by 10 US investors or 2 German investors." What was the point of stating that, do you believe?

A. The 20% would have been a reference, I presume, to the 20% equity investors in the Esat Consortium, and he was saying that it was irrelevant whether that stake was held by US investors or German investors. In other words, that the identity of the financial investor wasn't, in general terms, relevant, although he made the qualification that an -- not at this meeting but certainly -- sorry, he did make it at this meeting, that you could -- you may have a public policy objection, but in general terms, the identity of the financial investor wouldn't be relevant. And again putting that in context, the Esat Consortium still have the joint venturers, the original joint venturers in place. And that discussion of the 20% seems to me to refer to a discussion

in relation to the equity investors, the financial investors so to speak. Q. The next line penultimate sentence in the note: "April 96 requests to AG's Office from An T and ML as to what was happening. DG wrote back." Am I right in saying, Mr. McFadden, that the reference to "requests to the Attorney General's Office from An T" is a reference to An Taoiseach, and "ML" is a reference to Michael Lowry?

A. I would say that's correct. Q. Was that something that was brought to the attention of the Tribunal by officials from your office, i.e. yourself or Mr. Gormley?

A. I am aware that certainly requests -- that there was correspondence, but who raised that specifically, I am not sure, because it was possibly the Tribunal counsel, I am not -- I can't answer that definitively.

Q. Okay. And you mention at the end of that sentence that, "DG wrote back." So, obviously Mr. Gleeson was, as Attorney General at the time, would it be fair to say he was heavily involved in the advice that was being given by the Attorney General's Office to the Department? We have only really looked at it in respect of one issue at the end, but --

A. All opinions of any significance were submitted to the then Attorney General, and that would include matters relating to the Persona complaint as well. Q. I'll come back to that in due course. But any opinion which goes to the Attorney and which he adopts becomes his opinion, is that so?

A. That's always been the procedure, yes. Q. That was a meeting on the 18th October, 2002. And when you left it, Mr. McFadden, did you believe that we have now finally resolved the issue of the ownership matter with the Tribunal?

A. Yes, I believed that we had satisfied the Tribunal in respect of the queries they had raised with us, and I noted that to the Attorney General, but we certainly would have gone back down if there had been any issues. Q. Now, I don't know if you were aware soon after that, that the Opening Statement of the Tribunal in respect of the GSM module commenced on the 3rd of December, 2002, are you aware of that?

A. That the what? Q. The Opening Statement, the Tribunal started its public sittings in respect of the GSM module, which is a module here that looked at the licence, that was started on the 3rd of December 2002. That's not something you were --

A. I must confess, you know, I mean I had an involvement in this file and certain queries would be raised with me in the Office and myself and Mr. Gormley in respect of the -- but we're working advisory counsel, we're not full-time, I'm afraid, you know on -- Q. I just want to read out to you what was said in the Opening Statement on the 12th December, 2002, Mr. McFadden, and then ask you a question about it. It's just a small quote from the Opening Statement. And Counsel to the Tribunal said, in respect of the matter we are looking at here:-

"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. The specific issue of changes in the ownership of the Consortium between the date of the application and the date of the issue of the licence does not appear to have been further pursued by the Department. It appears that the Department continued to be concerned about the ownership issue in May of 1996." There is no mention in that Opening Statement, Mr. McFadden, that it is the Attorney General's Office view or the State's view that the ownership issue was dealt with in the opinion of Richard Nesbitt, isn't that correct?

A. If that's the entirety of the statement. Q. It may be an unfair question to ask you, and if you don't want to answer it, don't. But do you agree with me that the public would have been more fully informed of the issues in dispute that the Tribunal had to resolve if the Opening Statement had referred to the fact that it was the view of the State that Mr. Nesbitt's opinion dealt with the matter?

A. But I think the question of the opinion, one of the difficulties in relation to matters concerning it is that there was a claim of privilege, so I think that's possibly made the whole discussion of the opinion perhaps, how do I say, it hasn't been as complete as it certainly is now being examined more -- Q. I think that's certainly historically so, Mr. McFadden. Mr. McFadden, could I ask you now to look at Tab 38, and the last page of Tab 38. The Opening Statement reference to which I have just referred occurred on the 12th December, 2002. That was a Thursday. And then on the following Sunday, Mr. McFadden, in the Sunday Business Post, an article appeared, and the last page of Tab 38 contains that article. Do you have it there?

A. Yes. Q. I just want to open three paragraphs to you. In the second column, there is the paragraphs that have been opened in the letter, but I'll just open them again. It says:- "The Tribunal is expected to hear that just hours before the announcement was made awarding the licence to Esat Digifone, senior civil servants sought advice from the office of the Attorney General on whether consortia should be permitted to alter the makeup of their investors. The advice they received was that consortia could, but only for shareholdings of 20% or less. "Legal sources believe this advice may become a source of contention at the Inquiry, however. It is understood that in recent months the State has been examining the basis on which the advice was given in order to establish whether it will stand up to close scrutiny. The matter is known to be causing considerable anxiety in Government circles." Can I also ask you, Mr. McFadden, to look at the very last paragraph in that article, which says:

"The legal advice they got" - namely the Department got - "from the Attorney General was that there was no problem whatsoever in switching anything up to 20% from any named investor to Dermot Desmond' a source said. 'What would have happened if the Department had said 'We can't have that? They'd be in court since.' "They and others may well be yet." Can I ask you to look back three pages to the letter from the Tribunal that was caused by that article, Mr. McFadden. And when this letter came into the Attorney General, were you involved in preparing the reply?

A. That letter was -- sorry, now, when the letter -- Q. Of the 18th December, 2002, Mr. McFadden?

A. 16th December. Q. I beg your pardon, the 16th December.

A. That was dealt with at a senior level. The Attorney General himself was involved in the response, and other senior members of the staff, and both Mr. Gormley and myself obviously were asked to, again, provide material, or I think it was we were asked to respond to the, to what was contained in the newspaper article, to set out our understanding as to its accuracy or... Q. When you were asked to help in the reply to this letter, did it cross your mind that why was the Tribunal, once again, asking you questions about the ownership issue? You were down there two months ago, on the 18th October, 2002, why were they now writing directly to the Attorney General as opposed to through a solicitor? Did that cross your mind?

A. I thought -- I mean, there's been issues around newspaper leaks or whatever, newspaper articles and matters appearing in the media from whatever sources, and I think it was viewed perhaps in that light partially as well, that this was information which -- what was the source of it, and the Tribunal may have been concerned about information getting into the media. That might have been one aspect of it. But obviously they also asked for confirmation of the accuracy of what was contained in the report. Q. If I could ask you to look at the second page --

A. Sorry, not confirmation, but they asked a question as to the accuracy of the report. Q. Could I ask you to look at the second page of that letter of the 16th December, 2002, and you see specifically what the Tribunal is looking for from the Attorney General. In the middle of it they state:- "If the above statements are correct, the Tribunal would be anxious to obtain a narrative account setting out all the information available regarding these matters and, in particular:- "(a) the identity of the civil servants who sought advice from the Office of the Attorney General; "(b) precisely when the advice was sought and in what circumstances;

"(c) the identity of the officials (or counsel retained by the Attorney General) who provided such advice; "(d) whether such advice was furnished orally or in writing; "(e) the basis on which the advice was given; "(f) all the information made available to the AG in connection with such requests for advice." The request is, I suppose, in fairness to the Tribunal, specific to a suggestion that hours before the licence was granted that advice was given. But did these requests surprise you at all considering that the Tribunal were well aware of which Senior Counsel was advising and which officials were dealing with the matter?

A. Sorry, did these -- can you repeat that question? Q. Yes. Obviously the Tribunal will say that this

relates to a suggestion that in the hours before the grant of the licence on the 16th May, that advice was sought. But they are seeking specific information about the identity of the Senior Counsel, or the counsel who may have advised or the identity of officials from the AG's Office --

A. "The identity of civil servants who sought advice from the Office the Attorney General." Q. And C, Mr. McFadden, we are looking at: "The identity of the officials who provided such advice." Did it surprise you that two months after you were down there meeting them that the Tribunal was now asking you such questions,

considering that they must have been well aware who in the Attorney General's Office was dealing with it?

A. Well, I can't say that I particularly honed in on that. But I mean, lawyers tend to ask -- Q. In any event, a reply was provided extremely promptly by the Attorney General on the 20th December, 2002, isn't that correct?

A. Can you refer me -- Q. Tab 39, Mr. McFadden.

A. Yes. Q. And in the second paragraph of that letter, Mr. Brady refers to how both yourself and Mr. Gormley have read the extract from the article which refers to advice being given, and the Attorney understands that what the Tribunal is asking about is the announcement of the competition win on the 25th October, 1995. And that necessitates further correspondence, isn't that so, Mr. McFadden?

A. Yes. Q. But what I want to draw your attention to is paragraph 3 of the letter where the Attorney General of the time says: "There was a request for advice contained in the Department's minute of the 24th April, 1996, concerning the restructuring of the ownership of Esat Digifone since the date of their application, and the Attorney General's response thereto has already been made available to the Tribunal. Mr. Nesbitt's opinion of 9 May, 1996, which was released to the Department with the sanction of the then Attorney General on the 13th May, 1996, dealt with the matter."

You're happy with that statement by the Attorney General, are you, Mr. McFadden?

A. Absolutely. Q. It's an accurate account of what you say occurred in 1996, is it?

A. Very much so, yes. Q. So this is the fourth time now, Mr. McFadden, would you agree with me, that the Tribunal has been told by the State that the opinion of Mr. Nesbitt dealt with the matter? First, Mr. Hodson's note; second, Mr. O'Daly's note; third, the meeting on the 18th October, 2002; and now fourth, the letter from the Attorney General himself on the 20th December, 2002, isn't that correct?

A. I can only speak for the Attorney General and the Attorney General's Office really. Certainly correspondence from the Attorney General's Office has always indicated that position as far as I am aware, and also, if you are referring to the meeting with the Tribunal counsel, as I said, certainly I clearly indicated what our view -- the Office view of where that request for advice was dealt with. Q. But it's certainly the third time that the Attorney General's Office has told the Tribunal its view about it?

A. Yes. Q. Then there is interchange of correspondence. And if you can go to the last tab, 41, Mr. McFadden. Mr. Brady, as Attorney General, then provides further information to the Tribunal, and you assisted in the draft of this letter as well, isn't that so?

A. Yes, I would have -- this matter we would have been consulted, we would have had to have been as the officers who dealt with the file, Mr. Gormley and myself. Q. And if I could ask you to look at the second page of that letter and paragraph 6. And you see it says: "Subsequent to counsel furnishing his written advice, he was requested to attend at the Department during the closing stage of the licence issuing process. Counsel has informed this Office that, while he was there, he furnished oral advice in relation to the licence condition regarding ownership changes and, in particular, he was asked whether such condition was solely 'Forward looking.' Counsel advised that that was the case." Was there any reason why, can you tell us, Mr. McFadden, why that letter didn't go on to refer to other oral advice about the transfer or the restructuring of the ownership including II, or does it include a reference to it?

A. As I say, this letter was drafted very much in response to the, really the issue of the accuracy of the newspaper article; that's my understanding of what the purpose of the response was and the letter, it

was to deal with the newspaper article and what was stated in that newspaper article. Q. I just want to ask you finally in respect of 2002: Were you aware of the Tribunal ruling of February 2008 in respect of the privilege matter concerning Mr. Nesbitt's opinion?

A. Yes, I referred to that. I would have heard of that in the office. But, again, as I say, I wouldn't have -- I mean,

the matter of dealing with the Tribunal, I don't deal directly -- I mean there is occasions where I have dealt with matters, but Mr. Daly is the person, I think, who normally corresponds and deals with Tribunal counsel. Q. If you aren't aware of that, I won't ask you any questions about it, Mr. McFadden. But were you aware, when the Tribunal ruling was issued in February 2008, that within it there was a statement that the letter of the Attorney General confirmed that the opinion of Mr. Nesbitt did not deal with the matter?

A. I certainly became aware of that, and when the issue of waiving privilege on the opinion of the 9th May was being dealt with in the Office, Mr. Gormley and myself were very conscious of that, it was very alive in our minds and was an issue which we were surprised with, quite frankly. And we made a note internally concerning -- or certainly we made a note in respect of, and I think we saw an opinion in relation to the waiving of privilege. Q. You may not want to answer this question, but I am going to ask you, Mr. McFadden. Were you bemused by the Tribunal ruling which said that the Attorney General had confirmed that the opinion did not deal with the matter?

A. Well, I think internally we actually raised the question when did that -- that we were totally unaware of this. We were quite -- yes, we most certainly were surprised and we asked to see where that was stated and which Attorney General had stated it. Q. And what response did you get?

A. We were informed that there was no such response. Q. Okay. Can I now take you back to 1996 -- that's the end of

questions on 2002. And I don't know whether you have in front of you, Mr. McFadden, the red folder, Book 89A of the Tribunal? Perhaps Mr. Brady might give you a copy of it. Could I ask you to look at the first tab in that book, Mr. McFadden. And this is a letter from the Assistant Secretary at the Department, it's dated 5th of April, 1996, to the AG's Office. And this is at the time the competition and the issue in respect of the GSM is starting to get traction, isn't that so, because the competition is being organised?

A. Yes. Q. And just, I'll open the first paragraph, I don't propose to open much of these documents. But the first paragraph says: "I am directed by the Minister for Transport, Energy and Communications to refer to recent telephone contact with your Mr. Gormley in relation to the proposed engagement of Andersen Management International to provide consultancy advice to this Department." And over the page, Mr. McFadden, the last paragraph, just above the two bullet points, the Department says: "The Department recognises the role of the Office of the Attorney General in providing advice to members of the Government on legal matters. We would be quite happy to indicate in the Terms of Reference for the consultancy that the consultants should maintain close liaison with the Office of the AG throughout this assignment. In the event that you accept this approach, it would be desirable from this Department's perspective that you:-

" -- nominate an officer who could immediately undertake a review of the relevant legislation to determine the legal framework for the licence in order to provide a basis for the consultants work in relation to technical licence conditions; " -- confirm that the nominated officer could be available at short notice to provide necessary advice on legal issues throughout the competition and licensing process." Can I ask you, Mr. McFadden, were yourself and Mr. Gormley the lucky people who were nominated to be the officials in the AG's Office to deal with these matters?

A. That's correct. But I think the late Mr. Plunkett may have had some early involvement with the file as well. Q. And then if I could ask you to just jump forward to Tab 3. This is a meeting in the Attorney General's Office between yourself and Mr. Gormley and Mr. Towey and Ms. Nic Lochlainn from the

Department, isn't that so?

A. That's correct. Q. And just over the page there is the work schedule, and it says: "A, McFadden/Gormley to work immediately on draft licence, especially the 'Disclaimer' element -- agreed that 12 May deadline was set in stone." So you were operating under a lot of time constraints, Mr. McFadden, I would have thought at this time in relation to producing documents for this licence?

A. Yes, we would. But I mean, I hasten to add that we would have been dealing with other matters as well. I mean, we weren't assigned full-time to this matter. Q. And just the last line of that page refers to that your office is happy to hear all AMI views/suggestions on drafting the licence. That's a reference to Andersen Management who were assisting in the competition, isn't that so?

A. Yes. Q. And this was an entity that had considerable experience of mobile phone competitions around the world. Were you aware of that, Mr. McFadden?

A. I wasn't particularly involved with the consultant's report. I mean, we were largely dealing with legal -- I mean not largely, I mean that's what our role in the matter was, dealing with legal issues. Q. Could I now ask you to go forward, Mr. McFadden, to page 10 of the tab. And this is a letter from Mr. Gormley of your office to Mr. Nesbitt, isn't that so, of the 1st August, 1995?

A. That's correct. Q. And had Mr. Nesbitt been involved prior to that, do you know, or was this his first involvement in the matter? If you don't know, it's --

A. I mean, I can confirm that from our files. He probably was -- I mean, there was an issue about the licensing base which he gave advice on as well. Q. Anyway, Mr. Nesbitt is being asked, in this letter, to provide his advices in respect of a number of issues, isn't that so?

A. Correct. Q. And the first document that he is provided with is stated in the third paragraph there: "Enclosed herewith are the documents listed hereunder:- "I. Document entitled 'Competition For A Licence To Provide Digital Mobile Cellular Communications (GSM) In Ireland'." And could I ask you to move forward, Mr. McFadden, four pages then to the document that is entitled: "Competition For A Licence To Provide Digital Mobile Cellular Communications (GSM) In Ireland," Number 30, do you see that?

A. Yes. Q. That is what we have referred to in the Tribunal as the RFP document, I believe?

A. Yes. Q. And this was furnished to Mr. Nesbitt, is that correct?

A. That's correct, yes. Q. And the third rule -- or sorry, the third point in the document that was furnished to Mr. Nesbitt was:- "III. Applicants must give full ownership details for proposed licensee and will be expected to deal with the matters referred to in the following paragraphs in their submissions." So, Mr. Nesbitt, prior to providing his advices, was provided with the RFP, isn't that so?

A. That's correct. Q. Do you know whether Mr. Nesbitt was involved in drafting the RFP?

A. I don't believe he was, but again, I'd have to check our files, but I don't believe he was. Q. Okay. Can I then ask you to go to Tab 12, and this is the very prompt reply from Mr. Nesbitt, who was in the unfortunate position of receiving a letter on the 1st August, '95, but he replied by the 14th August, 1995, and he says to Mr. Gormley:- "Dear John, "The questions asked in your Letter of Instruction are very broad. I have considered the documentation sent to me and more particularly the provisions of the Post and Telecommunications Services Act, 1983, as amended by Statutory Instrument 45/1992. I enclose my opinion on the topics raised." So, part of what Mr. Nesbitt had to advise on was, and, actually, I didn't open it to you, but in the letter of the 1st August, there is a reference to the ownership issue, a condition that the ownership of the shareholding of the licensing company should not be changed without the prior consent of the Minister. So he was asked to advise on very many matters, including ownership, isn't that so?

A. That's correct. Q. I am sorry to move you around, but could you go back to the big book now,

and to Tab 1 of it, please, Mr. McFadden.

A. Tab 1? Q. Tab 1 of the big book, yes. Sorry, Tab 3.1, sorry, the opinion of Mr. Nesbitt of the 14th August, 1995. Do you have that, Mr. McFadden?

A. Tab 3 you were saying? Q. Tab 3.1. Just after your statement, Mr. McFadden. The body of the book is 30 or 42 tabs in it and it's Number 1 tab.

A. Oh, the '95 opinion? Q. Yes, 14th August, 1995.

A. I have it now, yes. Q. Now, Mr. Hogan referred you to this last Friday, and he referred you specifically to page 4, the bottom paragraph there. Do you see that paragraph, Mr. McFadden?

A. Yes. Q. "The identity of the licensee is only important, firstly, 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 the competitive marketplace continues to exist." And I think you confirmed that the advice Mr. Nesbitt set forth there in August 1995 is consistent with the advice he subsequently gave in respect of IIU, would you agree with that?

A. Yes, it's certainly consistent. Q. Then the next page, page 5, just the large paragraph and the last seven lines of it, I'll just open up one sentence. Mr. Nesbitt says: "I take the view that if 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 telephone operation, such conditions could be subject to attack." And again, do you agree with me that that is consistent with the advices that were subsequently given by Mr. Nesbitt in respect of IIU?

A. Yes, it's certainly consistent. Q. Now, a suggestion is made by the Tribunal that the Esat application did not comply with the rules because it did not give full ownership details. And what I want to do is, I just want to show you a document and -- MR. COUGHLAN: I beg your pardon, I don't think that that is what the Tribunal said, that it didn't comply, that it didn't give full ownership details. I think the position of the Tribunal has always been that it did give full ownership details, as I understand it. MR. O'CALLAGHAN: I thought there was an issue in respect of the fact that IIU, which came in to the Esat Consortium, had not been evaluated or were not identified previously but -- MR. COUGHLAN: That is correct. Q. MR. O'CALLAGHAN: Can I still hand you up a document, Mr. McFadden. It's just a small piece from Mr. Andersen's report which is dated the 25th October, 1995. I don't propose to look through this in any great detail, but I just wanted to ask you some relevant questions on it. I'll

hand a copy to you as well, Chairman. You are aware of the role that Mr. Andersen played in respect of this, Mr. McFadden?

A. Sorry, excuse me? Q. You are aware of the important role that Andersen Management played in respect of this competition?

A. Yes, although, as I said, our office wouldn't have really any involvement -- Q. I understand that. I am not going to be asking you technical questions about telecommunications. But could I ask you just to turn over the page, and this is Chapter 3 from Mr. Andersen's final report. And he sets out issues in respect of the ownership of the applicants for the licence. And I just want to open a couple of sentences and then ask you some questions. First of all, on page 7, the third paragraph down, Mr. McFadden. Just three lines above the pie chart, I think it is, or the cake.

A. Three lines below it or above it? Q. Above it. There is a statement by Mr. Andersen: "None of the consortia have stated intentions to make major changes in the consortium construction." Would you agree with me that implicit in that is certainly a recognition by Mr. Andersen that there can be some changes to the consortium construction?

A. Implicit in the sentence "None of the consortia have stated intentions to make..." -- Q. -- "...major changes in the consortium construction." Implicit in that is an acceptance or recognition that there may be changes in the consortium construction, would you agree with that?

A. Is it a statement of fact of just none of the consortia have stated intentions to make -- is that more a statement of fact? Q. It is a statement of fact, yes, but maybe I am being unfair by asking you that question. Could I ask you to go to page 9, then, Mr. McFadden. These are the pie charts in respect of the applicants who put in bids for the mobile phone licence. And at the bottom of the page there, you will see the participants behind A4, do you see that?

A. Yes. Q. And then there is a pie chart, and at the top there is a reference to "A Semi-State body: 5%"?

A. Yes. Q. And if you just turn over the page, and three lines down from the bottom of the first paragraph there is the narrative about that 5% to a Semi-State body, and Mr. Andersen states: "In addition, 5% has been reserved for an Irish Semi-State body." Isn't apparent from that, Mr. McFadden, that this Semi-State body, that could be anything from Udaras na Gaelige to An Bord Bia, that has not been specifically identified in this document?

A. "The consortium behind A4 is characterised by..." Q. It's simply a reference to a Semi-State body?

A. Yes. Q. It's apparent that that Semi-State body has not been identified?

A. Yes. It's not there clearly, yes. Q. And then underneath that we have the participants behind the successful Esat bid, and the pie chart indicates simply a 50:50 bid by Telenor and Communicorp, isn't that so?

A. That's correct. Q. And if I could take you down six lines, at the bottom of the page it says: "It is the intention of the applicant to make 20% of the equity available to institutional investors during the period prior to the commercial launch, including a 5% equity stake to Advent International plc. Furthermore, the application states an intention to make 12% available for flotation within three years." And now, can I ask you to turn to the next page please, Mr. McFadden. And at the top of the page we have a pie chart for the participants behind bid A6. And you can see that 40% of that bidder is made up of what's described as "Independently administered trust," and then the narrative, it says: "The remaining 40% of the share are to be administered by an independent trust." Do you agree with me that that bid does not identify who are the owners behind this independently administered trust?

A. The people behind the trust know. Q. I know, but the adjudicators of the competition have not been apprised of the identity of the persons behind the independently administered trust, according to this document?

A. I mean, I have never seen this document. I am not familiar with what -- but no, certainly on that I'd agree with you, yes. Q. Now, could I ask you to go to Tab 4 of the large book, and this is a document from March 1996, Mr. McFadden. Just to confirm, throughout March, April and May, obviously yourself and Mr. Gormley were working on other matters, but there was an urgency to the work you were doing in respect of the second GSM, isn't that so?

A. Yes, there certainly -- I mean, it was a matter that was moving forward at that time. It was an active matter. I mean, occasionally matters go into abeyance for one reason or the other with departments, the change of policy or whatever. This would have been an active file certainly. Q. And at Tab 4 we have the letter from the Department dated the 25th March, 1996, to yourself and Mr. Gormley, which encloses the draft licence. And obviously you played a significant part in reviewing and assisting in the drafting of the licence, isn't that so?

A. Yes, the drafting as such would be done by the late Mr. Bacon, but Mr. Gormley and myself reviewed the early drafts to identify legal issues. Q. Could I then ask you to look at Tab 5. Another matter you had to deal with along with Mr. Gormley were the draft regulations that were required in order to implement Commission Directive 96/2, isn't that so?

A. That's correct. Q. And that must also have been a time-consuming and urgent matter, isn't that correct?

A. That certainly was a matter that required attention. Q. And whilst you were preparing that, you had some assistance from a Dr. Ungerer, is that so?

A. That's correct. Q. That's Dr. Herbert Ungerer, is it?

A. DGIV, yes. Q. Then if I could ask you to jump forward to Tab 7, which is the first letter from the Office of the Attorney General in this book that is addressed to Mr. Nesbitt. I note, Mr. McFadden, that very many of the letters that were sent to Mr. Nesbitt in April and May 1996 were entitled "Urgent"?

A. Yes. Q. Was there a genuine reason for that or are you one of these individuals who puts "urgent" on everything?

A. No, no, I would not. I wouldn't use it -- I am used to receiving it on letters and so I try to spare people as much as I can. No, I presume it was, or there would have been urgency if I put that on it. And there was urgency at that time. Q. And what you are sending Mr. Nesbitt is a copy of the draft licence, a copy of a minute about the Commission Directive, a copy of the Commission Directive and a copy of the SI, isn't that so?

A. That's correct. Q. And then at the next tab, Mr. McFadden, we come to Tab 8, which is the note of the meeting of the 22nd April, 1996, isn't that correct?

A. That's correct. Q. And you are adamant that at this meeting there was no discussion about the IIU issue, isn't that correct?

A. Very much so, yes. Q. And I suppose the Tribunal questioned that because they have the minute from Mr. Towey, which is dated the 24th April, 1996. I don't know if you have that minute with you?

A. I don't. Q. I'll just get a copy of it handed up to you. Sorry, I was talking about the note of the meeting. There is another note of this meeting as well, Mr. McFadden. I can come back to it in due course. But anyway, the note of the meeting produced by Mr. Towey says in the last paragraph, and he is recording here the meeting of the 22nd: "The Department also gave to the Office of the Attorney General a copy of an extract from Esat Digifone's application outlining the ownership of the company, together with an internal Departmental document and a letter from William Fry & Co. Solicitors concerning restructuring of the Esat element. The Department indicated that clarification would be necessary of any change in the ownership structure of Esat Digifone relative to that outlined in the application." And where there is no dispute, Mr. McFadden, is that the Department certainly sought that advice from the Office of the Attorney General, isn't that correct?

A. Absolutely. There is no dispute. Also, I mentioned to Mr. Coughlan that minute of Mr. Towey's is dated the 24th, and I find it very surprising that there was no reference to the consultation with counsel or any note of the

consultation. It seems to be a -- that's dated the 24th April and the meeting he's saying that the documentation was handed over was on the 22nd. Q. Yes.

A. So I don't -- and there is no reference in the minute of the 24th to the consultation with counsel, which I would have regarded -- I would have thought most civil servants would have been very -- they would have noted particularly, that that would be a significant matter, I would have thought. But in any event, certainly, as you can see from my own note -- well, I mean, I am not suggesting my note is fully comprehensive, and I have said that before, but I have a -- I mean, my recollection of this is very clear and the matter was discussed with counsel on the 23rd, and even in Mr. Towey's letter, his request for advice on the 24th, he says he reiterates his request for an opinion. Because -- and my belief is what he needed was a written opinion. I mean, in the civil service, it's important, obviously, that matters as best they can be are recorded for bigger decisions, certainly, and they were looking for an advice of counsel on that issue, even though it had been discussed. And I think he was just reiterating the request he had made at the end of the consultation the previous day. Q. And this is no criticism of Mr. Towey, even the best of us can make mistakes about meetings, isn't that correct?

A. Very few of us are perfect. Q. Just another point in respect of it: Mr. Towey, in his note there, at paragraph 5 refers to the fact that documents were given to the Office of the Attorney General. And you say that simply didn't happen. And when we look at documents subsequently, that corroborates

your view?

A. Very much so. I mean, I don't know whether you wish me to go back over what occurred at the meeting of the 23rd? Q. No. We are going to come to the meeting of the 23rd now --

A. That's where the documents were first produced. Q. If you turn to Tab 9, please, Mr. McFadden. And this is the note that you prepared of the consultation with Mr. Nesbitt on the 23rd, isn't that so?

A. That's correct. Q. And also there was Mr. Towey, Mr. Gormley and your good self, isn't that correct?

A. That's correct. Q. Now, can we look at areas in respect of which there is no dispute between yourselves and Mr. Nesbitt. Mr. Nesbitt accepts that the ownership restructuring issue was raised at this meeting. There is no doubt about that.

A. Richard Nesbitt? Q. Yes.

A. Yes. Q. There was no doubt about this, that that was raised here. And your evidence is that it was raised at this meeting, isn't that correct?

A. Absolutely, yes. Q. And you have a crystal clear recollection of this, notwithstanding the fact that it took place nearly 14 years ago?

A. I recall it for a number of reasons, but first of all the particular issues raised by Mr. Towey at that time I saw as being a completely new issue, and I mean, quite frankly we had enough issues at the time that we were dealing with and he was raising this new issue; that was my first reaction. I can't be honest and say I welcomed it because we had a fairly full agenda in any event. But also, another point was that it hadn't been raised in writing at that time, and raising an issue like that, again sometimes I would -- I mean, if I was at some meetings I wouldn't allow that to happen, depending. But in any event, it was raised by Mr. Towey and he proceeded to set out the issue. Q. And where we get into some minor area of dispute is whether or not Mr. Nesbitt gave advice on the issue at this meeting. Mr. Nesbitt believes that it was at a later meeting on the 14th May, 1996. You are adamant that Mr. Nesbitt gave advice at this meeting, isn't that so, Mr. McFadden?

A. Yes. What I stated was that the issue of ownership which had been raised by Mr. Towey was discussed. He had set it out in quite some detail. Now, I was following that. It was a new issue to me and I was following it as best I could to understand the issues that were being raised by him. And it was discussed. I think Mr. Gormley involved himself in the discussion. Mr. Nesbitt obviously -- Mr. Towey was addressing Mr. Nesbitt, and he certainly expressed views which I recall and I expressed that particularly in -- he expressed views on the ownership issue generally, saying that he felt that changes in ownership which didn't compromise the delivery of the service, the second GSM service as set out in the business plan, that those changes were not significant. I recall that, words to that effect. He then, on the issue of IIU

-- the involvement of IIU as -- and bear in mind I was listening to this conversation more at the early stages rather than being an active participant at the early stages of, I think I probably did make some views known later, but the issue of IIU involvement was discussed, and I recall his view, the view he expressed in relation to that, that it was not -- that that was not a material change in ownership, and then he proceeded with the view that the only objection one could have to the financial involvement -- involvement of a financial institution would be on public policy grounds, and he was of the view, clearly, that the involvement of IIU did not -- it was not a material matter from a legal point of view. Q. And you have no doubt about what happened at that meeting, Mr. McFadden, do you?

A. Absolutely not. Q. And although this is obviously a huge issue now in 2009 and 2010, would I be correct in stating that back in 1996, the ownership restructuring issue was not the biggest issue that your office was facing in terms of the GSM project; there was the licence, there was the draft regulations, there was the European Commission?

A. There was many issues. In the Attorney General's opinion, if you actually look at it, you will see -- I mean, there was a lot of issues such as the windfall gains, there were many issues. Certainly when the

issue was raised and discussed at that consultation, I was quite relaxed about it, that it wasn't going to be that the issue raised by Mr. Towey wasn't going to be a matter of major legal concern, and that was in the light of counsel's response to

the matter. Q. Could I ask you now, Mr. McFadden, to go to Tab 11. And this is the letter from Mr. Towey which is referred to as his minute of the 24th April, 1996, isn't that so?

A. That's correct. Q. And the paragraph you were referring to earlier on is the large paragraph in the middle of the page where Mr. Towey states:- "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 22 April." The word "Reiterate" means to repeat again, isn't that so?

A. That's correct. Q. So, clearly Mr. Towey was recognising that previously a legal opinion had been sought on this issue by him and now he was repeating it again, isn't that correct?

A. Correct. Q. And also, if I could just look at the last paragraph there -- sorry, the first paragraph. Mr. Towey also refers to the meeting on the 22nd and 23rd April. So there were two separate meetings, isn't that correct?

A. Yes, but the first meeting was a meeting, Mr. Bacon was at it, so it would have been largely a drafting-type meeting. Q. And Mr. Nesbitt wasn't at the first meeting?

A. Definitely not. Q. And just, the last paragraph on that first page of that letter it says: "Finally, I will provide a brief for

counsel on the proposed disclosure procedure as soon as possible, but would, as discussed, appreciate your earliest opinion on whether the question of debriefing sessions should proceed in the shadow of a complaint to the Commission regarding the process." That raises another issue, Mr. McFadden, about that you were going to, or rather the State was going to have these, I don't know what they would call them as, some sort of counselling session for defeated applicants who would come in and be told why they didn't win, isn't that so?

A. Yes, that was the Department were exploring that as a -- Q. Anyway --

A. -- process. Q. Could I ask you to go to Tab 12. And this is the letter you send on to Mr. Nesbitt on the 24th. So, yourself and Mr. Gormley received a letter from Mr. Towey on the 24th April, 1996, and then immediately you send it on to Mr. Nesbitt, isn't that so?

A. Well, as I say, not maybe immediately. I think I possibly typed that letter, I was saying that, I am not sure about that. But I hadn't the documents in the minute, so I had to get those, so I rang, I believe it was I rang Mr. Towey and asked him to forward a copy of what he was referring to as the relevant papers, because I didn't have them. Now, I think there is a fax cover sheet there which is dated -- now, sometimes stuff goes down to Registry, so I am not totally sure, that possibly arrived the day after and therefore it may -- the letter may not actually have issued until the 25th. I am afraid I am not totally sure about

that. Q. Okay. But what is apparent from this letter is that you are sending on to Mr. Nesbitt the letter from Mr. Towey dated the 24th April, isn't that correct?

A. That's correct. Q. And you are also seeking an opinion and advice from Mr. Nesbitt in respect of the matter, because in the second paragraph on that page you say: "A copy of the 'Relevant papers'" - which is referred to in Mr. Towey's letter - "referred to in the third paragraph of the Department's minute is also enclosed, together with a new draft Article 8 of the proposed licence which is relevant, and your opinion on the issues set out in that paragraph would be appreciated." So, that is unambiguously clear, Mr. McFadden, that you were looking for an opinion from Richard Nesbitt on the issues raised in the third paragraph, which included the ownership restructuring issue?

A. Yes. Q. Could I ask you then to go to Tab 13. What we have here then is that Mr. Towey, on that - I think it's the 25th - faxes over to you what are the "Relevant papers", isn't that correct?

A. That's correct. Q. And the relevant papers include the ownership issue -- if you just turn over the page, you will see there is a section from the management part of the Esat Digifone bid. And just if I can

open this briefly. The third paragraph says:-

"The shareholders agreement states that Communicorp Group and Telenor will each initially hold 5% of the equity in Esat Digifone. In the period leading up to the award of the licence, 20% of the equity (10% from each of the partners) will be formally placed by Davy Stockbrokers, Ireland's largest stockbroker. "As of submission of this application, Davy Stockbrokers has received written investment commitments." And it sets out from whom the commitments were. So, would you agree with me, Mr. McFadden, that the entity that applied for the licence was an entity that was owned 50:50 by Communicorp and Telenor?

A. That's correct. Q. And would you agree with me that the subordinate clause which says "As of submission of this application," that that indicates that there may be changes to who these investors are to be?

A. Yes, that, I think, is reasonable, yes. Q. Now, at the same time, and this is relevant because you mentioned in your evidence that Mr. Gleeson, the Attorney General at the time, was aware of a Persona complaint, isn't that so?

A. Yes. Q. What I want to do is, I want to hand you up two letters from the solicitors for Persona that are dated the 24th April and 26th April, 1996. I just want to ask you some very brief questions on them please, Mr. McFadden.

Mr. McFadden, can we look at the short letter first, which is the letter from J.G. Moloney to Minister Lowry on the 24th April, 1996. Do you see that one?

A. Yes. Q. Am I correct in stating that any solicitor's letter that comes into a Minister will be handed onto the Office of the Attorney General?

A. Well, like, I couldn't say that. Q. Okay.

A. I mean, some letters -- this letter was. Q. I just want to open this letter to you. It says:- "Dear Minister, "Arising out of the press conference given by some of your officials last Friday, the 19th April, to which we, on behalf of our clients, were refused permission to attend, our clients now have even graver concerns concerning your decision to award this licence to Esat Digifone Limited. "You and your Department have refused to furnish details of the reasons for your decision. Our clients completely reject the stated basis for this refusal. Other very serious concerns relating to this matter have also been aired over the past number of months. "However, our clients were extremely surprised to learn that the role of the EU Commission and the postponement of the closing date and, indeed, in capping the level of

licence fee that applicants could offer, was not, as it had been represented to our clients in correspondence, received from your Department in June and July of 1995. Our clients believe that there are very serious implications arising from this and the matter is now being pursued immediately with the Commission. "In addition, your officials apparently released to journalists the weighting that attached to the criteria for evaluating applications for the licence. Our clients have a number of serious concerns in relation to the weighting as disclosed and, in particular, believe that there are serious implications arising from the fact that the level of the licence fee, the fourth criterion, attracted 11% of the weighting and notwithstanding the capping of the licence fee at the extremely low level of 15 million Irish punts. Our clients believe that this results in the fundamental flaw in the process. "The revelations at the press briefing also confirm our client's concerns as to whether obligations relating to ownership disclosure were fully complied with." I just want to stop there, Mr. McFadden. Clearly, as of the 24th April, 1996, the State was aware that one of the defeated applicants, Persona, was raising issues about the ownership issue of Esat Digifone, isn't that correct?

A. Yes, I am not sure what the position on privilege here is, but this letter was received and forwarded to the Attorney General's Office for advice, and Mr. Nesbitt actually advised in respect of it. Q. And that brings me to the next document --

A. Sorry, in respect of the response to that letter. Q. That brings me to the next document, which is the

complaint to the European Commission made by Persona on the 24th April, 1996. This would have been considered, and I think when we look at the submission to the Attorney General, reference is made to this, but this is a document that would have been considered by the Attorney General, isn't that correct?

A. Yes, but I can't say off the top of my head what dates it would have been considered. Q. Yes, well I'll come to that in due course. But it's a document dated the 26th April, 1996. And if I could ask you to -- I am on the longer letter, Mr. McFadden.

A. Yes. Q. J.G. Moloney, that is the solicitor for Persona, isn't that correct?

A. Yes, that's correct. Q. Could I ask you to go to page 19 of that letter. Do you have that, Mr. McFadden?

A. Yes. Q. One of the grounds of complaint made by Persona through their solicitor, Mr. Moloney, was that there was lack of objectivity in respect of the ownership matter. And I just want to open to you what were the complaints made by the Persona applicant to the submission. It says under:

"Ownership: "It should be noted that paragraph No. 3 of the invitation to compete for the GSM licence states:- "Applicants must give full ownership details for proposed licensee..." (Our underlining) "The draft licence issued by the Department makes the following statement in respect of the intended description of the eventual licensee:- "This will contain an extensive description of the legal structure of the licensee reflecting information provided by the successful applicant in response to paragraph 3 of the competition document." "All indications are that Esat Digifone disclosed only 80% of its ownership. To this day it remains unclear what was intended in relation to the outstanding 20% and what was disclosed to the Department in Esat's application. The Department indicated in the course of the press conference on Friday, the 19th April, that the Department had been shown a 'shopping list' of investors who would take up 20% of the consortium not owned by Esat Telecom and Telenor. Quite extraordinarily, Departmental officials have said that it would have a good 'fix' on the ownership of Esat Digifone. "It is not at all clear who owns the outstanding 20% of Esat Digifone. Press reports suggest that a company named International Underwriting and Investment Company holds

this 20% for clients or to be placed with other investors. Other reports suggest that this 20% may now have increased to 25%. "On the 22nd November, 1995, the Minister was questioned on this issue in the Dail. These questions and answers are enclosed with this complaint, but we would note a number of extracts from the Minister's statements as follows:- "The names of investors were not disclosed in respect of a number of applications, but that did not contravene the criteria set down." "The winning applicant clearly stated that it to be 40% ownership of Esat, 40% ownership of Telenor and that the other 20% would be available to institutional investors for other interest groups." "It would be impossible for any of the applicants to determine who would buy the minority shareholding until such time as the applicant had made an application, it had been processed and had received a commitment from the Department that it was successful in securing the licence and had a minority interest in that licence to sell." "As can be seen from the above, serious questions arise as to whether obligations in respect of ownership disclosure were complied with and whether the Department was objective in exercising its responsibility to ensure such disclosure."

Now, do you agree with me, Mr. McFadden, that an integral part of the Persona complaint is that the ownership issue wasn't properly disclosed by Esat, isn't that so?

A. Yes, that was part of the complaint. Q. And that complaint was considered by the Office of the Attorney General before the grant of the licence, isn't that correct?

A. Yes, as I say now I can't, off the top of my head, give you dates, and there is also an issue of privilege, and I think possibly both Mr. Nesbitt and the Attorney General -- Mr. Nesbitt advised in relation to this, and certainly the Attorney General would have seen his advices in relation to it. Q. And can I just jump forward whilst we are on it, but I'll be jumping back again then, Mr. McFadden, to Tab

22, and the second page of your submission to Mr. Gleeson, who was the Attorney General at the time. Tab 22, second page, bottom of the page, paragraph 4. Do you have that, Mr. McFadden?

A. I have, yes. Q. If you just look at the last sentence on that page, it says:- "Further, as you are aware, one of the unsuccessful applicants for the licence has already lodged a complaint with the Commission." So, isn't it clear from that, Mr. McFadden, that the Attorney at the time, Mr. Gleeson, was aware of the complaint made to the Commission?

A. He certainly would have seen, at the very least, the first letter you read out. But he was involved, yes, certainly. Q. And he is a highly, competent, diligent, professional lawyer who was the Attorney General at the time, isn't that correct?

A. Mr. Gleeson? Q. Yes.

A. Of course, yes. Q. And in terms of the letter, the letter outlined that the ownership issue in respect of Esat was an issue, isn't that correct?

A. That's the first letter? Q. The first letter on the second page. And even if he only had that letter, he would have known that the ownership issue was an issue, isn't that so?

A. Yes. Q. And if he had more, if he had the full complaint, he would have seen that Persona were making a considerable objection to the EU Commission in respect of the complaint, isn't that so?

A. That's correct. But, as I said, I am not sure -- he certainly would have -- the then Attorney General was fully aware of the complaint, but I am not sure of the exact dates when matters were -- I mean, they would have been submitted to him as they were active, but I'd have to review the file to give you details. As I said, I am not sure if there is a privilege issue here, which I'd have to -- I am not sure. Q. Can I now ask you to look at Tab 18, Mr. McFadden. And

this is another urgent letter sent by yourself and Mr. Gormley to Mr. Nesbitt on the 3rd May, isn't that so?

A. That's correct, yes. Q. And in that he encloses revised drafts of the licence and the regulations to implement the Commission Directive, isn't that so?

A. That's correct. Q. And then, on the next page, we have Mr. Nesbitt's opinion. And if I could ask you just to go to the covering letter of Mr. Nesbitt's opinion. At this stage he had been asked to deal with a considerable number of matters, hadn't he?

A. Very much so, yes. Q. And if you look at his first paragraph of his letter of the 9th May, he says:- "Dear John, "I enclose my suggested amendments to the Esat licence." He was asked about that in Tab 18. You don't have to go back to it, but that was the first thing he was asked about, isn't that correct?

A. Yes. Q. "My suggested amendments to the Statutory Instrument given to me." That's one of the things he was asked in Tab 11, and some general advices. "I am sending my views on the complaint made to the Commission under separate cover."

So, isn't it apparent at that stage that Mr. Nesbitt certainly is aware of the complaint and the nature of the complaint being made by Persona?

A. Yes. As I say, I'd have to review my file. Mr. Nesbitt advised extensively on this, yeah. Q. And he continues: "However, I remain of the view that the Minister should not drag his feet in issuing the licence." When you read, and I don't want to open the rest of the paragraph, it's been opened before and -- but when you read that sentence, what did -- did that have any impact upon you, Mr. McFadden?

A. Of course. Q. What did it impact upon you?

A. Well, it's a clear legal view that the licence should issue forthwith, and it's expressed by, as I say, a leading member of the Irish Bar. Q. And of course the issue in respect of the ownership restructuring had been raised on the 24th, or the 23rd April, the 24th April by letter, and you had sent it on to Mr. Nesbitt then. So that clearly was an issue for him to deal with, isn't that so?

A. Yes, of course, yes. Q. Now, can I take you to the opinion. Were you satisfied with the quality of this opinion, Mr. McFadden?

A. Of course I was satisfied. I believed, and I say earlier advices had stood up very much, I think, and I thought -- of course it was a very good opinion, I thought. And as I say, it was very much written having regard to Commission Directive 96/2/EC which, as I mentioned in evidence earlier, had changed the legal scenario significantly. And, I mean, for that very reason, the opinion is of a very high quality. I mean -- sorry -- the opinion is written having regard to that. I mean, many lawyers would look at things purely from a domestic perspective. Mr. Nesbitt had due regard to European law, which, of course, had direct effect. Q. And --

A. And I should say, I mean I am not sure the extent to which you want to go into that, but I have mentioned a number of times in evidence that from a legal perspective, that directive had a very significant impact. Q. And your unambiguous evidence, Mr. McFadden, to the Tribunal is that the second page of Mr. Nesbitt's opinion, and the second paragraph on that page, you regarded that as an answer to the request for advice about the ownership restructuring issue?

A. Yes. I regarded that as dealing with ownership issues, both the pre and post-licensing, so to speak, and I believed it set out the criteria for determining whether or not a change of ownership was of legal significance from the Minister's point of view, and as I say, that had been discussed at a consultation on the 23rd April. So, this concept of -- looking at whether it compromised the provision of the service was not a novel idea to me, because certainly in previous times, power to restrict transfers on ownership would have been, from a legal perspective, one wouldn't have been concerned about imposing such restrictions as you wanted to, basically. Q. And, Mr. McFadden, if you, when you read this opinion, believed that it didn't give an answer to the ownership restructuring issue raised by Mr. Towey, what would you have done?

A. Well, we would have reverted to counsel to deal with the matter. Q. You regarded this as answering the ownership issue?

A. Yes. Q. An opinion on ownership had been asked for and you regarded this as the answer to that question?

A. Yes. As I say, it reflected the views that Mr. Nesbitt had previously expressed and, as I say, whilst it might be regarded as a liberal approach to restraint of ownership or ownership changes, having regard to the Directive in particular, it seemed to me to be a valid legal opinion. Q. And would you agree with me that the opinion set out in this opinion of May 1996 is generally consistent with the ownership opinion which he gave back in August 1995?

A. Yes. And Mr. Hogan raised that matter. It is consistent, but as I said, when you are looking at the matter of change of ownership, I think you have to, again as I say, it had altered because of the Commission Directive. Q. And we know that when Mr. Nesbitt gave his opinion in August 1995, he had the RFP document which set out the requirements --

A. It was in the brief sent to him in August. Q. Can I ask you now to turn to Tab 22. And this is the formal document that you send onto the Attorney General, isn't that correct, Mr. McFadden?

A. That's correct. Q. And what you are looking for is the sanction of the Attorney to send the draft regulations, the stamped licence, and Mr. Nesbitt's advices to the Department, isn't that so?

A. That's correct. Q. And obviously if the Attorney gives it that sanction, the advices of Mr. Nesbitt transubstantiate into the advices of the Attorney General?

A. That's correct. Q. And I have opened already the relevant part at the bottom page 2. Could I ask you to go to page 3. You also, at the very end of it, Mr. McFadden, at paragraph 6, you also seek sanction "to transmit the stamped draft regulations, stamped licence, together with a copy of Mr. Law Nesbitt's advices to the Department under cover of a minute in the terms of the attached draft which is flag 'D7' thereon." I think a point that maybe Mr. Coughlan raised, but if he didn't, I'll ask you it: Why

didn't you have a large section in this submission to the Attorney General about the ownership restructuring issue?

A. It's matter -- as I say, first of all, Mr. Nesbitt's opinion was submitted to the Attorney General with all relevant papers. Article 8, in fact, is mentioned and Dr. Ungerer's letter earlier on in the submission. I presume the Attorney General - I mean, I'm not going to even say that - the Attorney General would have read the opinion, and certainly both myself and Mr. Gormley, he'll be giving evidence, but we were satisfied that the ownership issue was addressed and we had nothing further to add to Mr. Nesbitt's views, which are sophisticated views,

as I said, in the light of the Commission Directive. Q. And would you agree with me that part of the reason you didn't mention the ownership restructuring issue was because at that time, unlike now, it was not an issue of sufficient or significant importance to be spending time and mentioning it specifically to the Attorney General?

A. It was our view that the matter of pre and post-ownership, the issues relating to pre and post-licence grant were dealt with in Mr. Nesbitt's opinion satisfactorily. Q. And clearly, although humility may prevent you from agreeing with this, Mr. McFadden, but the Attorney certainly regarded the work that both yourself and Mr. Gormley performed as excellent professional work, isn't that so?

A. Well, that's what he states, yes. Q. And I am sure you'd agree with that. Could I now ask you to have a look at Tab 24. And Tab 24, I suppose, is the culmination of what happens after the Attorney gives you the sanction, isn't that correct?

A. That's correct. Q. And then you send on to the Department, on the 13th May, 1996, the opinion of Mr. Nesbitt, which of course is now the opinion of the Attorney General, isn't that so?

A. That's correct. Q. And you say just: "With reference to previous correspondence, we have been directed by the Attorney General to forward to you the above-mentioned draft regulations and draft licence which have been prepared in the Office of the Parliamentary Draftsman by Mr. Bacon, together with the advices of Richard Law Nesbitt concerning same." And again, if you were asked: Well why didn't you specifically in this letter refer to the ownership restructuring issue? Am I to take it that your answer is: You didn't think it was an issue of sufficient importance and it was clearly dealt with in Mr. Nesbitt's advices?

A. Well, also we were corresponding with the Department of State, and they had raised a question specifically in respect of ownership, and in our view, it was dealt with in the opinion. I mean, we weren't writing to a member of the public. Q. Now, then, if you go to Tab 25, please, Mr. McFadden. What we have here is the consultation on the 14th May, 1996, isn't that so?

A. That's correct. Q. And the primary purpose of this consultation was to discuss what you were going to do with the unsuccessful bidders, isn't that correct?

A. Yes. Q. But it's also your evidence, and indeed Mr. Nesbitt's evidence, and we believe it will be Mr. Gormley's evidence, that at this meeting on the 14th May the ownership issue was again discussed?

A. Yes. Q. And can you briefly tell us to what extent was it discussed? Was it mentioned by Mr. Nesbitt?

A. I mentioned this to Mr. Coughlan. As I said, I described the type of meeting it was, which wouldn't be -- it was certainly the type of meeting that I wouldn't be used to attending, but Mr. Nesbitt came along to the meeting and he was there to deal, I suppose, with legal aspects with Mr. Gormley and myself, and my recollection is that at one stage, I believe it was Mr. Towey asked the question: If questions concerning changes in ownership of Esat are brought up and the involvement of IIU, I think he added to it, what is the best way to respond to that or to deal with that? And it was at that stage that Mr. Nesbitt started discussing the changes of ownership that had taken place. He mentioned the involvement of IIU and stated that a change like that would not compromise, in his view, the delivery of the service, and that again he restated this point, that the only grounds upon which it could object to the involvement of a financial institution would be on public policy grounds on

the basis, obviously, that they could provide money. And he again, then, restated the general principle that he had been enunciating, that the only changes in ownership of the consortium which the Minister could validly concern himself with would be changes which would have the effect of compromising the delivery of the business plan, so to speak. And I mean, I must emphasise in relation to this too, that at all times we were conscious that the original joint venturers were still in the project. I mean, some of this was -- the original joint venturers were there. But to return to the meeting of the 14th, I viewed what Mr. Nesbitt was saying as being no more than reflecting his previously stated views. And, as I said, they were given in the context of a response of how the Department people would deal with issues that arose. Q. And there is no conflict between yourself and Mr. Nesbitt in respect of this meeting, because both you and he, and indeed, Mr. Gormley, when he comes to give evidence, based on what's in his memorandum, agree that Mr. Nesbitt gave advice at this meeting on the 14th?

A. Yes. But in fairness, I said yesterday that, yes, I am sure people receiving it would have expected his advice -- to me he was reiterating his views. Q. Now, the main purpose of this meeting was to discuss what to do with the unsuccessful bidders, isn't that correct?

A. Correct. Q. And that was quite a controversial issue at the time, Mr. McFadden, do you agree with that, that you would call in --

A. There were advices given by Mr. Nesbitt in relation to that. One of the issues was that a complaint had been made to the Commission and whether to proceed having regard to that complaint. Then obviously subsequently there was the issue of how to - which this meeting dealt with partially - how to deal with the meetings. And, as I say, Mr. Nesbitt advised in writing in relation to that. Q. And I think there was a Department of Transport, Energy and Communications idea that they should call in the unsuccessful bidders, are you aware of that?

A. That it was their idea? Q. Yes.

A. Yes, it was, but they sought advice in relation to it. Q. And there is a note here, Mr. McFadden, I apologise I don't have a copy for you, or indeed, I apologise to you, Chairman, I don't have a copy of it. I just don't have a copy available. But there was a note from Mr. McMeel in the Department of Finance. Do you recall Mr. McMeel in the Department of Finance? He was involved in the finance part of the Project Team for the GSM?

A. I haven't had any involvement, I may have encountered him at some stage. Q. He sent an e-mail to Mr. Phil Furlong and Stephen O'Sullivan. This is a document the Tribunal has furnished to us, and it's dated the 4th March, 1996. And in it he says to Mr. Furlong and Mr. O'Sullivan: "The Department of Transport, Energy and Communications, in their wisdom, have now decided to let the failed applicants for the second GSM licence know where they fell down. They have been put under considerable pressure by the American Embassy and the IDA. DTEC are to write to the losers tomorrow in considerable detail. Billy, in particular, because he was the Government's side financial expert, and I, are requested to review the proposed letters. While we appreciate the politics of the situation, we think it is a daft idea. If any failed applicant had a case, they would have sought a Judicial Review. None did so, which proves the probity of the process. As it stands, we will be revealing our hands and facilitating legal rake-over by the lads in wigs." I believe that's a reference to members of the legal profession. "Other countries may have done this, but they don't have our legal system. If letters are to issue, they should be scrutinised by the AGs and the consultants, Andersens of Denmark. The latter would cost money. I don't know whether DTEC did this. I can't get the relevant people this a.m." There is nothing else really I want to open up. But were you aware that the sending out of letters or the calling in of defeated applicants, first of all was a result from the American Embassy or the IDA?

A. That was never mentioned or I never heard. Q. But the Attorney General's Office was asked to give advice in respect of it, isn't that so?

A. Yes, we were. And I mean, you are referring to Inter-Departmental correspondence there. I mean, I have to -- I hasten to add that the Office of the Attorney General deals with legal matters raised with them. You know, I mean, there is policy people who deal with those issues -- Q. The only reason I ask you, Mr. McFadden, is because there is a reference in it that they should get the Attorney General's Office to look at the matter?

A. Yes, and as I said, certainly Mr. Nesbitt furnished advices that were submitted to the Attorney General in respect of that whole matter of giving feedback, as they call it -- sorry, explaining -- yes, feedback. Q. And then there was a meeting with Persona. My solicitor will hand up some of the documents. This is very quick. There was a meeting with Persona on the 15th May, 1996, isn't that correct, you are aware of that?

A. I wasn't -- I mean, I wasn't at that meeting, obviously. Q. The issue of the ownership issue was raised, and I just want to very briefly refer to what Persona said about ownership on the 15th May, 1996, and what the response from the Department was. And if I could ask you just to go to page 3 of the handwritten notes, which are handwritten notes of the Department in its meeting with Persona on the 15th May, 1996. And at page 3, just four entries down there is a reference to "TB", which I understand is a reference to Mr. Tony Boyle on behalf of Persona. And he says:- "How do you interpret full ownership? Martin Brennan: We were satisfied every application supplies full ownership. "Tony Boyle: What is definition of 'Full ownership'? "Sean McMahon: You have an Oxford English Dictionary. "Tony Boyle: Very good. We interpret it the same way as the dictionary." Were you aware after these meetings took place, Mr. McFadden, that they had taken place?

A. I have never seen this note before, and I -- as I said, we advised in respect of the Persona complaint, which actually subsequently was processed through the Commission, the European Commission, and responses issued to the European Commission and, as I say, material was furnished at various stages by the Department in respect of that complaint, and Mr. Nesbitt advised extensively in relation to it. Q. So, the defeated applicants, they were all very conscious of the ownership issue, weren't they?

A. It would appear so, yes. Q. And just to substantiate that --

A. Sorry, I can't speak for all of them, but certainly Persona was. Q. Could I ask you to have a look at another one of the applicants. You have a letter there from a company called GCI Limited dated the 16th May, 1996. And the Chairman of that company is a gentleman called Mr. Declan J. Ganley. And could I ask you just to look at the second page and the second paragraph of his letter, which deals with ownership as well. And in paragraph 2 he repeats what is the nature of the Persona complaint about ownership and he says:- "Article 3 of the guidelines required 'Full disclosure of ownership' of the proposed licensee prior to the award of the licence. You have accepted that this meant full beneficial ownership of all the persons involved in the licensee. We find this difficult to rationalise in view of the fact that the winning consortium is as yet unable to disclose their full ownership details. You have emphatically stated to us that the Department was fully satisfied on the ownership issue. You consistently stated that 'No applicant was disqualified by reason of the requirements of ownership criteria.' We interpret this literally that all applicants passed this criterion. We find the divergence of your statements with those of your Minister in the Dail wholly inexplicable. Can you please explain to us the divergence between the Minister's utterances and your pronouncements on this critical issue and which of the two represents the reality."

So that's evidence of another ownership complaint being made by a defeated applicant, Mr. McFadden, isn't that so?

A. As I said, I have never seen that. Q. I know that, but you accept that it does --

A. Yes, it clearly does. Q. And just very briefly, finally, in respect of the complaints, there is a letter there from Persona dated 30th May, 1996, and this is in response to the meeting which took place on the 15th May, 1996. If you just look at the second page, and paragraphs K and L in the middle of the

page. "These are what Persona say are examples of the questions which you on Mr. Andersen refused to answer, including K: How you could have satisfied yourself with the ownership of Esat? L: How you could have satisfied yourself with the financial status of Esat?" So, again, the defeated applicants were raising the ownership issue at that time, isn't that so?

A. Yes. That's post the grant of the licence. Q. That is post. But it refers to the meeting that was pre. Could I ask you to look at Tab 26, Mr. McFadden. And this is the letter from Mr. -- a fax from Mr. Towey to Mr. Gormley on the 15th May, and in it is the draft letter that the Department proposes to send to Mr. Digerud, isn't that so?

A. Yes. Q. And could I ask you to look at the second page of that, and the second paragraph, paragraph (a), there is a reference to direct shareholders and it says:- "The direct shareholders are Telenor Invest AS, Esat Telecom Holdings Limited, Dermot Desmond and any other person or company acquiring a direct shareholding in the licensee in accordance with this letter, or another consent issued pursuant to Article 8." Would you agree with me, therefore, that the Department must have been satisfied as of the 15th May that there was not a problem with Mr. Nesbitt being one of the direct shareholders?

A. Mr. Nesbitt? Q. I beg your pardon, Mr. Nesbitt has suffered enough here without me suggesting he is part of the bid. Mr. Desmond, suggested that Mr. Desmond --

A. Yes, that's the draft letter came in on the 15th May to us. Q. So the Department must have been satisfied to list Mr. Desmond as a direct shareholder?

A. Yes, they clearly were aware that he was a direct shareholder. Q. And if you just turn over a couple of pages, you see that the letter that was looked at there, the final draft of it changed slightly. Do you have just the last two pages of Tab 26, Mr. McFadden? There is the copy of the letter that was sent by the Department to Mr. Knut Digerud on the 16th May, 1996?

A. That letter was sent to counsel as well, I believe. Q. It was. But the letter changes slightly. You will see at the bottom of the page:-

"(A) 'Direct shareholders' are Telenor Invest AS, Esat Telecom Holdings Limited, IIU Nominees Limited, as trustee for Mr. Dermot Desmond, and any other person or company acquiring a direct shareholding." So, clearly the Department was satisfied as of the date of the draft letter that Mr. Desmond could be part of the direct shareholding of this bid?

A. Yes. Q. And then if you just look at Tab 28, do you see that, Mr. McFadden?

A. Yes. Q. And that's the -- you sending on the draft letter that we have just looked at to Mr. Nesbitt for his advices, isn't that so?

A. That's correct. Q. And then, if you go to Tab 31, which is dated the same day, the 15th May, 1996, at a quarter past four Mr. Nesbitt replies to the issues you have just raised, isn't that correct?

A. That's correct, yes. Q. And clearly he was happy, although he doesn't expressly state it, but he had no difficulty with the Department inclusion of Dermot Desmond as a direct shareholder, isn't that correct?

A. That's correct. Q. They are the only questions I need to ask you in the book. And I just want to conclude, Mr. McFadden, by asking you just a couple of general questions, and like Mr. Hogan said to you, this is not meant as any offence to you, but it has to be asked for the sake of the inquiry that's being conducted. Could I ask you: Are you, Mr. McFadden, Mr. Gormley and Mr. Nesbitt part of a conspiracy to mislead this Tribunal?

A. The answer is definitely not, and that's the answer. Q. Can I ask you, Mr. McFadden, did you deliberately obstruct or obscure the Department's request for advice on the ownership restructuring issue?

A. Sorry, can you just repeat that? Q. Did you deliberately obstruct the Department's request for advice on the ownership issue, which is recorded in the minute of the 24th?

A. Again, my answer is definitely not. I could give you a much more fulsome response, which I will

refrain from. Q. Did you support the advice about there being no legal impediment to the entry of IIU that was advised upon by Mr. Nesbitt, did you support that advice?

A. Yes, I believed his view was reasonable. Q. Did you support that advice because it was reasonable or, alternatively, because you thought Mr. Lowry wanted that to be the advice?

A. I am a lawyer and I was looking at it -- I supported it as a lawyer. Q. In any event, and finally, Mr. McFadden, you have nothing to gain by coming here in terms of the evidence you give; you are not subject to any criticism in any quarter in respect of the work you did, isn't that so?

A. Definitely is the answer, and in fact all that's happening is my files are building up back in the office. Q. And why have you put your head above the parapet to come here to give evidence which corroborates Mr. Nesbitt's evidence?

A. Because the -- when the provisional -- well, firstly the issue firstly arose on preliminary findings. Then the issue -- the waiving privilege was then considered internally in the Office. As I say, a Government decision was made to waive privilege. And the purpose of that was to come down to the Tribunal and explain the circumstances surrounding the opinion, and we believed we could assist the Tribunal in coming down here to do that. And, as I say, the preliminary findings obviously following the recent sittings where Mr. Nesbitt gave evidence made it all the more important that we should come down here. MR. O'CALLAGHAN: Thank you very much, Mr. McFadden. CHAIRMAN: Do you want to make a brief start, Mr. O'Donnell? MR. O'DONNELL: I am just conscious he has been in the witness-box for two hours and 20 minutes. What I would suggest, sir, if we rise slightly early for lunch and I can resume dealing with him at two o'clock. CHAIRMAN: Two o'clock. Is two all right? MR. O'DONNELL: Certainly.

THE TRIBUNAL ADJOURNED FOR LUNCH

THE TRIBUNAL CONTINUED AFTER LUNCH AS FOLLOWS: MR. O'CALLAGHAN: Chairman, my solicitor circulated that e-mail I referred to earlier on this morning. So just for the sake of the Tribunal. THE WITNESS WAS EXAMINED BY MR. O'DONNELL AS FOLLOWS: Q.

MR. O'DONNELL: Mr. McFadden, I just want to deal with a couple of issues that are referred to in the big booklet of documents, and if I could ask you to turn to Tab 5 of that big booklet. I think it's clear that you, in common with the other person who was working in the Attorney General's Office on this issue, and the Department were conscious that the issue of ownership was one of the issues that you were going to have to address in the context of the award of the licence as a legal issue?

A. That's correct. Q. And I think it's clear that in early 1995, there were consultations within the Department and between the Department and the Attorney General's Office, and that the ownership issue was on the agenda at that stage. And that I think you also retained Senior Counsel to advise on the issue of the ownership, and we have had Mr. Nesbitt's opinion of August 1995 opened to you?

A. That's correct. Q. And to the Tribunal. And it seems a reasonable summary to say that the opinion of Mr. Nesbitt was that the identity of a licensee would only be of material importance if it restricted open competition, and that one couldn't

otherwise impose arbitrary conditions on changes of ownership?

A. Yes, that's the opinion of 1995, yes. Q. And so -- and that opinion was forwarded to you, and you obviously had an opportunity to read that?

A. Yes. Q. And I gather from your evidence earlier today, that you are in broad agreement with the contents of that?

A. Yes, and that opinion as well, I should say, was submitted in due course to the Attorney. Q. And was adopted by the Attorney in the usual way?

A. Yes. But it was an early opinion. Q. Now, I think you have referred to the importance of the new directive, and if we look at Tab 5, we can see that there are three documents in Tab 5, attached to the letter of the 12th April of 1996. The first is a draft regulation in relation to transposition. The second is a letter from Dr. Ungerer, and we'll come back to that. And the third is itself the Directive. And

perhaps if I could ask you to turn to the directive which is behind Dr. Ungerer's letter, and in particular if you turn to Article 3(a). I am sorry, sir, mine isn't paginated, but it's the third-last page in that tab. And Article 3(a) is one of the articles to be inserted into the preexisting directives, isn't that right?

A. That's correct. Q. And this was a directive of, I think, the 16th January of 1996?

A. That's correct. Q. And I think would therefore have become effective in law on the 16th February, 1996?

A. That's correct. Q. And therefore would have applied to Ireland at that stage?

A. Correct. Q. Now, if I may be permitted, if I can just read out:- "In addition to the requirements set out in the second paragraph of Article 2, Member States shall, in attaching conditions to licences or general authorisations for mobile and personal communications systems ensure the following: "I. Licensing conditions must not contain conditions other than those justified on the grounds of the essential requirements. In the case of systems to be used by the general public, public service requirements in the form of trade regulations within the meaning of Article 3." Now, that was a new article being inserted into the existing directives. What was the significance, in your view, as a lawyer, of that article?

A. In short, it basically meant that the only conditions which could now be imposed on a licensee in the first place were conditions which related to the essential requirements which are defined in the Directive and are largely to do with the security of the PTGSM, and they are listed there in the Directive. Q.

Was identity of ownership an essential requirement at any stage?

A. No. Q. And therefore, if one was to impose into a licence restrictions on grounds or conditions on grounds of identity, one would be potentially in breach of that requirement of the Directive?

A. Potentially. Q. Now, I think the letter then, if we go back, further back in the tab we see the letter of Dr. Ungerer. I am sorry, sir, I think it's about three or four pages back towards the front, if I can put it that way. And it's a letter of the 28th March of 1996. And we see at the top a legend in handwriting which, I am not clear who it's from, but it says "This is important." And it's addressed to a number of people, who appear to include Mr. Towey, Mr. Dillon and Mr. O'Conghaile; it's copied to them. But it is obviously addressed in the first place to Mr. Martin Brennan, isn't that right?

A. That's correct. Q. And I think this is a letter from the Competition Director General, Dr. Ungerer, the Head of the Division, in relation to competition, setting out guidelines to Ireland as a Member State as to what this directive means and what its significance will be?

A. That's correct. Q. And do I take it that it is sent to Mr. Brennan in the context of the situation whereby the directorate would have been aware that Ireland were in the process of offering a licence to a second mobile phone company to operate within the jurisdiction?

A. Yes, I'd assume that's correct. Q. Yes, there had been, as you are aware, ongoing correspondence between the State and the Commission in relation to the competition and the licence?

A. Yes. Q. And I think the second -- the last sentence in the second paragraph says: "The Directive also requires Member States to abolish any limitations on the number of undertakings authorised to supply such services which are not based on objective, proportion and non-discriminatory criteria and to abstain from authorising mobile and personal communications operators other than in compliance with such criteria." Again, in your view, as a lawyer, could identity of owner ever be a relevant criteria in that context?

A. Certainly one wouldn't -- identity wouldn't be a matter that would come to mind there, no. Q. And then he makes the point which I think is, in effect, a summary of what's in the Directive, in the first sentence of the next paragraph: "Member States may only make the supply of such services subject to licensing or declaration procedures aimed at compliance with essential requirements." And again, I suppose, that's stating what you have said, that requires that the State's only imposed conditions which

are related to essential compliance?

A. Yes. Q. -- essential requirements. Then the fourth paragraph says: "The new Article 3(a) lists the framework which such licensing conditions must comply with. This framework also applies to licences granted before the entry into force of the Directive. Provisions in such licences which are incompatible with the principles set out in the Directive

must be deemed void." Now, Mr. McFadden, what significance did you attach to that requirement or that advice, I should say?

A. Well, the -- we had advice to the effect that Esat Digifone were effectively, I think I used the phrase, a licensee in waiting, so arguably the Directive applied to their entitlement to a licence, that was a further complication of the matter, but as is clear in any event, it certainly would have applied to the licence to be granted and arguably applied to the Esat licence before the grant, because of the legal advice we had obtained that there was an entitlement to the licence. It complicated, as I have already pointed out a number of times, the legal position. It complicated from the point of view of interpretation of what you -- what had happened to date and what was happening as regards licensing, because when one reads Mr. Nesbitt's opinion, he points out the great doubts there were about a number of conditions in the licence to be granted, and I mean, much of that -- of course we drew that to the attention of Attorney General as a matter of concern to us from a legal viewpoint, and it was something which is very much highlighted by Mr. Nesbitt, because the competition had been completed prior to the Directive, but the actual finalisation, the grant of the licence didn't take place until May of 1996, and this directive, which was brought to our attention, came -- was in force in February '96. So you had a situation where there was -- we had advice that there was an entitlement to a licence that Esat Digifone had this entitlement as a result of -- Q. They had to view it as if there were a licensee?

A. There could be -- yes, I think there is -- I mean, particularly when one is interpreting EU law, as the Chairman would be aware, it's not always the easiest law to, I mean, because of case law and the various methods of interpretation that are used in relation to EU law. Q. But it seemed, from Dr. Ungerer's advice, that this was retrospective in effect as well as prospective in effect from the 16th February, the day in which it would have come into effect?

A. If retrospective is the right word. What he is saying -- I mean, the Directive was in force, whilst it hasn't been transposed, it was in force from the 15th February, 1996, and what Dr. Ungerer is stating there, that it applies to licences granted even prior to the date. So even licences which were there in February. Q. So that meant an existing licensee could not be restricted in relation to changes of ownership within that licensee?

A. Correct. Q. And is it your position that you applied similar logic to a licensee in waiting; that a licensee in waiting likewise could not be restricted in relation to changes of ownership within the structure of the licensee in waiting?

A. I believe that was an interpretation that was open, certainly. But from Dr. Ungerer's letter, it certainly raises the question, and so it was a question that was there to -- I mean, it wasn't resolved, obviously, by way of litigation, but it would be certainly a matter -- Q. Would that be all that you were told?

A. -- which could be subject to litigation. Yes, but I mean, certainly, that was, as I say, a factor, and I believe it was very much in Mr. Nesbitt's mind when he advised generally. Q. Because he's expressly asked to advise in relation to -- on the 18th April of 1996 he is provided with the Commission Directive and the draft regulations and expressly asked to advise in that context --

A. Very much. Q. -- on Section 111, I think it is, of the legislation?

A. That's why I was saying that whilst his opinion in 1995, he clearly has a view in relation to ownership, that, as I say, from a legal perspective, would have changed in the light of -- having regard to the Directive 96/2. Q. So, his legal advice given in August of 1995 is consistent with the refinement added later by the directorate as explained --

A. Yes, it is. Q. -- in Dr. Ungerer's letter?

A. Yes, very much so. Q. And is it your view that his opinion in 1996 is likewise consistent and in harmony with the new directive and the advice given by Dr. Ungerer?

A. Yes, it's certainly consistent, and it was his view, which is set out clearly in his opinion, the relevance of the Commission Directive. I don't think there is any question about that. Q. Now, the meeting of the 22nd April, I want to just ask you about briefly, and just to confirm that Mr. Nesbitt did not attend that meeting?

A. No, he did not. Q. But he did attend the meeting on the 23rd April of 1996?

A. That's correct. Q. And your evidence is that he took the papers which were provided at that meeting away with him?

A. Yes. Q. So, the only opportunity he could have had to get those papers is at that meeting? I know subsequently you sent on papers again.

A. Correct. Q. But the only opportunity he would have had to obtain those papers was at the meeting on the 23rd?

A. Correct. Q. And therefore, we have to assume that Mr. Towey is mistaken in his date when he suggests that the papers were handed over on the 22nd, in fact, because Mr. Nesbitt wasn't there, they couldn't have been handed to him on the 22nd, they could only have been handed to him on the 23rd, because that's the only date at which he attended. MR. COUGHLAN: Sorry, sir, I think Mr. Towey's evidence was that he handed them over on the 22nd and he had a meeting on the 23rd. Q. MR. O'DONNELL: I have said that -- this would appear to be a mistake on Mr. Towey's part as to the date on which the papers were handed over, because the only date on which Mr. Nesbitt attended where he could have received the papers was the 23rd April, isn't that right?

A. That's correct. That's correct. Q. I see. And I think Mr. Towey expressly refers to meetings on the 22nd and 23rd, but he doesn't -- and he does suggest at some stage that the papers were provided at the meeting on the 22nd. But I am suggesting to you that your recollection is that they were provided on the 23rd, and certainly that's the only time that Mr. Nesbitt could have got those papers?

A. Yes, that was the first time he had been there, yes. Q. All right. Now, just in relation to the meeting of the 23rd April, I think you have indicated that it was a relatively lengthy meeting with a number of issues to be discussed at it. And were you aware that Mr. -- firstly, had you -- you had met Mr. Towey before on occasions?

A. Yes. Q. And he was a fairly senior civil servant and a capable and responsible civil servant, I would suggest?

A. Yes, I think he was an Assistant Principal Officer, I think, at the time. Q. And did you have any reservations about his ability or his capacity to understand and absorb information that was provided at meetings?

A. I had no reason to doubt the man at all. I mean, he was an ordinary civil servant, I presume. Q. And Mr. Towey himself says that he recalls being of the view that Mr. Nesbitt did not believe that any wish which the Department would have to title, control, ownership could be sustained, but he can't say whether that view arose from the opinion of the 9th May or earlier or later meetings.

A. Yes. Q. And he also says, in his evidence - sorry, Chairman, this is all at Day 359, page 102 - that he recalls a discussion with Martin Brennan in which he expressed the view that Senior Counsel's opinion confirmed that there was no legal reason to have concerns about the restructuring of ownership being undertaken in Esat Digifone. And would you agree with me that the opinion, insofar as it's stated in his evidence to confirm that there was no legal reason, would appear to confirm information that he received prior to receiving that written opinion of the 9th May?

A. The word "Confirm" suggests that, yes. Q. And I think he has also indicated that he can't be sure of whether the information that he got orally from Mr. Nesbitt occurred on the 23rd April, but nor can he expressly rule it out; he makes that clear, again at Day 359, page 134 and 135?

A. Yes. Q. You were at the meeting, Mr. McFadden, when Mr. Towey raised the issue. Do you recall your own view as to whether or not ownership, a change in ownership, if ownership was a major issue?

A. Well, as I said, it was raised I think probably near the end of the consultation, and it was a completely new issue to me. So, I listened to what Mr. Towey set out as being the issue which, or issues which he wished to get advice upon. And I think Mr. Gormley certainly expressed views, and I listened to Mr. Nesbitt's view, obviously, I mean it was a matter which I think he would have been -- had a clear expertise in because of the nature of it being a structure of corporations and consortia, and as I say, I mentioned the matters which he set out as being -- during the course of the discussion -- now, as I say, this was Mr. Towey opened the documentation and the issue became clear as to what he was asking, and Mr. Nesbitt, as I say, my recollection was I am certain he mentioned this -- I was aware, as you say it was in the '95 opinion, that the principal concern for the Minister would be whether any change in ownership would affect the delivery of the business plan. I can't remember the exact words, but that was the effect of what he said. And as I said, in respect of the financial institutions, I do particularly remember he said that the only grounds you could object to the involvement of a financial institution, again I presume on the basis that they had the money, was that if it had some criminal or it had an involvement with criminal activities, I suppose, or crime, that you could object in those circumstances on public policy grounds. And as I say, that was something that, I won't say didn't spring to my mind as I was listening to it, but I can understand in contractual terms that probably is, that obviously would be a ground. Q. I take it you agreed with the advice of Mr. Nesbitt?

A. Yes, as to whether it was a material change having regard to what was set out by Mr. Towey as regards what was in the application. And, as I say, the papers, I didn't have a set of papers, I was listening to what he said, and he said that the involvement of financial institutions had been flagged, the probable financial institution that would be involved, but that now there was a company called IIU Limited who were the equity investors, or would hold the 20%. I personally thought that -- a view, I mean money is money, I presume if it was available from whatever source -- well, sorry, I can't say from whatever source, but on the basis that the money was there from the financial institution, then I couldn't see how that would impact on the provision of the service. So from that point of view, I would have thought the advice was -- sorry, his views were reasonable. Q. Did you say this or anything to that effect at the meeting, do you recall?

A. I certainly, I didn't object to it, I didn't make any arguments against it. Q. And as a result of that, and I appreciate this may be somewhat difficult for you to say, were you able to form a view of Mr. Towey's degree of satisfaction with the advice he had received from Mr. Nesbitt?

A. I presume he would have -- he certainly didn't contest the view. That's all I could say. And I mean, it's difficult for me to say. He didn't contest the view, and I presume he would have deferred to it to a large extent. Q. And he wanted a written legal opinion, and he says he reiterated --

A. Yes. Q. -- his request, that is to repeat, obviously, to say again, his request for an opinion. But would it frequently be the case that people would want to "Get it in writing" even though they had already been given oral advice to the same effect at a consultation?

A. That wouldn't be unusual. As I said, I mean, often the majority of requests for advice in the Office would come in in writing. So, -- and in fact we frequently would, if we received phone calls, we would say to people, officials from departments, would they please put their requests in writing. I mean, I think that's obviously good practice. Q. And I suppose if Mr. Towey had further concerns about something that had been raised at the meeting, he would have had an opportunity to raise it with you again if he had decided that it was necessary to do so?

A. Yes. Well, I think in one of the documents we furnished there, there was a meeting again on the -- Q. I think there was one in May?

A. On the 3rd May where Mr. Nesbitt was there at that meeting. Q. And that was an opportunity for him, for Mr. Towey to say: "Look, I didn't get a satisfactory answer to the meeting -- at the meeting of the 23rd April. I am still not happy. I haven't got your written opinion. Can you tell me for once and for all does the change to IIU make any difference or not? Please tell me." He could have said that if --

A. I have no recollection of that. Q. I don't think anybody suggests that he did say that. And in fairness, it wasn't put by anybody that he did.

A. No. Q. So, can we take it, then, that so far as you are concerned, Mr. Towey never came back to you looking for further clarification of the advices he had been given at that meeting, never sought another meeting with counsel in relation to this issue, and never sought anything other than, in effect, written confirmation of what he had already been told?

A. Yes. Well, he sought -- he sent in his letter of the 24th, which clearly was a request that had to be dealt with. Q. Reiterating his request for --

A. Yes. Q. And I think subsequent to that meeting, as you say, you attended other meetings, including the meeting of the 14th May, where the issue came up, but only, you say, in relation to explaining to the disappointed competitors, the teams who hadn't won, what had happened?

A. Yes. Q. And I think we have -- it's already been explored with you the fact that the Persona complaint included a complaint about a potential change in ownership, and that that was something that was live in your minds, and you understand it had been sent to the Attorney General himself also?

A. That's correct. Q. Again, in relation to the opinion, once the opinion had been received, and we know that the opinion is dated the 9th May of 1996, I want to ask you, did Mr. Towey ever come back to you after he had received that opinion and say to you "I don't understand this opinion" or "It doesn't answer the question I asked"?

A. In relation to the -- Q. In relation to the ownership issue.

A. I have no recollection of that ever happening, no. Q. Do you think you would recollect it if he had?

A. Yes, because I'd have asked; if there was an issue raised on the opinion, I would have gone back to counsel if there was any further issues. Q. Yes, if Mr. Towey had come to you, or indeed if you yourself had said: "Look, Mr. Towey may be happy, but I am not, so counsel, I want you to explain this further"?

A. Absolutely. I mean, he would have reverted to counsel if there were any issues either raised by the Department or in the Office about the opinion. Q. Can I just quote from Mr. Towey's evidence, which is at, I think, Day 358:- "I can confirm that I, for one, had no questions in my mind as to what the position was after considering the opinion. It should be recalled the opinion was passed to us by two experienced officers of the Attorney General's Office. I believe they were fully aware of all the issues. I also think that if they or any other civil servant had raised doubts or queries as to the nature of the advice given by counsel, it is certain they would have raised any such doubts or queries by seeking further clarification through the appropriate legal channels from counsel. I should say, there was no need for further instructions. I was clear that even if there had been a change in the makeup of the consortium between the entering into the competition and the licensing stage, this had no impact on the entitlement of the consortium to be awarded the licence and could not prevent the Department from awarding the licence to the consortium." I am not suggesting Mr. Towey said that in so many words, but was it clear to you that he didn't have a problem any longer with the ownership issue?

A. He certainly never reverted. And as I say, at that stage, once the opinion was adopted as the Attorney General's, I certainly couldn't have altered that opinion without reverting to the Attorney himself. As I say, once it was transmitted to the Department, that effectively was the advice of the Attorney General, so if any queries were raised in relation to it, it would be standard practice to make a submission back to the Attorney General. In this case I am sure we would have got the views of Mr. Nesbitt first and submitted them to

the Attorney. Q. And again we have had the issue in relation to the submission by you and Mr. Gormley of the relevant documentation, including the opinion to the Attorney General for sanction, and while the Attorney General may not have explored each and every detail daily of all the documents concerned, would it be his practice to read the opinion that had been provided?

A. I would certainly assume so, yes. Q. And again, there would be no reason for you not to raise an issue with him if you thought there was still an outstanding issue in respect of ownership?

A. There would be no -- Q. No reason for you to withhold raising an issue which you genuinely believed to exist?

A. I mean, it would be my duty to do that, so, yes. Q. Exactly. So you would have been in breach of your duty if you had withheld raising an issue which had been in fact still a significant issue?

A. Yes, if there was a significant issue, I definitely would have raised it. If I felt there was a significant issue, yes, of course. Q. But you didn't?

A. No. I believed that Mr. Nesbitt's advice was good advice and, as I say, there is a detailed submission made to the

Attorney General in relation to it. I thought his advice was good and, as I said, I had an understanding of it. Q. Now, if I could just turn to the correspondence that was, I think, handed in to you this morning.

There is a small booklet of correspondence, and the first is a letter of the 15th March, 2002. And while we have had this letter before, it is clear that it is a letter addressed to the Department of Public Enterprise, isn't that right?

A. Yes. Q. You never saw this letter?

A. I certainly don't believe I ever did. I have no recollection of it at this time anyway. Q. Is it fair to say, therefore, that you were never asked as a result of this letter to provide any written account of oral advices given by or on behalf of the Office of the Attorney General?

A. I certainly have no recollection of being asked to do that. Q. All right. So, if we then turn to the letter of the 27th May, which is a letter again addressed to the Department of Public Enterprise from the Tribunal, but it refers to their view, the Tribunal's view, that Senior Counsel did not address the specific question raised by Mr. Towey. And I think it was that letter that is referred to in the minute prepared in or about July of 2002 by Liam O'Daly, or rather I should say, signed by Liam O'Daly, but you had a considerable input into preparing that minute, isn't that right?

A. Yes, Mr. Gormley and myself, as the officers who had, who were dealing with the file would have had to provide the material, yes. Q. That letter of the 27th May, 2002, does not ask for any oral advices as to whether -- it does not ask whether or not oral advices are given. It doesn't raise the issue of oral advices, and indeed, the word "oral advices" simply isn't mentioned throughout that letter of the 27th May, isn't that right?

A. Yes, I presume -- Q. This is the earlier letter -- we have raised that, the one of the 15th March. I am dealing with what's -- what you were asked to deal with was, as is clear from the minute, is the minute of the 27th June, enclosing correspondence dated 27th May, so that's the letter that you were asked to deal with, isn't that right?

A. Yes. Q. And in preparing that minute, you expressed the view that pages 1 and 2 of Mr. Law Nesbitt's advices of 9/5/96 appear to deal with the matters raised in the Department's minute and there is nothing on the file to suggest that the Department thought otherwise. Mr. McFadden, if you were of the belief that the Tribunal were keenly interested in finding out whether oral advices had also been given, would you have withheld that information knowingly from the Tribunal at that stage or would you have supplied it willingly?

A. Of course not. I would have supplied any information we had, and I hope we have done that. But I think at the core of this is that the Office view at all times was that the response to the opinion is the request for advice, Mr. Towey's request for advice was the Attorney General's opinion of the 9th May, and that was our position. What we have been discussing here today -- sorry,

during these sittings, is what I would regard as the surrounding circumstances and what, the discussions that took place in that context, but certainly as regards the, what was the response to the request of the 24th, certainly we regarded the Attorney General's opinion, or Mr. Nesbitt's opinion as adopted and sanctioned by the Attorney General, that that was the opinion. Q. And dealt with the matter?

A. Yes. So, what we have come here to discuss is what transpired on the 23rd, and there were views expressed undoubtedly at that meeting. But our position certainly always has been and our understanding was that the official advice, the sanctioned advice dealt with the issue. Q. So am I right in thinking, therefore, that your -- the minute which is signed by Mr. O'Daly but prepared, certainly, to a significant extent by you --

A. Yes. Q. -- focuses on the opinion, because that is, as you see it, the question asked which has to be answered by you?

A. Yes, I think that's very much the case, because -- and indeed, when we went to meet the Tribunal -- Q. We'll come to that.

A. Yes. Q. And there was no deliberate or intended withholding by you of information about oral advices from the Tribunal, and indeed, you say you have willingly given the evidence in relation to such oral advices had it been requested?

A. Of course we would have. But as I have said that we still -- we regarded -- obviously the Attorney General had seen the opinion and that was the sanctioned opinion in respect of the ownership issues, and that's what we would regard as the advices furnished in response to that request. Q. Now, you didn't get any further letter from the Tribunal -- MR.

COUGHLAN: Sorry, sir -- CHAIRMAN: I think there is a letter, Mr. O'Donnell, we better see something of it now. Q. MR. O'DONNELL: -- arising from this. You didn't get a letter that suggested to you that there was any other advices given prior to your meeting with the Tribunal? If My Friend has a specific letter, then he better tell me about it. (Letter handed in.) Did you ever see any other letter, Mr. McFadden -- MR. HOGAN: Before Mr. O'Donnell continues with his cross-examination, I have to say, sir, it is somewhat unsatisfactory that a letter is now being produced bearing -- which could have potential material bearing on cross-examination of other parties that we are only seeing now for the first time. I haven't even had a chance of looking at it. It's just been handed to me, sir, and that clearly is material to the cross-examination that both myself and Mr. O'Callaghan have conducted on this witness.

MR. COUGHLAN: I accept what Mr. Hogan says. It arose out of questioning by Mr. O'Callaghan this morning as to whether there had been any other correspondence or request for oral advice from the witness. MR. O'DONNELL: Sorry, this letter predates the submission by Mr. McFadden to the

Tribunal, because as the Tribunal is aware, the letter that was sent to the Tribunal was sent on the 30th September, and this appears to pre-date it. Q. And what I want to find out from Mr. McFadden is -- sorry, firstly, I suppose I should ask you, this appears to be directed to the Department rather than to you. But did you see this letter? Have you seen this letter before?

A. I can't say. I certainly, in respect of us being called down to the meeting, I would have been informed of that and internally in the Office, my own office I would have been told, as would Mr. Gormley, that we were being asked to attend. Q. Oh, I know that. But I am talking about before the meeting, did you see a letter of the 16th September, which would have been before the submission --

A. It's possible. I can't say. Q. Have you any recollection of seeing it?

A. My recollection is that we got relatively short notice, that's my recollection; that we were told possibly in the morning that we were going down. I can't recall -- Q. Is it the case, therefore, that you had no dealings with either the Tribunal directly or requests to deal with correspondence from the Tribunal between the date on which you drafted the submission for Mr. O'Daly to sign in or about July of 2002 and the date in October when you were informed that you were going to have to go to see the Tribunal?

A. That I -- Q. That you had no other dealings with this issue?

A. Well, I wouldn't have been corresponding with the Tribunal myself. Q. And did the -- do you remember did the Chief State Solicitor's Office contact you in any way in relation to any of those issues at that time?

A. I don't have a recollection of that. I mean, as I say, my understanding is that arising from correspondence that the Office, or Mr. Shaw had received from the Tribunal, and arising from the responses which had been given by the Office, that the Tribunal wanted to speak to Mr. Gormley and myself -- Q. But at that stage --

A. -- concerning that. Q. Mr. McFadden, did you think at that stage that they were going to ask you for anything other than your views and the views of Mr. Nesbitt about the written opinion of the 9th May of 1996?

A. Well, we were there to answer whatever questions were raised. But I mean, I think I have to go back to the point that as far as the Office was concerned and Mr. Gormley and myself, that the opinion that -- the sanctioned opinion, Mr. Nesbitt's opinion as sanctioned by the Attorney General, that that was the advice in relation to the matter. And I mean that is still our position. Undoubtedly what occurred on the 23rd informed us -- is arguably relevant, but the official response of the Attorney General was the opinion -- the release of Mr. Nesbitt's opinion. And that would be our position on the matter. As I say, the whole opinion since -- obviously it's become now the centre of attention and has been now apparent for some time, but we are now looking into the general circumstances leading up to it. But, it would be still our position that if you read the opinion of the 9th May, that it deals with the issue. Q. Did you ever, between 1996 and October of 2002, did you ever sign a letter, draft a letter or see a letter from the Attorney General's Office which said that the opinion did not deal with the issue raised?

A. I have certainly never signed a letter to that effect, and I never saw. But the first -- I do recall, is it, I am not sure is it arising from the provisional -- sorry, the preliminary -- either maybe the ruling on the privilege. Q. We'll come to the ruling in 2000. But I am just asking you from the period between 1996 and 2002 when you signed the original minute, was there ever a letter sent out from the Attorney General's Office, so far as you are aware, saying that the opinion of Mr. Nesbitt did not deal with the issue raised in relation to ownership?

A. Certainly I am not aware of any letter of that type. Q. All right. Now, the meeting on the 18th October, 2002, you kept a brief note of it which --

A. Well, I made a report really. Q. You made a note of it?

A. Yes. Q. And that records Mr. Coughlan, Mr. Healy, Ms. O'Brien and Mr. Davis attending on behalf of the Tribunal?

A. Correct. Q. And you have no reason to insert Mr. Coughlan's name if he wasn't there?

A. I can't think of one. Q. Because Mr. Coughlan suggested to you that he wasn't there. MR. COUGHLAN: I never challenged the witness at all -- I did not challenge the witness when he said in evidence that I had said -- I have no recollection of being at the meeting. I am informed that I wasn't there, but I accept, and I accept wholly that if Mr. McFadden says I was there, that I was there. I accept that. MR. O'DONNELL: I am grateful for the concession, even if it's somewhat belated, because I think Mr. McFadden was put under the cosh as to whether he could be certain Mr. Coughlan was there. But, however, this minute makes it clear, it says that "the queries raised by the Tribunal and responded to by this Office were discussed." So, in making up this minute, you were aware that there had already been one written response by the Attorney General's Office indicating that the opinion had been dealt with?

A. Yes. Q. Sorry, had dealt with the issue raised?

A. Yes. Q. "The position outlined in this Office's written response" - and we now know that that is the Liam O'Daly minute, if I can call it that - "was confirmed by the undersigned" - which is you?

A. Yes. Q. -- "and appeared to be accepted."

A. Yes. Q. And can I ask you again, again the use of the word "Appeared to" is a felicity of language. You don't wish to -- do you wish to diminish the impact of it? Or, are you saying, well, it was kind of accepted or it might have been accepted? I think you are saying it was accepted, so far as you can tell?

A. Well, as far as -- I think I have said in response to Mr. Coughlan the other day, certainly I have no recollection of somebody saying "We don't accept that", or, you know, "What you are putting to me, you know, that's a totally unreasonable position to have." As I said, Mr. Healy did proceed to discuss the opinion with Mr. Nesbitt, but I mean, my involvement was, I think it was, as I said, I was asked the question where in the opinion was the matter dealt with? And I identified that portion of the opinion. Q. And Mr. Healy never said to you, "Sure, how can that be?"

A. To the best of my recollection, as I say, the discussion concerning the meaning of the opinion was between Mr. Healy -- more with Mr. Healy and Mr. Nesbitt. Q. And Mr. Healy, despite starting by referring in agricultural terms to the opinion, appeared at your view, from your point of view, to have accepted the explanation given by Mr. Nesbitt, and that's what you said in your minute to the Attorney General?

A. My understanding of what took place was that there was a testing, was the word I used yesterday, which one would

expect maybe if you are querying an opinion; there was a testing of the opinion and there was a discussion. But soon after that, my recollection is, I don't think it was an overly long meeting, I said in the note -- Q. I think you say it lasted less than an hour?

A. Yeah, and that, as I said -- Q. It could have been a lot less than an hour?

A. Yes, I don't think it -- it certainly was less than an hour. So it wasn't -- I mean, it certainly wasn't gone into the detail that we have gone into it. Q. You also put in at the end of your minute, you said: "There was no indication that the Tribunal required any further assistance from this office." I take it that again if you were concerned that there might be more coming about this issue, that you would want, you would have wanted to alert the Attorney General that this is a matter we are going to deal with at a later stage or that we may be summoned down here again, or there may be follow-on from this; you would have put that in your minute as a responsible legal advisor and wanted the Attorney General to know that?

A. Yes, of course, and I had discussed it with my colleague, Mr. Gormley, and certainly we didn't -- we weren't going back with the view that we were going to have to come back down and that there is a major issue here that -- Q. Yeah, and there is no suggestion in the Tribunal's note that they are going to want you back or that they are going to have to return to this issue at a later stage with you. I think the Tribunal's note ends, so far as this issue is concerned, with Mr. Nesbitt's quote "That it was irrelevant whether 20% was held by 10 US investors or 2 German investors."

A. Yes, but I mean, I hasten to add that we would have returned at any time, I think, and I think the Tribunal counsel accept that. I mean, there is no -- Q. Of course. And can I take it again, that as in the time when you prepared the minute in July of 2002, that if the Tribunal had said: "Well, look, have you anything else that might assist us apart from this opinion, would you tell us? Was there any meetings or any suggestions which might be able to help us to understand how this came to be?" you would have volunteered the oral advices which you recall being given so clearly by Mr. Nesbitt on the 23rd April?

A. Yes, of course. But, again, as I said, the meeting with the Tribunal focused on the written opinion, and what we have been looking here at is the background to that, how it was received. And, as I say, the opinion of the 9th May, we would consider dealt with all issues raised in Mr. Towey's request for advice. Q. So, for the second time, this time face-to-face, you were telling the Tribunal that the opinion of Richard Nesbitt dealt with the issue raised?

A. Yes. Q. At this meeting?

A. At the meeting. Q. Both you and Mr. Gormley were doing this?

A. Well, Mr. Gormley wasn't invited to speak. Q. But I suppose you, on behalf of the two legal officers who had been dealing with it in the Attorney General's Office, made clear your view in that regard?

A. Yes, I did make it clear, my view. Q. And then we know that a letter -- sorry, between then, between the 18th October and the 20th of December, can I take it that you were never asked to come back to assist the Tribunal further?

A. I certainly was not notified of any request. Q. And then we know that a letter was written arising out of an article in the Sunday Business Post, where the Tribunal asked for the view of the Attorney General on the accuracy of that article, but was not putting forward the Tribunal's own view of what the opinion meant or didn't mean, isn't that right?

A. Certainly the letter from the Tribunal doesn't set out their view of the opinion of the 9th. Q. Absolutely, no. I think the letter of the 16th December, 2002, is a letter which expresses concern about a newspaper report which refers to something occurring hours before the award of the licence?

A. A request being made to our office. Q. Yes.

A. And then it sets out the terms of the advice given, and that never happened. Q. Yes, of course. But what the letter from the Tribunal seeks is your response to that newspaper report?

A. Correct. Q. It isn't a letter which says: "We have heard what you have said on the 18th October and we still don't agree with you and we want you to tell us more"? It's not that kind of a letter at all?

A. As I said, the letter was a report, a newspaper report, and my understanding is the Tribunal, I wasn't sure -- I mean, when I heard about it, I thought there were possibly two concerns. I mean, whether the Tribunal had an interest in how the report originated or the source of it, I don't know that, but then there was a request specifically as regards the accuracy of the report, and that was dealt with in the Office, and the Attorney General himself was involved in that. Q. And I think that's the letter of the 20th December which has been opened already, it's Tab 39. I don't require to open it again.

A. Yes. Q. But that's the letter where for now, the third time, and the second time in writing, the Attorney General's Office in a minute, this time signed by the Attorney General himself, is making it clear that the opinion of the 9th May dealt with the issue in question raised on the 23rd April?

A. That's correct. Q. And while there was a clarification on the 9th January, 2003, where Mr. Davis, on behalf of the Tribunal said, "Well, we are actually looking at the, in effect the hours before the award of the licence on the 16th and where that was responded to by a letter of the 4th February, 2002, the position remained unchanged, the view of the Attorney General remained that the opinion of the 9th May of 1996 dealt with the matter"?

A. Correct. Q. And while there is a reference to advices given by Mr. Nesbitt at a meeting on the 15th about whether such conditions was forward looking, and he said it was, it didn't change the Attorney General's view of the written opinion given by him on the 9th May, 1996?

A. Correct. Q. So, the consistent position of the Attorney General from 1996 onwards has been that the written opinion dealt with the issue raised by Mr. Towey in his letter of the 24th April?

A. That's correct. Q. You are aware, then, that the Tribunal commenced its hearings in December of 2002 and issued a preliminary ruling on the 25th February, 2008, isn't that right?

A. Yes. Q. And perhaps I can read out the relevant paragraph of the ruling, which is a public ruling and which remains on the Tribunal's website. And at paragraph 9 it says:- "There seemed to be only two ways of demonstrating that the advice actually sought had not been furnished, that is either by disclosing the opinion which would have been firstly in breach of the Tribunal's undertaking to the Department, and secondly, of the Government's privilege, or, by conveying in some other way the fact that it did not contain the advice actually sought. The latter was achieved by obtaining from the then Attorney General a letter stating that the advice actually sought had not been provided." And perhaps that minute could be put up. I don't know if it's possible to put paragraph 9 of the ruling, if it's of

assistance. Mr. McFadden, you have continued to work in the Attorney General's Office throughout all of this time?

A. Yes. Q. And you, presumably, would have been one of the persons, together with Mr. Gormley, responsible for drafting or at the very least, having an input into any letter from the Attorney General in relation to this issue, is that --

A. Yes, in relation to the opinion of the 9th? Q. Yes.

A. Well, as far as I am aware, certainly, yes. Q. And is it your position that no letter from the Attorney General has ever issued saying that the opinion of the 9th May of 1996 did not deal with the issue raised?

A. I certainly am unaware of any letter of that form. And in fact, Mr. Gormley and myself raised that matter specifically when it came to our attention, and we asked when was such a letter issued, for obvious reasons, because it was contrary to our position. Q. I think there was correspondence between the Chief State Solicitor's Office on behalf of the Attorney General's Office and the Tribunal on the -- following the ruling on the 25th February, there was correspondence on the 7th March, the 12th March, the 21st April, the 29th April, the 17th June, and the 1st July in the year 2008 alone. You may not have seen them in advance of them going out, but you are aware of the existence of that correspondence?

A. Yes, I have heard of that since, yes. Q. And I think in September of 2008, the Department put in its submissions, its written submissions in relation to the anticipated provisional findings that were due to come out in which this issue was also addressed at length by the Department in the course of those submissions, and I think while again you may not have seen them in advance, you are aware that that's the position?

A. Yes. Q. And you are aware also that the provisional findings of the Tribunal became -- were issued at the end of October of 2008, and I think without disclosing the contents of those provisional findings, it became clear that it was now going to be a serious matter to consider the waiver of privilege in relation to the opinion because of the view that the Tribunal had formed in relation to that opinion?

A. That's correct. Q. Mr. McFadden, I think you are aware that the State has been sued by a number of the unsuccessful applicants for this licence in the High Court of Ireland?

A. Yes, I am aware of that. Q. And while those proceedings have been at present dismissed, that dismissal is under appeal to the Supreme Court?

A. Yes, I am aware of that. I am not dealing with those proceedings. Q. But you are aware of it in a general way? CHAIRMAN: Is that Judge Gilligan's decision? MR. O'DONNELL: Judge Gilligan's decision, yes. Q. And I think you are cognisant of the fact that the waiver of privilege over any legal opinion is a matter of considerable gravity in any situation, is that correct?

A. Very much so, yes. Q. And can I suggest to you that that applies even more forcefully in circumstances where the State is embroiled in litigation of the type I have just described?

A. Yes, very much so. Q. And that it was a matter of considerable seriousness for the Government to decide to waive the privilege, and that it sought advice on whether it should do so before so doing so ultimately in early 2009?

A. That's correct. Q. And I think further correspondence ensued between the Tribunal and the Chief State Solicitor's Office on behalf of the Attorney General, again in relation to opinion and, more particularly, in relation to the letter, the phantom letter from the Attorney General's Office which was alleged to have issued saying that the opinion never dealt with the matter raised by Mr. Towey. You may again not have seen that correspondence, but are you aware that further correspondence took place on the 13th, the 18th, the 19th and the 31st March, 2009, you are aware of that?

A. I am aware there was correspondence, yes. Q. And it was only following the unwillingness of the Department to review its position in relation to that opinion and the effect of that opinion, that the grave step was taken by the State of calling Mr. Nesbitt to give evidence both in relation to his opinion and in relation -- sorry, the opinion -- sorry, the grave step was taken of suggesting to the Tribunal that Mr.

Nesbitt should be called in order to give evidence in relation to his opinion and in relation to oral advices given by him?

A. Yes. And as I say, I wasn't dealing with that directly. Q. But you are aware of the background?

A. Yes. Q. And at that stage, are you aware, Mr. McFadden, that it was the belief and the hope of the State that Mr. Nesbitt's evidence would be accepted, and that it would be unnecessary to call any other witness to establish that the opinion dealt with the question asked and that oral advices had also been given to the same effect?

A. Yes, I believe that's the position. Q. And that it was only -- sorry, I should say, I think in early 2009, I think it may have been February or March of 2009, you and Mr. Gormley had, in a minute, indicated that you had a recollection of oral advices being given in the meeting of the 23rd April, 1996?

A. Yes, we had a -- we recalled the matter being discussed at that consultation and no legal concerns being expressed by counsel. Q. But I think the view was taken that it was the fervent belief of the Department that the evidence of Mr. Nesbitt that he had given those oral advices and the evidence of Mr. Nesbitt in relation to his opinion, it was the fervent belief of the Department that that evidence would be accepted and that there be no need to call you or to call Mr. Gormley?

A. Yes, I believe that was the case. As I say, I wasn't particularly dealing with that, but I believe that was the case. Q. And it was only when the additional provisional findings made by the Tribunal, which again I do not wish to open, when those additional provisional findings made it clear that the evidence of Mr. Nesbitt was not accepted, that the decision was taken to ask the Tribunal that you and Mr. Gormley be called?

A. Yes, and also in relation to the issue as to whether or not the opinion dealt with the matter as well, yes. Q. And if your assertion in writing in July or September of 2002, and your face-to-face assertion in October of 2002, had been accepted by the Tribunal, there would be no need for Mr. Nesbitt to have given evidence and there would be no need for you or Mr. Gormley to have given evidence?

A. Well, yes, of course, if the -- I mean, what we are here dealing with is whether the opinion of the 9th May dealt with the request for advice and just the circumstances surrounding it, that's my understanding of why we are here. Q. You have not sought to withhold information in any way whatsoever from the Tribunal?

A. Well, on the contrary, I believe, and I hope we have done everything we can to assist the Tribunal.

MR. O'DONNELL: Thank you very much, Mr. McFadden. THE WITNESS WAS EXAMINED FURTHER BY MR. COUGHLAN: Q. MR. COUGHLAN: Just a few matters, Mr. McFadden, if I may. And I am sorry to have just uncovered that letter of the 16th September, 2002, and if you need further time to think about it or deal with it, off course it will be given.

But I think how this matter, and I think Mr. O'Callaghan is right, it's probably grown into a bigger issue now than it might have been at the time when the initial inquiries were being made about the question of Mr. Towey's minute of the 24th April, 1996. But, if we start with the letter on the 15th March. There had been a lot of dealings between the Tribunal and the Department, through its solicitor, in relation to the getting of documents, and a man called Mr. Hodson seemed to be the official who was dealing with Mr. Shaw in providing documentation to the Tribunal. Now, on the 15th March, 2002, Mr. Davis wrote to Mr. Shaw:- "Further to the transmission by you of certain documents previously withheld from the Tribunal on the grounds of privilege, I wish to refer to a letter dated the 24th April, 1996, from Fintan Towey to Messrs. Gormley and McFadden of the Office of the Attorney General, which I enclose for your convenience, and now request that you provide us with the following documents and/or information arising therefrom:- " -- all documents in the power, possession or procurement of the Department relating to the request for legal advice on the compatibility of changes in the Digifone Consortium with the ownership details contained in the original Digifone bid. " -- all documents in the power, possession or procurement of the Department bearing on the request for advice from the Office of the Attorney General on whether it would be preferable to seek warranties in

relation to both the beneficial ownership of Esat Digifone and the financial package for the project. " -- all documents containing or relating to the response and advice of the Office of the Attorney General on these points. " -- a narrative account of any response or advices of the Office of the Attorney General on these points which may have been given other than by way of written advice." Now, enclosed with that was Mr. Fintan Towey's letter or minute of the 24th April, and then that gave rise -- that was the first request for details of any advices other than written advices, do you see that?

A. Yes. Q. Now, that was sent to Mr. Shaw, who was acting on behalf of the Department and, I understand, liaising with the Office of the Attorney General in relation to matters also, is that correct?

A. Yes, I presume Mr. Shaw would have, yes, yes. Q. Now, in the first instance, the response was: "I refer to your minute of the 16th March, 2002." That should be the 15th March, in fact.

A. Sorry, which letter? Q. This is Mr. Shaw's response dated the 15th May. The next letter in the sequence, Mr. McFadden.

"I refer to your minute of the 16th March, 2002, which you may recall I had no record of receipt. "I now enclose herewith a reply that I have received from the Department of Public Enterprise for your attention. "I also enclose herewith reply received from Billy Riordan in response to your minute dated the 3rd May." We needn't concern ourselves with that. Now, this morning Mr. O'Callaghan opened Mr. Hodson's response, and I think all we need to go to is the final paragraph, it's the 13th May, 2002. "I have checked the files and have spoken to Fintan Towey on the questions raised in the Tribunal's letter. Mr. Towey does not recall any written response to his letter." That's Fintan Towey's response to Mr. Hodson. Now, that is the answer to our request for any written documentation, do you understand?

A. That's to the Department now? Q. Yes.

A. To the Department, yes. Q. This is what Fintan Towey had told Mr. Hodson.

A. But -- MR. O'DONNELL: Let him answer.

A. I am not qualifying, I am just clarifying. That's the response from the Department, aren't I correct in saying that? Q. Yes.

A. Not from the Office. MR. HOGAN: Mr. Chairman, I think in absolute fairness to the witness, the entirety of those -- MR. COUGHLAN: I intend to put it. Q. "And I" - that's Mr. Hodson - "have been unable to find a direct follow-up in the files other than legal advice from Richard Law Nesbitt dated 9th May, 1996, which refers to ownership issues." That's Mr. Hodson has found this. Now, bear in mind that Fintan Towey did not recall any written response to his letter, that's what he told Mr. Hodson, and that was what the Tribunal was informed.

A. Yes, but that letter is not from the Office of the Attorney General, is it? Q. I appreciate that, I appreciate that.

A. That's all I am getting at, because you are putting it to me. I mean, I didn't write this letter. Q. No, no. Now, but this is the information that was being conveyed to the Tribunal. Right?

A. Yes. Q. "Mr. Towey suggests that the matter raised in his letter of April, 1996, may have been subsequently pursued and dealt with in the context of the finalisation of provisions of the licence, in particular Article 8, and in the certification of ownership, which was obtained before the issue of the licence." Now, that is the first port of call, the information being conveyed to the Tribunal; that it may have been dealt with in the context of Article 8.

A. Yes. Q. Now, there is no information there being conveyed to the Tribunal that the opinion of the 9th May is a response to the, a written response to the letter of the 24th April, 1996, isn't that correct?

In fact, Mr. Towey is saying he can't remember any written response to his letter. MR. HOGAN: Again, sir -- A. I can't really comment on this. I didn't -- I had no input into this letter at all. MR.

O'DONNELL: He was examined about this previously and he said that he never saw the letter. A.

Sorry, what I am saying -- I had no input into the letter, that's what I am saying. Q. MR.

COUGHLAN: The only reason I ask you is because you agreed with Mr. O'Callaghan this morning that this was a statement by the Department that the opinion of the 9th May

answered the queries raised in the 24th April, 1996. MR. HOGAN: Sorry -- A. I think it was put to me, I am not sure what my answer was.

MR. HOGAN: -- before the witness answers the question, Chair, I do, with respect, have to record my objection to the way in which those questions are being put to the witness, because that entire paragraph is being deconstructed as if Mr. Towey does not recollect any answer whatsoever to the query raised in April 24th. That is, with great respect to Mr. Coughlan, that appears to be the way in which he is putting. But that, with respect, is an entirely false premise because there is a key word here, "Other than legal advice from Richard Law Nesbitt which refers to ownership issues," and goes on in that way. In my respectful submission, that is, with great respect to Mr. Coughlan, that is not -- that is putting the question on a false premise to this witness. MR.

O'CALLAGHAN: I agree. MR. COUGHLAN: I accept what My Friend says. I don't accept that I am putting it on that basis. Q. I am not -- I am asking you to say -- read it again. "I have checked the files and have spoken to Fintan Towey on the questions raised in the Tribunal's letter. Mr. Towey does not recall any written response to his

letter and I have been unable to find a direct follow-up in the files" - and this is Mr. Hodson saying - "other than legal advice from Richard Law Nesbitt, SC, dated 9 May, 1996, which refers to ownership issues." That's Mr. Hodson. And then, obviously, he raised the matter with Mr. Towey, because this is being conveyed. "Mr. Towey suggests that the matter raised in his letter of the 24 April, 1996, may have been subsequently pursued and dealt with in the context of the finalisation of provisions of the licence, in particular Article 8, and in the certification of ownership, which was obtained before issue of the licence." The only reason I raise it with you is because you agreed -- now, I appreciate that when somebody is in the witness-box, I am not suggesting that -- and something is put you, it's easy to agree on occasions -- that that is a statement by the Department that the opinion of the 9th May dealt with the minute of the 24th April, 1996?

A. I must say, I find it very difficult to comment on a letter that I had no input into whatsoever, and I am not sure why it's even being put to me. Q. It was put to you by Mr. O'Callaghan in the first instance.

A. Yes, and I am not sure -- I was slightly reluctant to answer it, I think, even from Mr. O'Callaghan.

Q. Now, it's important, because I just want you to realise this is the information which was first conveyed to the Tribunal about the minute of the 24th April, 1996. Now, on the 27th May, 2002, the Tribunal's understanding of

that particular response and the position of Mr. Towey is very clearly stated in paragraph 2:- "I note that Mr. Towey does not recall any written response to his letter. Having read the opinion of Mr. Nesbitt, dated the 9 May, 1996, it would appear that Senior Counsel did not address the specific questions raised by Mr. Towey in his letter (third paragraph)." So, that is the Tribunal writing to Mr. Shaw confirming its understanding of the information that had been conveyed to it by Mr. Hodson in that particular minute. Then -- MR. O'DONNELL: Sorry, sir, it's not actually confirming its

understanding. It's the first time in which it is suggested that the opinion doesn't deal with the matter. The first written communication from the Tribunal in which it says that the opinion doesn't deal with the matter is the letter of the 27th May, and that is responded to, I accept a little tardily, by the minute of the 3rd July, which is sent to them on the 30th September. Q. MR. COUGHLAN: "I note that Mr. Towey does not recall response in this 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 by Mr. Towey in his letter (third paragraph).

"One assumes, therefore, that a specific question to that effect was not formally raised by the Office of the Attorney General." And then it goes on to describe: "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 in the identity of 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 very much obliged to hear from you at your earliest convenience concerning the above matter." Now, the response which was prepared I think, which I will come to, that's Mr. O'Daly's minute, was prepared I think in June of that year, but wasn't transmitted to the Tribunal until the 30th September of that year. Now, on the 16th September, 2002, before it was received, the Tribunal wrote to Mr. Shaw once again as follows:-

"Dear Mr. Shaw, "I refer to recent correspondence, and I am writing to seek your assistance in connection with the enclosed document, i.e. letter dated 24th April, 1996, from the Department of Transport, Energy and Communications, Mr. Fintan Towey, to Messrs. McFadden and Gormley of the Office of the Attorney General. "You will recall previous contact between the Tribunal and your office in connection with the matter referred to in the second paragraph of this letter, namely the requirement for a legal opinion on the restructuring of the ownership of Esat Digifone, together with a number of other matters as set out in that paragraph. You will also recall that you were unable to identify any document specifically responding to the three queries raised in that paragraph." This is the second time now that the Tribunal has confirmed its view based on the information furnished to the Tribunal through Mr. Shaw by Mr. Hodson.

A. But what I don't understand is, as far as I am aware the Attorney General's Office made it absolutely clear that the opinion of the 9th May, as far as the Office of the Attorney General was concerned, dealt with the issue raised by Mr. Towey in his minute of the 24th. So, I am just a bit at pains to see this correspondence -- it is still our position that the opinion of the 9th May -- now, I accept that what has transpired during these sittings is there is

a more detailed examination of the surrounding circumstances. But the position of the Office has always been that the opinion of the 9th May dealt with the matter, and, as I say, that was an opinion that was sanctioned by the Attorney General. Q. Could we continue with the letter now for a moment?

A. Sorry, I am trying to be helpful, I mean, because I am not sure where this is going. Q. I think here, again, the Tribunal is making its position and understanding of the opinion clear, isn't that right?

A. Yes, yes, they are raising the issue again, yes. Q. This is the second time, for the second time.

"You will also recall that you were unable to identify any document specifically responding to the three queries raised in the paragraph. As the Tribunal sees this as a matter of some importance, I would be much obliged if you could arrange for the Tribunal to meet with Messrs. McFadden and Gormley of the Attorney General's Office with a view to ascertaining what advice, if any, whether oral or otherwise, was transmitted to the Department or to Mr. Fintan Towey in connection with this request." Now, this is the second request for details of whether advices other than written advices, in other words oral advices, were furnished either to the Department or, in this case, to Mr. Fintan Towey.

A. Can I just ask you in relation to that. At this stage had you received Mr. O'Daly's letter stating -- Q. No.

A. You hadn't. Okay. Q. Do you understand the sequence?

A. Yes. I apologise for my own loss of train of thought there. It's Mr. O'Daly's response that that letter indicates where the response to the request for advice contained -- Q. The Tribunal's letter seeking to know whether there was any oral advice given predated the Tribunal receiving Mr. O'Daly's response, which wasn't received until the 30th September?

A. Yes, I understand now. Q. So the Tribunal has now twice, you say that the first occasion was addressed to the Department where they sought whether advices other than written advices were given. Now there is a letter dated the 16th September, 2002, where the Tribunal is bringing to the attention of Mr. Shaw matters relating to the Attorney General's Office and specifically in relation to yourself and

Mr. Gormley and wanted to ascertain what advices, if any, whether oral or otherwise, was transmitted to the Department or to Mr. Fintan Towey in connection with this request. And it was in that regard that the meeting was suggested, do you understand?

A. And had you -- I am just trying to be, follow the -- had you Mr. O'Daly's response? Q. No.

A. So we were asked prior to Mr. O'Daly's response to go down? Q. Yes.

A. Yes. Q. This is a letter dated the 30th September -- sorry, I beg your pardon, the 30th September, 2002, from Mr. Shaw to the

Tribunal. "Dear John, "I refer to my letter to you dated 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 an important observation 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 documents furnished by the Office of the Attorney General and their observations thereon is what 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, 1996. In the event that the Tribunal wishes 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." So, here for the third time, the Tribunal is asking -- sorry, I beg your pardon, I beg your pardon -- the Tribunal, a response to the Tribunal enclosing Mr. O'Daly's minute informs the Tribunal that "The documentation furnished by the Office of the Attorney General and their observations thereon is what 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, 1996."

A. Yes, and I think, surely, that's a very fulsome response, because it actually refers -- I am just looking at Mr. O'Daly's -- the second page of his letter. And it says: "The following points are made in relation to the documents: Pages 1 and 2 of Mr. Richard Law Nesbitt's advices of 9/5/96 appear to deal with the matters raised in the Department's minute of the 24/4/96, and there is nothing on the file to suggest that the Department thought otherwise." So, that is clearly identifying the opinion of the 9th May, 1996, as being the place where the request for advice was dealt with. And, as I say, that was an opinion that was sanctioned by the Attorney General. So certainly in our office we would have regarded that as the advice. Q. But what has been conveyed to the Tribunal here by Mr. Shaw is that "The documentation furnished by the Office of the Attorney General and their observations thereon is what 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 on the 24th April, 1996."

The Tribunal had requested whether advices other than written advices, namely whether oral advices had been given, first of all, on the 15th March, 2002, and then the 16th September, 2002, isn't that correct?

A. Yes, but even when you were making those requests, you weren't even aware of the opinion of the 9th May, the position of the Attorney General's Office that the opinion of the 9th May dealt with the matter. You weren't even aware of that when you were making that request, is that correct? Q. That's right. The Tribunal had read the opinion and had conveyed its clear view of the opinion, isn't that right?

A. I didn't read that. I mean -- Q. Sorry. I'll bring you back.

A. It doesn't appear -- Q. 27th May, 2002, the second paragraph again:- "I note that Mr. Towey" -- the Tribunal's letter to Mr. Shaw dated the 27th May, 2002. "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 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."

A. Actually, can I just mention one thing there, please? Q. Yes.

A. Just I notice there it says: "One assumes, therefore, that a specific question to that effect was not formally raised by the Office of the Attorney General." Now, I presume Mr. O'Daly's response enclosed the request to Mr. Nesbitt for the advices in respect of -- Q. No, no, this isn't a criticism of you?

A. No, sorry, but I presume -- Q. This is raising a query?

A. Absolutely, but I am saying that the response from the Attorney General's Office clearly responded to that saying that the request for advice went out to counsel. Q. Yes, yes, we know that. This is a query. This is a query?

A. Oh, yes. Q. Do you understand?

A. Yes. Q. But the Tribunal is clearly setting out its understanding of the opinion, isn't that correct, having read it?

A. Yes, in the first part and then -- yes, I can see that interpretation, yes. Q. Now, -- and on the 16th September, when the request for the meeting was sent to Mr. Shaw, the Tribunal wanted to know what advices, if any, were given, whether oral or otherwise was transmitted to the Department or to Mr. Fintan Towey in connection with this request. So, what the Tribunal, in setting up the meeting, was looking for was clearly set out in the letter of the 16th September, isn't that right?

A. Yes. And you had the Attorney General's response to that letter prior -- Q. I have Mr. O'Daly's response under cover of Mr. Shaw's letter.

A. Yes, we read that. And you had that prior to the meeting? Q. Yes. Yes. In which Mr. Shaw's letter of the 30th September, 2002, in the final paragraph -- sorry, second paragraph:-

"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 the 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 advice of the 24th April, 1996. In the event that the Tribunal wishes any further clarification, or do wish to meet with Messrs. Gormley and McFadden, please let me know and I will make the appropriate arrangements forthwith."

A. Yes. Q. Now, Mr. O'Daly's response, which is attached to that, refers to -- this is, of course, a minute to Mr. Shaw which was transmitted to the Tribunal. And over on the second page it is stated:-

"That the following points were made in relation to the documents:- "I. Pages 1 and 2 of Mr. Law Nesbitt's advice on the 9th May, 1996, appear to deal with the matter 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." Now, it's entirely a matter for the Tribunal as to how it understands that particular item being put to you by Mr. O'Callaghan and Mr. Hogan, that that is a polite expression by Mr. O'Daly, and I know he expresses himself politely and you have given your view in relation to that. But what is absolutely -- sorry, then it goes on: "In relation to the draft letter sent by fax on the 30 April, 1996, the Department does not appear to have furnished this office with any reply received from Mr. O'Donnell or indicated whether there was one. "Article 8 of the proposed Esat licence which deals inter alia with the ownership of the licence was drafted by Mr. Bacon." Now, there is no reference there -- of course it was prepared before --

A. The meeting. Q. -- before the meeting and before the request for the meeting, do you understand?

A. No, I accept that. Q. And I don't know whether Mr. O'Daly had received the initial letter of the 15th March, 2002, but one would assume that for the purpose of responding, he would have had to

have possession of Mr. Hodson's minute? You'd have -- to respond you'd have to have the relevant correspondence, isn't that right?

A. Yes. Q. And can one assume that you must have had, if Mr. O'Daly was asking you for your assistance, that it would have been brought to your attention, Mr. Hodson's minute?

A. You put that to me yesterday, and -- Q. You can't recollect?

A. I can't. I certainly would have, in relation to the request for the advice that was Mr. Towey's request for advice, I clearly would have been asked to deal with that and to furnish, collate -- sorry, collate documents and to deal with how that request for advice was dealt with -- Q. Now, --

A. -- or responded to. Q. -- you have already testified that you did not, at that time, inform Mr. O'Daly of the oral advices?

A. Correct. Q. So, he wouldn't have been able to include them in the minute that he was sending to Mr. Shaw?

A. That's correct. Q. Now, if you come to the meeting on the 18th October. I'll just get the tab now. Tab 37. It is clear that the Tribunal, in arranging this meeting, wanted to know what written advices and what oral advices had been given, isn't that correct?

MR. O'CALLAGHAN: Chairman, can I just make a point in respect of that. I think Mr. Coughlan is now crossing a very important line from Tribunal counsel to Tribunal witness. If it is the case that the Tribunal is suggesting that at the meeting of the 18th October, 2002, the Tribunal raised questions as to whether or not oral advice was provided, well obviously that can only be done by evidence being given in respect of it.

MR. O'DONNELL: And it wasn't put to Mr. McFadden in examination-in-chief by Mr. Coughlan that anything Mr. McFadden said about his account of the meeting was wrong or that he was asked questions about whether oral advice was given.

MR. COUGHLAN: I am not suggesting for one moment that a question was asked. I am not suggesting -- MR. HOGAN: Mr. Chairman, just before Mr. Coughlan replies to that. Might I just add that there is a further reason why this line of examination is of critical importance to why we are here, because I will have a submission to make once Mr. McFadden concludes giving evidence, and I would expect that, and I am sure will be the case, and I am waiting and my client will be waiting eagerly to hear the way in which Mr. Coughlan deals with the meeting of October the 18th, 2002, with this witness, and in particular how the Tribunal's account of that particular meeting, I would expect, will be put fully to the witness in the light of

the cross-examination both by myself, Mr. O'Callaghan and Mr. O'Donnell, because, in my respectful submission, I think, as you know, Mr. Shipsey made a point on Thursday that those are questions that have become even louder in the course of the last three or four days. And in my respectful submission, it is now incumbent on Mr. Coughlan to put the Tribunal's account very squarely and fully to this witness, in particular a failure to do so, in my respectful submission, has huge implications for the way in which earlier witnesses, not least that of Mr. Nesbitt, has been dealt with both in the cross-examination last July and in other matters of which the Tribunal is fully aware.

CHAIRMAN: I accept that, Mr. Hogan.

Q. MR. COUGHLAN: I have accepted it, and accepted at all times your account of this particular meeting, isn't that correct?

A. Thank you, absolutely, yes. Q. And in fact, in your direct evidence you informed us that you did not give any information to the Tribunal about having furnished oral advices or Mr. Nesbitt having furnished oral advices at that meeting, isn't that correct?

A. I described my recollection of the meeting and how it developed or progressed. Q. Now, the next matter where the question of ownership arose in relation to -- sorry, just before I leave that there, I think in your account, or in your minute to the Attorney, I think you have described that -- sorry, I beg your pardon, it's on the screen. And you list who is there and then you

say: "The queries raised by the Tribunal and responded to by this Office were discussed. The position outlined in this Office's written response was confirmed by the undersigned and appeared to be accepted." That's your account of it?

A. That's my bona fide account of it, yes. Q. You described an exchange between Mr. Nesbitt and Mr. Healy, isn't that correct, this morning?

A. Yes. Q. And you described --

A. And yesterday. Q. Sorry, I beg your pardon.

A. Sorry, not yesterday, on Friday. Q. And you gave evidence of a colourful use of language in the course --

A. I mean, I didn't emphasise that I think, I hope you accept. Q. But from your account of the meeting and from the note which you describe as being a reasonable note of the meeting, or a reasonable --

A. It's my bona fide understanding of the meeting, yes. Q. That it was stated at the meeting, if this note which you accept as being correct. "The opinion does not deal with the queries raised, instead with future problems" -- sorry, I beg your pardon.

A. Sorry, yes, this is Mr. Davis's note. Q. Yes. You say that the: "Opinion does not deal with query raised" - sorry - "JH: Opinion does not deal with the query raised -- deals instead with future problems." Isn't that correct?

A. I'd prefer to get that. Yes, that's after JH, "Opinion does not deal with query raised -- deals instead with future problems." Q. Yes. Now, that is a statement made after Mr. O'Daly's minute was received, isn't that correct?

A. Yes. Q. Now, the next matter in the sequence is that on the 16th December, 2002, the Tribunal wrote to the Attorney General. "I am writing to you in my capacity as Solicitor to the Tribunal of Inquiry appointed by the above Order of the Oireachtas. I enclose herewith a copy extract from an article which appeared in yesterday's edition of the Sunday Business Post. The relevant portion of the article reads as follows:- "The Tribunal is expected to hear that just hours before the announcement was made awarding the licence to Esat Digifone, senior civil servants sought advice from the Office of the Attorney General on whether consortia should be permitted to alter the makeup of their investors. The advice they received was that a consortia could, but only for a shareholding of 20% or less. "Legal sources believe this advice may become a source of contention at the Inquiry. However, it is understood that in recent months the State had been examining the basis on which advice was given in order to establish whether it could stand up to close scrutiny. The matter is now causing considerable anxiety in Government circles.'

"The Tribunal wishes to know whether the above extract is correct, in particular the Tribunal wishes to establish whether the following statements of fact are correct:- "1. That 'Just hours before the announcement was made to awarding the licence to Esat Digifone, senior civil servants sought advice from the Office of the Attorney General on whether the consortia should be permitted to alter the makeup of their investors.' "2. That the 'The advice that they received was that consortia could, but only for a shareholding of 20% or less.' "3. That "In recent months the State had been examining the basis on which advice was given.' "If the above statements or any one of them are correct, the Tribunal would be anxious to obtain a narrative account setting out all of the information available regarding the matters and, in particular, the: - "a. the identity of all civil servants who sought advice from the Office of the Attorney General; "b. precisely when the advice was sought, and in what circumstances; "c. the identity of the officials (or counsel retained by the Attorney General who provided such advice;

"d. whether such advice was furnished orally or in writing; "e. the basis on which the advice was given; "f. all the information made available to the Attorney General in connection with the above request for advice, if any. "The Tribunal would also be very much obliged if you could provide the Tribunal with copies of all documents in your power, possession or procurement which touches or concerns these matters, insofar as it is confirmed that they are factually correct. "Your request for assistance has been made in the course of the investigative phase." The usual phase. Now, a response was received, and as you have given in evidence, you would supply the information to

enable us --

A. Can you just refer me to the tab, because this is the Attorney General's letter? Q. Sorry, I beg your pardon. 39. The next tab, 39.

A. I explained that that letter was the Attorney General himself was involved in it, in the response to that, letter obviously, because it was a serious -- it raised serious issues. Q. Yes. Now, the matters that were raised in the newspaper article indicated that civil servants had sought advice from the Office of the Attorney General as to whether the consortia should be permitted to alter the makeup of their investors.

A. That's paragraph -- Q. Paragraph 1.

A. Yes. Q. And the second one is that they received advice that the consortia could, which is, you say, advice they did receive, that they could change --

A. Yes, but that was not given hours before the grant of the licence. Q. Yes. Well, we can come back to that, but just would you leave it aside for one moment while I ask this.

A. Yes. Q. They did seek -- advice was sought whether they could change -- could be permitted to alter the makeup of their investors, isn't that correct? That was effectively what the letter of the 24th of September was asking?

A. Correct, not hours beforehand. Certainly the advice which it is suggested was given, was never given. Q. I am going to come along now. The advice was received that the consortia could. Now, the advice was given that the consortia could change --

A. No, sorry, the advice that is quoted in the newspaper article. Q. I am going to -- but advice was given that the consortia could, isn't that right?

A. Sorry, Mr. Coughlan, the Attorney General was dealing with a newspaper report that the Tribunal had queried the accuracy of the report. That's what was dealt with. And it was dealt with in quite a painstaking way, in the sense that everything -- the file was checked and there were discussions in relation to it. It was a detailed examination dealing with a press report, which I think in fact goes on to say that this was a grave matter that was of concern, I am not sure whether it was our office. It was incorrect, seriously incorrect. And the Attorney dealt with that in his response. I mean, the letter was treated -- it was not dealing, and I don't think you are suggesting that this was a continuation of earlier correspondence about the opinion of the 9th May? Q. No, I am not.

A. That's all I am clarifying. Q. I am saying that the advice that Fintan Towey sought initially was: Can the consortium change its makeup? Isn't that --

A. Correct. Q. And can the consortium change its makeup to the extent that they would be a 37.5:37.5:25 --

A. Yes, equity investors, yes. Q. That is what he was seeking advice on?

A. Yes, the request of the 24th, yes. Q. And on your recollection of events, on the 23rd he was told that they could?

A. Well, I expressed to you what took place at that meeting, how counsel dealt with the issue as was put forward by -- as explained by Mr. Towey. He explained the issues, and I told you what the views expressed by Mr. Nesbitt were. Q. But you were in no doubt at the meeting -- you say, your recollection is that you have no doubt that on the 23rd that the information was conveyed to you and to Mr. Towey that the consortium could alter its makeup, isn't that right?

A. I think what I said was that Mr. Nesbitt set out the view that the only changes of ownership which the Minister could be legitimately concerned with would be changes of ownership which would have compromised the delivery of the GSM service as outlined in the business plan. And I then mentioned that specifically in respect of IIU, the IIU issue, he stated that the only grounds which he felt, which he was -- the only grounds that he said the Minister could object to the involvement of IIU were -- sorry, was on public, the only grounds were, sorry, on public policy grounds, and he gave the example if the

institution had connections with crime. And that's my recollection of the meeting which I have described, I think, now a number of times. Q. But it was put to you by Mr. O'Donnell that the information, or the gist of the advices must have been before the opinion was received because -- I haven't got his exact words, but that Mr. Towey confirmed, when he said "Confirmed" that he must have received the opinion that it confirmed --

A. Yes. Well, I mean, I said that myself, that I understood the opinion, having regard to the views, or sorry, I was aware that Mr. Nesbitt's views as discussed -- as indicated at the meeting on the 23rd, and I read the opinion of the 9th May. Obviously I was aware of the views he had expressed at that meeting. Q. But you were, in your own mind, satisfied on the 23rd, from what you heard --

A. I was certainly of the view that there didn't appear to be -- that Mr. Nesbitt had a clear view, certainly as regards IIU he had a very clear view, and then he mentioned the general criterion as regards change of ownership. He mentioned that general criterion. And that's when I saw that again, I saw that again, that was the basis of his opinion on the 9th May. Q. But you are satisfied that he had a very clear view that there was no impediment to IIU, in other words --

A. To IIU, he expressed a very clear view, and he expressed the criterion as regards change of ownership generally. Q. And that was a response to the query that was raised by Mr. Fintan Towey when he explained the letter from Mr. O'Connell and the information --

A. Well, he went through the documentation and outlined orally the issue and, as I said, I hadn't the documentation in front of me and I was listening to that conversation, and I think Mr. Gormley, as I said, involved and engaged himself. I possibly made some comments, I don't -- but he had a clear view, certainly, on the involvement of IIU. But again, I'd say a formal request for advice came in on the 24th. That was a written request for advice, and the written response to it, as I say, is the 9th May. That's --

Q. But the statement, at paragraph 2, that "There were no advices on this Office's file of any advice of the type mentioned in the extract or of any note of same having been given by the Attorney General or any other person in his Office", when -- and perhaps this will explain the understanding of the Tribunal in relation to this.

A. Yes. Q. That what had happened in the course of this competition was that an application or a bid came in from a consortium and it had indicated that it was made up of 40% Telenor, 40% Communicorp, it would have been at that time --

A. Was it 50% each initially, I think, and then it was set out in the application, if I am correct, that 20% would be placed leading up to the grant -- Q. I will rephrase it. The intended licensee was described as being Telenor, IIU and -- sorry, I beg your pardon -- Telenor, Communicorp and four institutional investors, that was the intended licensee?

A. Yes. Q. And those institutional investors were named, isn't that right?

A. As probable investors, and that was in the Esat Digifone application, and that's the document that was presented at -- that was the document, as I said, that was opened. I am not sure, I am using the word "Opened," that was the document that Mr. Towey had read from, I presume. He had documents in front of him and, as I say, I hadn't those documents. I was listening to what he was saying. Q. And the Department, before the grant of the licence, permitted a change in the consortium that had applied a change -- sorry, I beg your pardon -- a change in the proposed licensee?

A. Sorry, I don't -- the question Mr. Towey asked was whether the shareholdings indicated in the, in Mr. O'Connell's letter, where that indicated a change in the beneficial ownership as set out in the Esat Digifone application. And the application set out, my recollection is as I indicated, that there were originally -- I mean, there were two joint venturers, principal joint venturers: Esat and Communicorp and Telenor, and as I have indicated, that there was going to be, leading up -- in other words, prior to the grant there would be four -- sorry, 20% of the shareholding would be taken up by four identified financial -- but I mean, it was basically equity investment finance. Q. I understand your

point on that.

A. And then at that -- what Mr. -- what William Fry and Co.'s letter indicated, that that 20% equity finance was now held by a company called IIU, I think it actually was held by IIU. And the question, then, was: Was that different? Did that indicate an alteration of concern, of legal concern from that set out in the application? And Mr. Nesbitt's view was that, as regards the involvement of IIU as effectively being, representing the equity finance, or financial institution that was there, was that a material change? Now, there were other changes: There was the percentage changes as well, and it's in that context, when it was raised orally, that he made the views known which I have said to you, or which I told you about. Q. So, the query was whether the consortia should be permitted to alter the makeup of their investors, or words to that effect, would you agree?

A. He asked whether it disclosed a change in -- this is the letter of the 24th? MR. O'DONNELL: It's Tab 11.

A. Yes. "...in particular the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed." And that was their concern. And it related around changes in ownership, obviously, and particularly those identified in William Fry and Co.'s letter. And, as I say, when the matter was discussed orally, the views expressed by Mr. Nesbitt were, as I said, the general criterion which again is reflected in the opinion of the 9th, and as I said, particularly in relation to the IIU involvement, he indicated that because of the nature of that equity holding and having regard to, I suppose, the application of Esat where it had flagged the involvement of financial institutions, that that was not a material change, and having regard to his views on ownership generally, that wouldn't be an inconsistent view, I suggest. Q. MR. COUGHLAN: But what was raised at the meeting was IIU having now an interest in, or a beneficial interest as investors, isn't that right?

A. Yes, it was certainly -- I mean, with reference to, I presume it was Mr. -- I think Regina Finn had done as well the diagram, but clearly, yes, they were identified as the 20% -- 25% in fact, I think they were, in the correspondence, William Fry's correspondence. Q. And the advice, as you understood it, was that there was no bar, or it was permissible for IIU to be an investor?

A. That was the view expressed at the meeting by, and as I said, subject to the, this, he mentioned the public policy objection. And again, I'd emphasise, that wasn't -- I mean, the reality of the situation was that the joint venturers were still involved anyway, so I mean, you were basically talking about the equity finance portion. And as regards the small changes in holdings, the 37.5, he didn't seem to -- that didn't seem to raise any alarm bells because he had a particular view. But the IIU involvement is possibly, I think, a discrete matter anyway because it was, it had to be looked at in the context of the application form, and there was the -- there were going to be financial institutions involved, or that had been flagged in some way, that there probably be 20% placed leading up, or prior to the grant of the licence. And as I say, it was -- as I understood it, that was now identified as IIU, and that's what Mr. Towey presented to the meeting. Q. But they had been identified -- sorry, I'll go back. Now, what did transpire was that there was a change in the ownership situation and it was to the extent of 20% interest on the part of IIU -- sorry, 25%, which was then as a result of, Mr. O'Donnell has informed us, was a policy decision by the Department, required to be 20%, isn't that right?

A. Yes. Q. Mr. Loughrey. Now, looking at the matter which appeared in the newspaper article and which the Tribunal sought assistance on, the Tribunal's understanding was that what had been permitted was a change in the consortia, but that it could only be for 20%. That was the Tribunal's understanding as matters unfolded. Do you understand? I want to explain something to you. And the Tribunal, looking at paragraph 2 of the letter of the 20th December, 2002, from the Tribunal to the Attorney General, Tab 39, dealing with the particular matters which were raised in the article, "That

there is no copy on this office file of any advices of the type mentioned in the extract or any note of same having been given by the Attorney General or any other person in the Office." MR. O'DONNELL: Sorry, sir, I am not sure why this is being raised again, because again the context of this letter is critical. The letter says: "It is understood the announcement" - which is what the article appears to refer to on one view - "was made on the 25th October." And so paragraph 2 says: "There is no copy on this Office's file of any advice of the type mentioned in the extract or any notes of same having given by the Attorney General or any other person in this office." But it must be read in the context of an article about what happened in the hours leading up to the announcement of the winning of the competition on the 25th October. Separately at paragraph 3 is dealt with the response to the 24th April of 1996. But I really don't understand -- this witness has said on a number of occasions that this letter was responding to a particular query not from the Tribunal setting out the Tribunal's own view, but rather a query from the Tribunal saying, "Here is a newspaper article which refers to something which is alleged to have happened in the hours going up to the award, and that could be the 25th October.

What do you have to say?" And I just don't understand why more time is being expended, shall I say, on this issue when he has answered it at length in examination-in-chief and at hopefully lesser length in cross-examination. It doesn't appear to be a matter that arises out of cross-examination, and I am just not clear why it's being raised again with him. He has answered it already even in this re-examination, so I am hesitant to waste more time by standing up and objecting, but I don't see what else I can do.

MR. HOGAN: Again, Mr. Chairman, before Mr. Coughlan comes in, I would, with respect, wish to respectfully remind the Tribunal of the submission I made some five or ten minutes ago, and it's a matter which I fear I have to say, Mr. Coughlan has moved from with some speed with regard to the events of October the 18th, 2002. I am listening very carefully to this re-examination. I do not -- I have to confess, with great respect to Mr. Coughlan, a very esteemed colleague, I don't quite understand the line that has been taken, and I would wish, with respect, that it would be put directly to the witness. Is it being suggested (A), that the Tribunal now accept that the Attorney General's Office at all times understood the advice of the 9th May, 1996, to include the change of ownership issue, and are then wishing to explain how they came to a particular position themselves, or, are they disputing Mr. McFadden's account? Now, as I say, I have listened very carefully to the re-examination, and I do suggest this is a matter that ought to be put -- it's of

such critical importance -- it's a matter that ought to be put directly to the witness. I am sure it will be put, but we are waiting for it to be put, and I think it would be very helpful to all the parties if Mr. Coughlan was to make the Tribunal's position absolutely clear on this critical point. And again, Mr. Chairman, I respectfully remind you that when this re-examination is concluded, I will have a submission to make.

Q. MR. COUGHLAN: The Tribunal has made no finding of fact, as I understand it, at the moment, sir, of any sort. This is all part of the Tribunal's inquiries. I am explaining, I am explaining to Mr. McFadden the understanding that "There is no copy on this Office's file of any advice of the type mentioned in the extract of the note of same having been given by the Attorney General or any other person in this office" has been put to other witnesses as being the Tribunal's understanding that the letter from the Attorney General, that the letter from the Attorney General confirmed that no advice had been given --

A. I have to go back, Mr. Coughlan, just purely because I can contextualise it. That letter was very much prepared to respond to the Tribunal's queries in respect of the newspaper article. That's what the focus was. Because if you actually read the whole of the article, in fact it was quite inaccurate, to put it conservatively, and that was the focus. But, however, when the query arrived in from the Tribunal, it appeared to be -- if it was correct, it would have raised, obviously, matters that would have required a response. But, in fact, the accuracy of that

report, it proved to be quite inaccurate, significantly, and that was the focus of the Attorney General. Q. I see. I am only raising with you, it does indicate what transpired in this particular process, that when the licence was granted, IIU had 20% of the shareholding, isn't that correct?

A. Yes, but I really -- I have to respond to that because the focus of the Attorney General in responding to that, I have no doubt, is whether or not what is contained in the newspaper article is correct. That was the focus. Q. Sorry, what I am trying to draw to your attention is that many elements of what was stated in the article were consistent with what had occurred?

A. I would not regard that as an accurate article. The content of that article is -- perhaps aspects of it. As I say, I'd need to go back in detail, but the focus of the Attorney General was dealing with this alleged advice that was furnished. I can read it out. I mean, it's probably no harm to actually read it out.

Q. I am just indicating to you that the Tribunal's understanding of that was the understanding which the Tribunal expressed obiter, not in respect of the ruling which was specifically in relation to whether counsel had waived privilege? MR. O'DONNELL: Sir, that's never been said in correspondence before.

There has been a considerable amount of correspondence about this in which, and I don't want to delay the Tribunal further, and it's not appropriate in any event to deal with it with this witness,

but it is not the case that the Tribunal have in some way sought to insist that the letter of the 20th December constitutes a letter that says the opinion didn't deal with the issue raised. How could it?

Because paragraph 3 makes it clear that the opinion did deal, as far as the Attorney General was concerned, with the opinion raised. And your own ruling says: "It was clear to the Tribunal that no opinion addressed the issue raised in the Department's letter of the 27th April, 1996." And you then go on to conclude that: "A letter had been obtained from the Attorney General stating that the advice

actually sought had not been provided." And we say, sir, that is an error on the face of the record, because it's on the record of the Tribunal, it's on the website, it was there this morning when we

downloaded it, and that it's an error that we have been asking you to correct, with respect, since the ruling was made, and which I understand Mr. O'Callaghan had also been asking you to respect. And to

now suggest in some way that because there was no file note about advice given in the hours leading up to the award of the winning of the competition announcement in the 25th October, 1995, is, I would suggest, misleading in the extreme. I am not saying Mr. Coughlan is doing it deliberately. I certainly

wouldn't believe that of him. But it's certainly misleading in the extreme to say that that's the defence for your ruling, that a letter has been obtained from the Attorney General saying the opinion did not deal with the request for information. And I will be

asking you to deal with this at the end of -- CHAIRMAN: Your client indicated last week that there may be aspects of this -- part of the concluding Tribunal inquiries that in justice I may be required to reappraise. I am not going to do it piecemeal, as I said last week. MR. O'DONNELL: No, but you

have a ruling, sir, this is different because it's a public ruling. I appreciate that where you have made provisional findings, they are provisional and they are to some extent in flux and we can make

submissions in relation to that orally and in writing in due course, but this isn't a provisional finding. This is an actual written finding, and it's a finding that the Attorney General of this State wrote a letter telling the Tribunal something which simply did not happen. It's saying that the Tribunal received a letter from the

Attorney General saying the opinion did not deal with the issue raised, whereas in fact we know that on two occasions in writing and on one occasion orally, the Tribunal were told that the opinion did deal with it. And I think, sir, that that will have to be dealt with, with the greatest of respect now, and by "now" I

mean at the conclusion of this evidence, rather than simply waiting for the conclusion of the Tribunal and the conclusion of submissions and additional provisional findings. Because that's a ruling that you have made now rather than a provisional ruling, if I can put it that way. It's a statement of fact. And so, Mr.

Coughlan has raised with this witness, and as I say, I don't see why we're elongating the proceedings by dealing

with this matter yet again with this witness. But it is a matter that I have to draw to your attention, and I will be asking you to make a ruling on it. CHAIRMAN: Well, I will be addressing sooner rather than

later, Mr. O'Donnell, but I am conscious Mr. McFadden has been here since two o'clock, and I am very anxious that if we can we achieve closure in that context at least. Q. MR. COUGHLAN: Now, just on

the question of whether oral advices, when they were given, if they were given, this is a question of recollection, and you say that Mr. Towey would have been present on the 23rd when the matter was fully discussed?

A. Yes. Q. So, like you, when the written opinion was received, he would have been au fait with the thinking of counsel in relation to the matter?

A. He would have been aware of the views that counsel had expressed at that meeting, yes. Q. Now, I would just ask you to look at -- this is, we have had it in evidence, it's Mr. Owen O'Connell's note, Book 49, 126 A, of a telephone conversation he had with Mr. Towey on the 29th. MR.

O'DONNELL: This is new -- it's new to this witness at this stage. It wasn't something that was raised with him in examination-in-chief. It wasn't something that arose out of something that was put to him in cross-examination, and it seems to me, sir, that it's a breach of the normal rules of re-examination, which is that you don't introduce new evidence, and I just simply don't know why this is being raised with this witness where he is being asked to comment on a letter that he hasn't seen before, that it's never been suggested that he saw before, that it doesn't appear to me wasn't in the bible of documents that were supplied to us. And why is this issue now being raised at this stage? And I am objecting to it on behalf of the Department, this line of questioning being pursued. MR. HOGAN: Mr. Chairman, I would echo what Mr. O'Donnell has just said, and I would add this again, at the risk of labouring the point, but if I may make this point very directly, sir, because it is a matter of absolute critical importance. It's absolutely incumbent on Mr. Coughlan to put the case of the Tribunal directly, squarely, pellucidly, unambiguously without any questions of obfuscation at all. And, in my respectful submission, Mr. Coughlan, is now very late in the day, it is twenty-five past four, this witness has been in the witness-box for the best part of five hours and, in my respectful submission, it is, in fairness to this witness and in fairness to all the other parties, it's absolutely critical that those points are put rather than a new issue, which can only be as Mr. O'Donnell has indicated, of the most tangential relevance, if relevance at all, being put to him now at this stage in re-examination, when none of the other parties have had an opportunity of dealing with it.

MR. O'CALLAGHAN: Can I say as well, Chairman, just to say in terms of I agree with Mr. Hogan and Mr. O'Donnell. This document does not arise out of any cross-examination that was conducted. There is an element of desperation as to why documents like this are being put in at this stage. This evidence is given, the clearest evidence of any witness I have ever heard at this Tribunal, and his evidence is unconvertible and must be accepted by the Tribunal, and we shouldn't be trying to pull rabbits out of the hat to try and change the clear evidence he has given over the past three days. MR. O'DONNELL:

This isn't even -- this document isn't a memorandum compiled by Mr. Towey. It's a memorandum compiled by Mr. Owen O'Connell of a telephone conversation that he had with Mr. Towey, so it's his recollection of what Mr. Towey told him. And how is that a relevant matter to put to a witness who wasn't there for this conversation? How is duirt ban liom, duirt ban leith relevant for you, sir, and particularly relevant for a witness from the Attorney General's Office? I just don't see, so I am objecting, renewing my objection. MR. COUGHLAN: Just in response to Mr. Hogan. The Tribunal doesn't have a position and doesn't put a position, it's an inquiry. MR. O'DONNELL: It does have a position, it's told us its position is that it doesn't believe that the opinion dealt

with the issue raised. It can't now say it doesn't have a position. It does. It's made it clear. MR. COUGHLAN: Sir, the Tribunal does not have a position. It inquires. It is ultimately for you to report in relation to matters, sir. So there was no question of me putting a Tribunal position. The Tribunal examines the documents, examines the witnesses, and is not in the business of having a case to make against anybody. The only reason I wanted to bring this to the attention, and it will be the last matter that I bring to the attention, sir, is simply that Mr. Towey, and I could go through Mr. Towey's whole evidence in relation to the matter -- MR. O'DONNELL: I am asking you to rule on my objection. CHAIRMAN: I have to hear the response to it first. MR. COUGHLAN: Mr. Towey, in his

evidence, continued to make inquiries through Mr. Owen O'Connell of the makeup of the consortium. And he was doing it as late as the 30th -- 29th April, into May, and this was all after the 23rd April. Q. It's just, could your recollection as to when -- MR. SHIPSEY: Sir, you have said you were going to hear Mr. Coughlan in response. Mr. Coughlan is now ignoring your ruling, or whether you are going to make a ruling, and he is putting it to the witness looking for the witness's response. With respect, Mr. Coughlan has to deal with the objections that have been made, and he has got to make those submissions to you, sir, and you have got to rule on it. It's not for Mr. McFadden. MR. O'DONNELL: And, sir, if it's going to be put to this witness on the basis of could his recollection be mistaken? There is no contrary evidence that was put by Mr. Coughlan in examination-in-chief and no contrary evidence put by any of the other parties who cross-examined Mr. McFadden about his account of the meeting of the 23rd April. And so, to simply put to him now in re-examination, "Could your recollection be mistaken?" We are going to be back into the doubts about credibility which were slipped in at the last moment against Mr. Nesbitt, and I am objecting, I am objecting twice-fold, if that is what is now going to be put to Mr. McFadden, because we have been through all that. MR. COUGHLAN: I wasn't going to put it to Mr. McFadden. CHAIRMAN: What's the end product of this document in any event? MR. COUGHLAN: The end product of this document is simply that Mr. Towey made, was continuing to make inquiries about ownership after the 23rd. It's just to know when the information was conveyed. CHAIRMAN: Well, on a basis of it being limited to that and being the final question, I will allow it. Q. MR. COUGHLAN: Were you aware that Mr. Towey continued, after the 23rd, to make inquiries? MR. O'DONNELL: Sir, that doesn't say that he continued to make inquiries. It simply doesn't say that, and this witness is now being misled. He didn't -- Mr. Towey did not continue to make inquiries. And if it's being put to him that this document says he did, it's misleading. MR. COUGHLAN: Well, Mr. O'Donnell, I am not saying this document, I am saying he continued to make inquiries. Mr. O'Donnell knows he did. And simply, he recorded, on the 29th April, 1996 -- MR. O'DONNELL: I am objecting to this document going in. MR. COUGHLAN: Well, then, I won't -- CHAIRMAN: Just in the generic form. MR. COUGHLAN: Yes, I will put it in generic form. Q. He is informing Mr. Owen O'Connell that "the question is whether the company to be licensed is the same as the company that applied and has to be assured from a legal perspective. Haven't reached a decision as to whether there is any difficulty or anything they want done differently." A. Sorry, you are asking me? Q. This is just to inquire about the certainty of your recollection of the 23rd? A. I mean, I have, on a number of occasions, indicated, I hope clearly, what took place on the 23rd, and as you are aware, Mr. Gormley will be giving his recollection of that. My recollection, it happened over -- at that meeting and I have a clear recollection of it. And I have indicated what that is a number of times, in fact. MR. COUGHLAN: Thank you very much. CHAIRMAN: Now, Mr. McFadden, just as regards your recollection of the meeting with the Tribunal, you hadn't had it drawn to your attention the letter that was written to Mr. Shaw seeking to set up the meeting and mentioning the question of oral advices, or am I correct in that? A. At this remove, I haven't a clear recollection, Mr. Chairman, but as I said, the way that meeting unfolded, the issue of the surrounding circumstances in which the leading up to the obtaining of the opinion of the 9th May, that never became an issue at the meeting, as I explained. CHAIRMAN: I have noted your evidence on that. Thank you for your attendance on these last several days, particularly on this rather long day. We have Mr. Gormley tomorrow, when we will perhaps be a little less tired. Well, if you have a submission, perhaps it's preferable I hear it at the start of tomorrow. I intend to sit at half ten to try to maximise the time.

THE TRIBUNAL ADJOURNED UNTIL TUESDAY, THE 23RD OF MARCH, 2010, AT 10.30

A.M..