

THE TRIBUNAL RESUMED ON THE 23RD MARCH 2010 AS FOLLOWS:

CHAIRMAN: Mr. Hogan, I think you had indicated you might wish to make some observations before we proceed further.

MR. HOGAN: Certainly, Mr. Chairman, I am very grateful to you, sir, for providing me with the opportunity to do so.

In my submission, sir, there are certain consequences which flow ineluctably from the failure of the Tribunal to put key questions to Mr. McFadden in the witness box yesterday.

Those questions were clearly flagged by Mr. Shipsey in his opening and indeed by me on a number of occasions during the course of the re-examination yesterday, and indeed some of my colleagues, Mr. O'Donnell and Mr. O'Callaghan have also traversed this territory.

And I know that Mr. Coughlan said that the Tribunal doesn't make any case, and the normal rule, so to speak, in terms of putting cases don't apply to the Tribunal. In my respectful submission that is, certainly in this context and in this mini module such as we are conducting here, and in the light of the Tribunal 's provisional findings, I am sorry to have to say that that is a pure fiction. It must be recalled that the Tribunal has been given enormous powers by both Houses of the Oireachtas. It's elementary that those powers, very far reaching as they have been

granted in the public interest, have to be exercised in a constitutional fashion and with appropriate fairness to the witnesses and to the people who are likely to be affected by it.

And that, in my respectful submission, is all the more true given the nature of the provisional findings that have been made. Now, I know that there is a sort of a code here that I can't dwell on the provisional findings, and it's not my intention to visit them in any way, but I think that without saying any further or going any further, the Tribunal will be well aware what I am driving at.

And really what emerges from the failure on the part of the Tribunal to challenge Mr. McFadden's evidence and indeed, as I understand what Mr. Coughlan said yesterday, was to accept it in substantial -- substantially accept it, two things follow:

First is, is that it is now clear beyond per adventure, beyond any doubt whatsoever that the State had legal advice available to it in May of 1996 prior to the award of the licence regarding the reconfiguration of the consortium, the change of ownership issue. And may I say, sir, that it doesn't matter whether that was good advice, bad advice or indifferent advice. It doesn't matter whether the Tribunal would have given different advice, whether other lawyers

would have given different advice or whether the advice should have been set out at greater length. All of those issues are totally irrelevant to the inquiry which the Tribunal has to conduct. All that matters and all that could be relevant is whether the State had legal advice available to it in May 1996.

and, as I understand the line of examination pursued by Mr. Coughlan with the witness, both in terms of the things that he did say and the things that he didn't say, it has to be accepted, sir, that there was such advice available.

And may I add in passing, it doesn't greatly matter whether that advice was given orally or whether it was given in writing. The fact is it was given. And, as I understand, what Mr. Coughlan spent a great deal of time over the last few days pursuing with Mr. McFadden was the question as to whether or not oral advice was given by Mr. Nesbitt, when it was given, whether that fact was communicated to the Tribunal and Tribunal counsel at various stages. In my respectful submission, that is, pardon me for resorting to colloquialism in these hallowed halls, sir, but that is a total red herring. It doesn't matter whether Mr. Nesbitt gave advice orally on the 22nd, the 23rd or the 24th April, or whether he was totally mistaken in his recollection, or whether in fact he did give it but gave it on the 14th May.

All of that is quite irrelevant. What counts and what is beyond controversy now is that advice was given on the 9th May and that was accepted by the Attorney General of the day. So that's the first thing that must follow, I say.

The second thing is this, is that it is also clear now that the Tribunal legal team and the Tribunal was apprised of this in October 2002. That account has not been challenged. There was an explanation given at the time by Mr. McFadden, indeed by Mr. Nesbitt at the meeting in October 2002 that such advice was given and they explained how they gave that advice. Now, of course, the Tribunal would have been perfectly entitled to say well we are not sure about this or we must investigate this further. But what is, I have to say, sir, a very surprising turn of events was that for eight years essentially, or seven, depending on your perspective, at least for a very considerable period of time the parties other than the Tribunal were under the impression that there was no such advice and that this issue had -- the change of ownership had not been satisfactorily addressed by the Attorney General. And that led, I have to say, sir, to a whole line of inquiry culminating in what amounts to this mini module both in terms of June and July 2009 and March 2010 being conducted essentially by reason of a series of false

premises, and the false premises, it has to be said, sir,  
in the light of the account given by Mr. McFadden, is this:  
That the Opening Statement in December 2002 saying that  
there was no advice which dealt with the change of  
ownership issue; there was the assurances given to various  
witnesses recollecting, in particular I think Mr. Loughrey  
on the first occasion in February 2003, where the  
transcript seems to suggest at least that he was reassured  
that there was no advice which dealt with it and that the  
Attorney General's letters of December 2002 and January  
2003 confirmed this fact; you have most fundamentally of  
all the cross-examination last July of Mr. Nesbitt. And I  
am only going to make just -- open this very briefly, sir,  
and it's the only passage I am going to open, but it's from  
Day 369 at pages 48 and 49, questions 115 onwards.

And question 115 -- this is Mr. Coughlan with Mr. Nesbitt.

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

Answer: Well, whatever happened, happened.

You know, I don't think it's right I should opine

upon it."

And then a little further on, at question 117, Mr. Coughlan says:

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

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

Question: I asked you a question you understand that you are asking the Tribunal to accept that your evidence is credible?

Answer: Yes.

Question: Just to join issue, we are professional.

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

Question: Thus, just to join issue, just to enable the Tribunal deal with the matter, I have to put it you, I have just joined the issue with you, I have

to put it to you that your evidence isn't credible  
in that respect.

Answer: In which?

Question: Is not credible, yes.

Answer: Well I haven't heard anyone suggest that  
these events didn't happen in the way that I've  
described them."

Now, sir, I have to say, with great respect to my very  
esteemed colleague Mr. Coughlan, that is objectively a line  
of examination which I am bound to say, in the light of the  
evidence yesterday, indeed earlier, should not have been  
put to Mr. Nesbitt on that basis. It was entirely a false  
premise, as we know now, because it's perfectly plain  
Mr. Nesbitt's credibility was being impugned on the basis  
that he had only, so to speak, recently come up with this  
explanation. That essentially was the way it was being  
put, albeit in very polite terms by Mr. Coughlan, but  
firmly nonetheless. But it is a proposition, with respect,  
which ought not to have been put to the witness and ought  
not to have been put to the witness on that basis, and why  
do I say that, sir? Because it's perfectly obvious now, in  
the light of the evidence given by Mr. McFadden,  
unchallenged, and I stress unchallenged, that in October  
2002 Mr. Nesbitt, and indeed Mr. McFadden and others gave

the same explanation to the Tribunal, but for some reason this was not drawn to the attention of the witness in the witness box, it was not drawn to the attention of all of the other parties. And, as I say, sir, it was with considerable surprise that we heard an Opening Statement as recently as last Thursday which again appeared to suggest, if I have understood the Opening Statement and listened to it correctly, that it is something which has only just emerged so far as the Tribunal is concerned.

And I have to say, sir, that there is a lot of this segment of the Tribunal's investigation culminating in this mini module is erected on the basis of a series of false premises of the find that I have indicated. And I am bound to say, sir, with appropriate deference and respect to the high office that you hold, that I believe the parties are entitled to an explanation as to how this state of affairs came about. It doesn't give me any pleasure to say so in the presence of such distinguished and esteemed company, but I am bound by to say that, sir, and I am instructed to put it to you directly.

And a further thing must follow, I say, from the failure to challenge this evidence is, in a sense, why are we here at all in the shape of this mini module? Why do we have to -- I am sure Mr. Gormley will give you perfectly fair evidence



and will be a very interesting witness, I have no doubt about that, but why does Mr. Gormley and the rest of us have to, and I am sure Mr. Gormley won't mind me using these words, have to suffer another day of evidence for Mr. Gormley to give exactly the same evidence as Mr. McFadden when Mr. McFadden's evidence has been unchallenged by the Tribunal?

We now know certain things. We now know that this advice was given in May 1996. We now know that this advice was accepted by the Attorney of the day. And it doesn't matter whether oral advice was or was not given by Mr. Nesbitt.

We now know that the State consistently adopted this position with the Tribunal in various items of correspondence in June, September and October 2002. And yet, as I say, we have had an aspect of this entire Tribunal conducted on a series of false premises.

And I therefore conclude this submission by saying the following sir:

Firstly, is there any necessity to call Mr. Gormley or indeed any other witness in the view of the position which the Tribunal has adopted, vis-a-vis Mr. McFadden, even though various other parties insisted that if the Tribunal was going to take a different view, it must put its case to the witness, that it singly failed to do so. It would be

manifestly unfair to this witness if his -- to Mr.

McFadden, that is -- if his evidence was not to be accepted in full given the failure of the Tribunal to put the contrary case to him, especially in re-examination and especially having been repeatedly challenged to do so.

The second thing is this, sir, is that there are a whole series of provisional findings which I need not ventilate and it would probably be inappropriate for me to ventilate at this stage but you are acutely aware of them, sir, and you are acutely aware of the inferences which the further provisional findings which have been made in January, in February of this year amplifying the earlier provisional findings, the basis, the evidential basis such as it was, I say that with great respect, sir, such as it was rested.

In my respectful submission, the inferential basis for all of that has been, with great respect, entirely eviscerated and exploded by reason of the evidence of Mr. McFadden.

And in my respectful submission, given the very wide ranging powers which the Oireachtas has vested in this Tribunal, given the overriding duty of fairness and to respect the constitutional right to good name of a number of parties, including the witnesses, in the light of this, in my respectful submission, it must follow and follow immediately that the Tribunal, if it is not to challenge

Mr. McFadden's evidence, must a) accept that evidence in its entirety; b) vacate its provisional findings so far as the witnesses are concerned and, c) accept that this segment of the Tribunal dealing with the change of ownership issue, that it must accept that such advice was given and that there is no question of any impropriety, whether vis-a-vis the State, the consortium or any individual members of the consortium, not least my client Mr. Desmond and IUU.

So, in my respectful submission, sir, in the light of the failure to do this, that is an immediate obligation which rests on the Tribunal.

MR. LEHANE: Sir, before you respond to Mr. Hogan, I have a very brief submission to make with your permission, sir. I don't think it will be very long.

Mr. Chairman, I just wish to make five very brief points.

First of all, and I don't intend going into Mr. McFadden's evidence; Mr. Hogan has done that there. Mr. McFadden wasn't challenged by counsel for the Tribunal as to whether or not the Tribunal was told in 2002 that the State believed that the opinion of Mr. Nesbitt had dealt with the matter, and I say, sir, that this uncontradicted evidence must be accepted by the Tribunal.

Second of all, sir, I say that the Tribunal minute of the

18th October 2002 is clearly very relevant to this issue.

It should have been furnished to the parties. It was either overlooked or concealed. We believe that an explanation should be provided, particularly since the minute was not furnished until Mr. McFadden referred to it in his witness statement. I know that during the evidence of Mr. McFadden, Mr. Coughlan alluded to a possible reason for this, and I am not clear, tied up with the privilege issue surrounding the whole matter, but I am looking for a precise statement as to why this statement wasn't provided, sir, because as you are aware that my solicitors, Messrs. Meagher Solicitors wrote to the Tribunal on the 18th March, 2010, and at the end of that letter, sir, my solicitor stated:

"In conclusion, we must point out that the failure, neglect and refusal of the Tribunal and its legal team to furnish documents in a timely and orderly fashion is causing us serious difficulty in terms of making what would be considered normal preparations for the hearing of evidence. The constant drip feed of information and the habit of serving documents while witnesses are giving evidence is totally unacceptable.

"It is now abundantly clear that the Tribunal has failed to provide all necessary documents to us and the

other affected parties, and that witnesses have been taken short by this failure. We are reserving our client's position in relation to the recall of the following witnesses: Fintan Towey, Martin Brennan, John Loughrey and Richard Nesbitt. This problem is wholly of the Tribunal's own making."

Sir, if this was a court of law, and I know it's not, a party who failed to discover such a relevant document would be heavily criticised and run the risk of having their claim or defence struck out. And it's for those reasons, sir, that I just want a precise response as to why that memo wasn't disclosed and also, judge, when the Tribunal became aware that in the context of the most recent hearings once again.

Thirdly, sir, we know that Mr. Nesbitt's cross-examination, or we now know that Mr. Nesbitt's cross-examination was premised on a falsehood. That falsehood was that the Tribunal had never been told that it was the State's view that the opinion dealt with the matter. Mr. Nesbitt's examination on Day 369 indicates that he was heavily criticised for not bringing the State's view to the attention of the Tribunal and I, sir, am just going to refer to a short extract from Mr. Nesbitt's evidence which wasn't referred to by Mr. Hogan.

"Question 20: Your client did not bring your view to the attention of the Tribunal?

Answer: Well I am not aware if he did or he didn't.

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

Answer: I think I am going to answer the question, the first thing that's correct, Mr. Coughlan, is that a letter was written by the Attorney General's Office, as I understand it, indicating that they believe that the opinion did deal with the particular issue; that's number one, and that's one issue. And two: Until the privilege was waived, I did not feel in a position to deal with it.

Question: Your client did not bring it to the attention of the Tribunal, did it?

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

Question: Maybe I'll ask Mr. O'Donnell. This is farcical Mr. Nesbitt, you --

Answer: It's not farcical, with respect."

Sir, in light of the reference particularly to farcicality, I don't know if that's a word there, I believe the Tribunal should withdraw the suggestion that the State didn't bring its view to the attention of the Tribunal.

Fourthly, sir, Mr. Coughlan and the Tribunal, I submit, must accept everything that Mr. McFadden has said about the meeting of the 18th October 2002. If the Tribunal wishes to challenge any aspect of that evidence, then I respectfully submit, sir, that the other people present at that meeting, namely Mr. Coughlan, Mr. Healy, Ms. O'Brien and Mr. Davis need to get into that box and give evidence about it.

Finally, sir, we are now aware from the Persona complaint that part of that complaint concerned the ownership issue. The Attorney General at the time, Mr. Dermot Gleeson, in 1996 was aware of this, according to Mr. McFadden. I submit, sir, that if this is not accepted by the Tribunal, it should consider calling Mr. Dermot Gleeson.

And finally, sir, in relation to the ruling -- Mr. O'Callaghan has repeatedly addressed you then point and Mr. O'Donnell and other parties here have put a lot better than I can.

But, sir, there is a precedent, I would submit, for the Tribunal indicating that it no longer wishes to proceed

with certain lines of inquiry, and that's provided, sir, in your ruling of the 29th September 2005 at paragraph 5.8 where you state, sir:

"I think it is appropriate that I should mention that a number of matters dealt with in the course of evidence would not now appear to me subject to what may transpire during the remainder of the Tribunal's work to warrant further consideration as indicators of any interference or any intervention in the process by the Minister or any outside third party. This is not to say that the same conclusion could not be reached in relation to any of the matters mentioned above" -- where you listed some of the matters -- "worthy of further inquiries" and you list three, sir.

So what I would say is, there is a precedent for the Tribunal clarifying its position in relation to its lines of inquiry. That, sir, is my very briefly submission.

MR. O'DONNELL: Just in respect of the State, if I just inform the Tribunal, as I think it's probably aware anyway from having seen the statement of the -- the Memorandum of Information provided by Mr. Gormley, that his evidence will be broadly along the same lines as Mr. McFadden and will corroborate same, though he was not, as you are aware, asked to speak at the meeting of the 18th October 2002.



Given that we asked for Mr. Gormley and Mr. McFadden to be called, as indeed did other witnesses, we would not wish to withdraw them as witnesses unless we were clear from the Tribunal, I say that from you, sir, rather than from the team, with respect to the team, no disrespect is meant, that this issue is now dead; that the Tribunal now accepted that the opinion that was given by Mr. Nesbitt dealt with, and more importantly was believed and accepted by the relevant parties at the time to have dealt with the issue concerned and that in those circumstances, the Tribunal can move on to other matters.

Could I just quote one question that you, sir, asked to Mr. Fintan Towey on Day 360, page 136. You said:

"Well, in ease of Mr. Towey position" --

And you turned Mr. Towey and you said:

"May I take it, Mr. Towey, that it wasn't the situation that you explicitly realised you hadn't got the advice you sought and decided to plough on regardless?"

Now, that is the key question which informs much of the Tribunal's thinking -- or sorry, I should say the Tribunal's team's thinking. And the answer was:

"The proposition that the advice didn't address all of the issues in a composite way wasn't suggested

by anybody who was involved in receiving or interpreting the advice, including the officials of the Attorney General or the officials of our Department. I have the view absolutely that the opinion resolved the legal issues including ownership conformity questions."

And, sir, I say that that was a fair question insofar as the Tribunal still held the view that the opinion issue was live. But it can't really be regarded live now. And, sir, you, in response to, I think, direct correspondence from one of the parties here, gave an engaging and somewhat endearing rebuff to Mr. O'Callaghan where you said that in your experience as a judge, you believed that you'd have the humility to make corrections to mistakes where they had occurred and you assured us that you would make findings based only on evidence. But it seems to me, sir, that this is an opportunity for you to demonstrate that to the parties firstly, by correcting the ruling that we debated yesterday of the 25th February 2008, and secondly, by making it clear, as the Chairman of the Tribunal, leave aside what the Tribunal's team may be, that you, as Chairman of the Tribunal, can say "We have had enough of this, we have listened to enough about the opinion. The evidence of Mr. McFadden now is unassailable, the

correspondence is unassailable. And in those circumstances we can leave that as an issue and we can safely conclude, even now, that whether the opinion, as a matter of law, was a good opinion or a bad opinion is nothing to do with anything; that whether the opinion, as you read it now, looks like it did or didn't deal with the issues in question. The point is that back in 1996, when it was read in conjunction with, but even on its own, with the oral advices, it clearly was believed to deal with the issues raised. And I would ask you, sir, that we simply now move on, and if the Tribunal is prepared to do that at this stage, and I see no reason why it couldn't make a ruling on that now, then I wouldn't see the need for Mr. Gormley to give evidence. Obviously he is here and he is ready to give evidence and he will be corroborative of Mr. McFadden, but I just envisage another three days of public time and public money being spent and I am conscious that the Tribunal obviously is anxious to conclude its investigations.

And it's not fair any more for Mr. Coughlan to say, as he did on the transcript last night, "the Tribunal hasn't a view, the Tribunal is only inquiring." You are the Tribunal. The Tribunal team have a view, and in some way that has made its way into your rulings. The Tribunal team

clearly have a view and they have never let go of that view. But you are the Chairman. It's your report and it's your rulings that we are looking at and it's ultimately your report that we are going to be concerned about. And it's in those circumstances that I ask you to make those rulings now correcting the ruling of the 25th February and also making it clear that as far as you are concerned now, the issue about the opinion is dead and gone.

CHAIRMAN: I do not propose to respond seriatim to all the submissions that have been cogently made by the counsel who have just addressed me. It is the case that last week I indicated that if the Tribunal had strayed or gone into error, it should be humble enough and magnanimous enough to acknowledge that. And at the outset I have to acknowledge that two not insignificant errors have been made relevant to the evidence that has been heard over these latter few days.

The first is in relation to the view attributed to the Attorney General as regards the scope of the opinion from Mr. Nesbitt as recorded in the ruling in relation to privilege. It is the case indeed that that was primarily a legal ruling addressing the question of whether, in particular circumstances, the privilege enjoyed by the State had been waived. But nonetheless, it was an

observation that appeared in that and I accept that that will have to be rectified and I will take steps to see that is implemented with promptness.

The second matter in which I have to acknowledge that the Tribunal is in error is in relation to the belated production of the note of the Tribunal meeting with Messrs. McFadden and Gormley in October 2002. And whilst again I might make observations in relation to change of solicitor or misfiling of documents, I accept that the end product is that this document was not produced until an appreciably later stage than it should have been. And having, over the years of the Tribunal, I hope, achieved a reasonably diligent and careful standard of procedural compliance and fairness, I have to accept where these two matters have appeared, that it must be taken on the chin and acknowledged.

And at the conclusion of these remarks, I will indicate how these matters will, to a not inconsiderable degree, affect the manner in which I view reporting on these particular matters. But I nonetheless remain of the view that even allowing for all these matters and taking the observations of counsel at their high water mark, I still have the duty that was imposed on me by the Oireachtas to inquire into these particular matters.

I accept the force with which both Mr. O'Donnell and Mr. Hogan have urged the view that whether or not the written opinion prepared by Mr. Nesbitt in 1996 was utterly explicit or perfect, I must have regard to the effect that it had on civil servants who were busily engaged in a considerable myriad of issues. But I think as was referred to by Mr. Nesbitt in the course of his evidence, I must nonetheless seek to make my own judgement upon the scope of that opinion having full regard for everything that has been urged. And in this, even though I must have regard to the actual form of the opinion, I am entitled to adopt the assistance, where there may be uncertainty or ambiguity of such parole evidence as may be given by Mr. McFadden or any other witness.

In addition to that, there is the matter I am not disposed to accept is a triviality of additional or supplemental oral advices that were advanced by Mr. Nesbitt in addition to the written advices that he prepared to the effect that not only was the substitution of the four institutions set forth in the Esat application by ICI (sic) and Mr. Desmond permissible, but that an upward alteration of his equity shareholding from 20 to 25% was likewise immaterial and acceptable. And in that regard, I have to take cognisance of such elements as some differences in recollection as to

what may have precisely transpired as to time frames and the like in those oral advices, and the fact that whilst undoubtedly the matter of the written opinion extending to, in Mr. Nesbitt's view, inclusion of the ICI (sic) issue was canvassed at the 2002 meeting, it nonetheless was the case that the supplemental oral advices were not referred to by anyone over a very considerable period of time.

I will have regard to these and other matters but, as I have stated in the context of the view that I had already formed and having heard what has been cogently stated by Mr. Hogan, by Mr. Lehané and by Mr. O'Donnell, I have to accept that the view that I take will be conditioned in a number of ways.

First of all, the hypothesis referred to by Mr. Lehané of my calling all the Tribunal legal personnel who attended with Mr. McFadden and Mr. Gormley and Mr. Shaw at the October 2002 meeting seems to me a scenario which comes very squarely within the maxim of *nemo iudex in sua causa*, that somebody should not be a judge in their own cause.

The Tribunal is effectively a collectivity of a Chairman, of legal practitioners and administrative staff, and the notion to me of those witnesses being called seems to me utterly inappropriate.

In the circumstances, I accept that the evidence has been

given by Mr. McFadden and that I anticipate hearing from Mr. Gormley is the primary evidence that will be adduced in relation to the content of that meeting. And I accept that the secondary evidence will be the respective memoranda prepared by Mr. McFadden on one hand, and by the former Tribunal solicitor, Mr. John Davis on the other.

So, I accept that I am bound, to a very substantial degree, to act on the evidence that is given by Mr. McFadden and by Mr. Gormley and I do not propose to entertain the proposal of calling other practitioners who attended on behalf of the Tribunal.

Secondly, and in the course of reading the very lengthy and thorough submissions provided by a number of legal teams over recent months, I have noted the emphasis placed, in at least one of them, on the recent decision last year of the Supreme Court in the case of Mrs. Hazel Lawlor against the Mahon Tribunal. In this case the question of the appropriate standard of proof was considered by the Supreme Court, and in an appeal brought by Mrs. Lawlor's advisors to challenge the view formed in the High Court that the standard remained one of a balance of probabilities, the Supreme Court affirmed that view. But in the course of his judgement the Chief Justice, Mr. Justice Murray, did express the view that there was a difference between



relatively minor matters such as the date of a particular meeting and matters of a considerable or momentous consequence.

I accept that in the context of possible findings that could impact very seriously upon the entire conduct of a series of practitioners and senior public service and legal personnel, it would require something at the appreciably upper end of that civil onus of proof to warrant my coming to conclusions that might accord with those that have been objected to by a number of the practitioners who have spoken over the last few days.

And in the context -- thirdly, or indeed as a corollary to my reading of that decision, I will accept, having acknowledged that the Tribunal has made error, that I am effectively required to make some allowance for the considerable myriad of issues that had to be addressed by the Attorney General's staff at the time of the material events in 1996, and I am of the view that if I am to come to what might be called a dramatic view on this, it will not be, in justice, one that should be based on trivial matters or matters that may reflect lapse of time or the like but will have to be on matters of very considerable substance.

I will have regard to everything that has been stated by

counsel in these submissions, including the remarks made by both Mr. Hogan and Mr. Lehane in relation to all that was stated in the course of Mr. Nesbitt's evidence, but I remain of the view that I still have a duty to inquire. I have indicated clearly that I believe that there are important factors that will have a substantial bearing upon my view and having indicated that I have never purported towards infallibility, I believe not lose sight of those.

In these circumstances however, I feel it is appropriate that we proceed with the evidence of Mr. Gormley.

JOHN GORMLEY, HAVING BEEN SWORN, WAS EXAMINED BY MS. O'BRIEN AS FOLLOWS:

MS. O'BRIEN: Thank you, Mr. Gormley. Mr. Gormley, before I start your examination, I just want to outline to you the approach that I intend to take so that you understand what will now transpire. What I intend to do firstly is open to you your Memorandum of Information so that you can just formally confirm that, and if there is anything that you want to add to in the course of me opening it, please feel free to interrupt me and do so.

Now, having done that, I am then going to focus primarily on the events of 1995 and 1996 and in particular, the request for legal advice made by Fintan Towey on the 23rd April, the 22nd April and confirmed in his letter of the

24th April.

Now, what I want to make clear you, Mr. Gormley, is that in calling you as a witness, you are, as have all other witnesses, been a witness to the Tribunal. The Tribunal wishes to inquire into these matters and for that purpose, it wishes to hear your evidence.

Now, the fact that the information which you have has only come to light at this point, after the service of provisional findings, doesn't alter in any way your status as a witness to the Tribunal or the Tribunal's anxiety and desire to hear your evidence. I want you to understand that.

Now, you may be aware that when the Sole Member first enunciated this procedure of serving provisional findings, that was back in a ruling that he made on the 29th September, 2005, he had adverted to the possibility of hearing further evidence after service of the provisional findings, because he had anticipated that this very eventuality might arise and that having notified affected persons in accordance with the fair procedure which he adopted, that information might come to light that would indicate to him that further inquiries were necessitated.

I just want you to understand that.

Now, in the course of examination, I may wish to probe with

you certain aspects of the information that you set out in your memorandum. I may want to draw to your attention the evidence of other witness. I may wish to make suggestions to you or put propositions to you for your comment. But what I want you to understand is that in doing that, I am not expressing my view of any matter which is in any event entirely irrelevant, nor am I expressing any settled view of the Sole Member of the Tribunal. My purpose in doing that, Mr. Gormley, is to elicit all of the evidence that is available in relation to this information which is in your memorandum, so that the Sole Member will have available to him all of that evidence when he comes to form his findings of fact.

So, if that's agreeable you, I am just going to open your Memorandum of Information and I'll ask you to confirm it.

Now, you have informed the Tribunal that you were called to the Bar in July of 1978. You had joined the Attorney General's Office in September 1985. In April/May of 1996 you were legal assistant to the Attorney General. Your title is now Advisory Counsel.

In paragraph 2 you informed the Tribunal that your first meaningful recollection of relevant events is of a consultation at your office on the 23rd April with Richard Nesbitt, senior counsel; Fintan Towey, Department of

transport and communications; Denis McFadden and yourself.

The purpose of the consultation was to discuss inter alia the impact of the Directive of January 1996 on the competition for the second GSM licence and the licence process. You think that an issue relating to how to deal with a complaint from and concerns of unsuccessful bidders was also discussed.

You inform the Tribunal that the consultation which took place in the afternoon lasted for well over an hour. At the end of the discussion on the matters which had originally given rise to the consultation, you remember Fintan Towey announcing that he had some fresh or new issues on which he needed advice. You think he said at that point that he would be requesting advice in writing. Mr. Towey then told you -- that's you collectively -- that while it was initially expected that four named banks would take up 20% of the equity shareholding in Esat Digifone for the purposes of financing the joint venture, Esat Digifone had now decided that a company called IIU would take those shares in their place. Mr. Towey indicated that advice was needed as to whether or not this was legally permissible.

He also told you that IIU would have a further 5% shareholding in Esat Digifone, thus leaving the shareholding of the joint venturers at 37.5 each rather

than 40% each as earlier envisaged. Fintan Towey explained the position in some detail. Richard Nesbitt, Denis and you had been advising on issues in relation to the bidding process and the perspective licence since early 1995 and you had a certain familiarity with this particular subject at the time.

You say that Mr. Towey produced some papers which he later referred to in his written instructions of the 24th April, 1998 as the "relevant papers." These papers were made up of a letter from Fry's Solicitors dated April 17, 1996 and a note or memorandum from Ms. Regina Finn of the Department. The note/memorandum contained certain information taken down by her relating to corporate structures in a conversation between her and Mr. Owen O'Connell of Fry's solicitors. Mr. Towey read from those papers when explaining those fresh legal issues and he handed them to Richard Nesbitt later at the end of the consultation.

You remember being concerned that Mr. Towey was, at this stage, raising these fresh additional issues, because at the time there was a myriad of issues which had arisen in the preceding weeks and these had not been dealt with fully. However, it seemed to you that the question regarding IIU was one that for you invited an immediate

response. You should say that after Mr. Towey's detailed explanation, your initial reaction was that a change in the financing of the consortium would not be a bar to issuing the licence in that consortium, though you were of course keen to hear senior counsel's advice.

You have informed the Tribunal that you recall Richard taking a lead role in the discussion. You remember him analysing the situation explaining why Esat Digifone won the competition and explaining also the limited role of those who were expected to take up the shareholding in order to provide finance to the joint venture. You remember him emphasising that once the joint venture of Communicorp and Telenor could deliver the service required in accordance with its application bid, no problem arose.

You remember thinking of the joint venture as a vehicle and the financiers as merely the fuel providers. You also considered whether this would impact unfairly on the disappointed bidders. You remember supporting the views of Richard and participating at the discussion. You were in agreement that as far as the shareholders, whose role was merely to finance the joint venture was concerned, the Minister or the Department would only have to be satisfied that they had the money and that the money was clean and came from a reputable business. It clearly could not be

drug money or the proceeds of crime. You were clear in your recollection of the discussion of IIU's participation was by no means a superficial one. In your mind, all of you were clear at the end that the participation of IIU in place of the four named banks was not a problem.

You recall Richard then going on to express the view that IIU taking up a further 5% of the company was nothing to worry about either, because it had little or no impact on the control. You don't recall discussing this latter point in much detail but you all seem to have agreed with him.

Towards the end of the meeting Mr. Towey said he would send written instructions on the following day seeking the formal advice of counsel. Richard Nesbitt took the "relevant papers" with him to consider their controls(sic) while awaiting the request for written advices.

A. It should be "content", sorry, it was a mistake --

1 Q. I assumed that was so. You say while you were somewhat puzzled (sic) while reading Richard Nesbitt's intended Statement of Evidence -- "surprised" -- sorry, I will correct that.

While you were somewhat surprised when reading Richard Nesbitt's intended Statement of Evidence and Mr. Fintan Towey's intended Statement of Evidence to see that they did not make any reference to the details of these discussions,



you have no doubt in your mind that the discussions took place.

You believe that there was a subsequent meeting on the 3rd May 1996 to discuss the drafting of the terms of the licence, but you have no real recollection of it. You do not believe that the issue of ownership shareholding or financing was discussed at the meeting however.

You have informed the Tribunal that Mr. Nesbitt's written opinion was provided to the Attorney General's Office on the 9th May 1996. On reading it you were satisfied that it had dealt with the question raised by Mr. Towey concerning the restructuring of the consortium. You recall thinking that what he said in his opinion was applicable to both the pre-licence situation and to the draft licence itself. You felt the opinion was echoing or reconfirming the advice given by Mr. Nesbitt at the meeting of the 23rd April 1996.

He had made it clear, and was now doing it again in writing, that in considering whether a change of ownership within the consortium was of legal significance, the real issue was whether such a change compromised the ability of the joint venture to deliver the service in the manner proposed in its application. For what it is worth, you agreed with the contents of the written opinion.

On the 10th May 1996 you and Denis McFadden made a

submission to the then Attorney General concerning

"1. Proposal of the Minister for Transport, Energy and Communications to grant a licence to Esat Digifone Limited to be the second provider and operator of a GSM mobile telephony service in Ireland and;

2. Stamped draft regulations entitled "European communities mobile and personal communications regulations 1996 to give effect to Commission Directive Number 90/338/EEC of 28 June 1990 and Commission Directive of 96/2 EC of 16 January 1996" and;

3. Stamped draft of licence proposed to be granted under Section 2 of Section 111 of the Postal and Telecommunications Act, 1983 (No. 24 of 1983) as amended by the above-mentioned regulations when made and;

4. Advices of Richard Law Nesbitt dated 9 May, 1996."

The submission sought the sanction of the then Attorney General to transmit the stamped draft regulations and stamped licence. You believe Denis McFadden did most of the drafting of the submission, although you believe you had an input also. The submission was put forward by both of you.

You have informed the Tribunal that you should say that if you have the slightest concern or doubt about the legal correctness of issuing the licence to the Esat consortium,

you would not have made the submission in question to the Attorney General. You were an experienced legal assistant and you would not have been willing to waste the Attorney General's time by asking him to consider a submission that you considered flawed or legally unsound. You were satisfied from the oral and written legal advices received from senior counsel, as described above, that it was appropriate that the licence issued to the Consortium in question irrespective of the involvement of IIU.

A copy of Mr. Law Nesbitt's advices to the Department was also sent under cover of a minute in the terms of a draft attached to the submission.

On the 13th May 1996 the Attorney General sanctioned the aforementioned drafts. Those drafts, together with the advices of counsel, were forwarded with the sanction of the Attorney General to the Department under cover of a minute, the terms of which were settled by him.

You believe that there was a further meeting on the 14th -- I think that should be May, is it? You have 14/4 in your statement but I think it should be 14/5

A. Yes.

2 Q. -- 14th May 1996 with the departmental officials which you attended with senior counsel and Denis McFadden. You do not have a full recall, although you believe this meeting

was called to discuss the giving of the feedback to unsuccessful licence applicants. You have a recollection of the issue of changes of ownership in Esat Digifone were discussed. To the best of your recollection, Mr. Nesbitt expressed views similar to those contained in his opinion of the 9th May 1996 and at the consultation held on the 23rd April 1996. You should say, however, that your memory is that this discussion was only by way of preparing to meet possible queries from disappointed losers. You were aware that by the time of this meeting the issuing of the licence had already been sanctioned on the 13th May 1996 by the then Attorney General who, as you have pointed out above, had, before so doing, been provided with Mr. Nesbitt's opinion along with your draft minute.

And I take it that you confirm that the contents of that Memorandum of Information are correct?

A. I do.

3 Q. Now, Mr. Gormley, just looking back over all the documentation, it seems to be that the involvement of the Office of the Attorney General with the GSM process, in its broadest -- as at broadest term, commenced around April of 1995?

A. That's correct.

4 Q. And you and Mr. McFadden were assigned by the Attorney

General to deal with issues that might arise in the course of that process?

A. That's correct.

5 Q. Now, I think you are aware that the GSM process, from start to finish, was a twofold process, isn't that right?

A. Yes.

6 Q. There was the competition process to start with, and then the negotiation process which came after the competition process had concluded?

A. Correct.

7 Q. And that competition process commenced formally I think on the 2nd March of 1995 with the issue of the RFP document, that's the request for tenders, but it's referred to as the RFP document, and with that document I think an indicative licence was available to interested parties who paid the €5,000 to purchase the RFP, isn't that right?

A. That's correct.

8 Q. Now, I think I am correct in suggesting to you that the Attorney General's Office actually had no input into the preparation of that indicative licence; that had been the output of departmental consideration only?

A. I recall making some suggestions in relation to the indicative licence and I think Mr. McFadden would be the same. So...

9 Q. Was that prior to March of 1995?

A. I'd say around March 1995.

10 Q. I see. I see. We know then that the competition proceeded and initially there had been an envisaged closing date sometime towards the end of June, I think it was the 23rd June, and that it was deferred to the 2nd August, do you recall that?

A. Yes, I recall that.

11 Q. And you recall that as regards that process, the advice of the Attorney General was sought in relation to an EU intervention in April or May of 1995, where the Commission had objected to the auction fee element of the criteria by which the applications were to be evaluated; you recall that?

A. That's correct.

12 Q. And advice was given on that, and as a result of that advice certain proposals were put to the European Commission which were accepted, isn't that the position?

A. That's correct.

13 Q. And I am correct in thinking, am I not, that that was really the only aspect of the competitive process as distinct from the negotiations or the drafting of the licence or all of the work that we see that the Attorney General's Office was so involved with from February of 1996

onwards, that they had an input to in relation to the competitive process itself, isn't that so?

A. Yes, but I recall, in August of course, the opinion which we dealt with Mr. McFadden and the questions that we raised there in relation to --

14 Q. Of course. But that was in fact -- that did not relate to the competitive process. That related to what would happen once the competitive process concluded, once the licence -- it was to do with the draft licence, isn't that right?

A. Yes. I would think so. I think that the opinion of August was given in the context of the indicative draft licence.

15 Q. We'll have a look at it in a moment. But then the negotiation process started in November, and I think the Attorney General's Office, albeit that it went to the Parliamentary Draftsman, was furnished with a considered draft by the Department sometime before Christmas of 1995, isn't that so?

A. I think that's correct.

16 Q. And I think at that stage what you had in mind is that the statutory framework under which the licence would be issued would be the existing Section 111 of the 1983 Act?

A. That's correct.

17 Q. And then that became more complicated because of the additional mobile directive of the EU which was Directive

96/2, that came into force in direct effect in February of 1996?

A. That is correct.

18 Q. Now, you know that at the end of the competitive process on the 25th October, when the winner of the process was announced, that what the winner had won was not an entitlement to the licence but an entitlement to the exclusive right to negotiate for the licence, you would have been aware of that?

A. Yes. I think the view was that it might be slightly more than that, that there was an obligation on the Minister to give the licence on reasonable terms to the winner of the competition. It wasn't just a matter of grace and favour.

19 Q. Oh, no, of course not. But there would have been an obligation to negotiate bona fide with the winner in order to agree the terms of a licence acceptable to both parties?

A. Yes, well I would say more so that there was a duty on the Minister to provide a licence on reasonable terms in accordance with the law to the successful bidder.

20 Q. Were you aware that under the Government decision that effectively approved this, that the Minister was authorised to actually enter into negotiations with the second, and indeed the third ranked applicant, if the negotiations with the first ranked applicant didn't come to fruition? You



may not have known that.

A. I wasn't aware of that.

21 Q. Now, in August of 1995 an opinion was sought in relation to the kinds of terms and conditions that the Minister could insert into the draft licence, isn't that right?

A. That's correct.

22 Q. And I think it would be fair to say that was your first encounter with the whole issue, global issue of ownership of the company that was going to be licensed by the Minister?

A. Yes, I would think that's probably correct, but it was, as I said, regarding an indicative licence that would be offered to whoever would win the competition.

23 Q. Yes. But this was your first encounter in the Office of the Attorney General with specific consideration of ownership in the context of the GSM process, isn't that right?

A. I think that earlier in March or thereabouts, of 1995, there was in existence a skeleton type of indicative licence into which I made some input as regards the draft. I recall that.

24 Q. Okay. But was this the first occasion, then, on which the Attorney General's Office was asked to consider the extent to which the Minister could restrict changes of ownership

in the licence?

A. Yes, yes, that would be correct.

25 Q. And it was on this occasion that Mr. Nesbitt furnished his opinion, which is at -- which is Document 1 in the Book of Documents that was circulated by the Tribunal, and it was dated the 14th August of 1995, isn't that so?

A. That's correct.

26 Q. And I think how all that arose was that under the statutory, then statutory framework, the Minister could grant the licence subject to such terms and conditions as he saw fit and the Department was looking, in anticipation of issuing the licence and in anticipation of the more detailed work that would be required when it came closer to finalising the licence, for some guidelines on the extent to which the Minister could impose conditions and how strict those conditions could be, wouldn't that be the case?

A. That is correct.

27 Q. Now, just if I can refer you very briefly to the portion of that opinion that dealt with ownership. It's Tab 3.1 in the book, and it's page 4 of the internal pagination of the opinion itself, and the heading is "Assignment of licence/identity of licensee."

A. Yes, I have got it.

28 Q. I'll just read it to you very briefly.

"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 a competitive marketplace continues to exist i.e. to stop a concentration of services in the hands of a monopoly. Condition 6 of the draft terms and conditions of the licence seeks to sustain this objective. The licence has been advertised as being one which will contain arrangements in respect of a change of ownership or a transfer of a licence. Clearly the Minister has an interest in ensuring that an appropriate party is licensed from the point of view of the ability to deliver the service in question. However, is there any valid reason for the Minister to insist upon unnecessary controls in respect of the ownership of the licensed entity or the ability of a licensed entity to transfer its licence to somebody else.

"In my opinion the identity of the Party licensed is only of material importance if a change in identity restricts open competition in the provision of mobile phone services.

Under the act the Minister is given power to impose whatever terms and conditions he considers appropriate.

However the terms and conditions must be connected to the

achievement of the objective of the act. 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 phone operation such conditions could be subject to attack.

Clearly the Minister is entitled to insist on information about changes and prescribes by way of condition changes which will be unacceptable and lead to the loss of the licence. Such conditions must be objectively justifiable."

So really there, Mr. Nesbitt is saying that in terms of the licence to be issued as regards the Minister's entitlement to control or fetter the right of the licensee to change its ownership, it was restricted to being objectively justifiable?

A. Correct.

29 Q. And as he saw it, the Minister's objective was to ensure that competition was not undermined by any change of ownership, isn't that right?

A. Correct. And the measure could not be arbitrary.

30 Q. Exactly, arbitrary or unreasonable. Now, in furnishing that opinion, that opinion related not to any aspect of the competition prospect, isn't that right?

A. That's correct.

31 Q. The competition process was in being, the process had been launched, the closing date had been due in June, it had been deferred to the 4th August, the competition now was well and truly in being and Mr. Nesbitt's observations related to a prospective licence to be issued following the outcome of both the competition process and the negotiation process, isn't that right?

A. That's correct.

32 Q. Now, as I said, moving on from there, the result was announced on the 25th October. We know, but you may not have known, that the first negotiation meeting was on the 8th November 1995, and at that stage I think the actual production of a draft document became the responsibility of Mr. McMahon, I don't know if you recall Mr. McMahon who headed up the Regulatory Division within the Department. And we also know that I think it was possibly around December of 1995 that that was submitted to the parliamentary draftsman, isn't that right?

A. I don't clearly recall that.

33 Q. All right. And as I said earlier, matters became slightly more complicated then because of the new mobile directive that was introduced in February of 1996 with direct effect?

A. That's true.

34 Q. I think matters then became a little more urgent coming up

to March and early April and there was some pressure being brought to bear in trying to progress, naturally enough, the production of this draft licence, isn't that right?

A. Yes, that would be true.

35 Q. Now, it was then on the 18th April that you instructed Mr. Nesbitt in relation to the draft licence formally, and can I refer you to Document 7 in the Book of Documents.

Yes, Tab 7, 3.7 in the Book of Documents.

A. That's correct, yes, Mr. McFadden's letter.

36 Q. Yes.

A. And I think this is the letter that led to the consultation of the 23rd April 1996 with Richard Nesbitt.

37 Q. Yes, I was going to ask you that. I thought maybe that was the case.

A. Yes, I think so.

38 Q. Now, it's the 18th April,  
"Re proposal of the Minister for Transport, Energy and Communications to grant a licence to Esat Digifone to be the second provider and operator of a GSM mobile telephony service in Ireland and Commission Directive.

"Dear Richard,

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

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

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

"3. A copy of Commission Directive 90/3888/EEC.

"4. A copy of SI No. 45 of 1992.

"On the basis that regulations similar to the draft are made in the near future the Minister is considering granting the said licence pursuant to what would be the new Section 111 (2B) of the Act of 1983.

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

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

And, as you said, that is the letter of the 18th April which seems to have given rise to the consultation that then proceeded on the 23rd April, which Mr. Nesbitt attended

A. That's correct.

39 Q. And just looking at that letter, there were a number of

issues undoubtedly that Mr. Nesbitt was involved in and on which he was instructed over these weeks coming up towards the grant of the licence, but the two particular matters on which he was instructed in this letter of the 18th was firstly, the draft licence; he was asked to consider that, the draft as it then was, because we know that that was revised as time went by. And secondly, to consider the Minister's proposal, or the Department's thinking, presumably, that the licence would be issued under the new statutory framework which would come about as a result of the adoption of the Statutory Instrument to transpose the Directive of the European Commission?

A. That's correct.

40 Q. Isn't that right?

A. That's correct.

41 Q. So it was both to consider a draft and to advise on whether it should be granted under the new statutory framework?

A. That's right.

42 Q. And it was that request which gave rise to the meeting of the 23rd April?

A. That's correct.

43 Q. Now, we know that in fact you had meetings back-to-back with Mr. Towey, isn't that right?

A. Yes.



44 Q. On the 22nd and then the 23rd?

A. The 22nd was held with the Parliamentary Draftsman, the late Laney Bacon, and it was held in his office, and it was what I would consider to be a drafting meeting to discuss the draft licence and the draft regulations. And also the legal, as you say, the legal landscape had changed now by virtue of this new directive. Now, the new directive just came to our attention, or to my attention for the first time on the 25th March of 1996, and so there was a lot of work to be done.

45 Q. There certainly was. That was the 22nd. And I think Ms. Regina Finn of the Regulatory Division in the Department also attended that meeting?

A. That is correct, with Mr. McFadden and myself, yes.

46 Q. And then the following day, the 23rd, you had the meeting then that Mr. Nesbitt attended?

A. That's correct.

47 Q. Now, we have, I think, Mr. McFadden's note of both of those meetings, and I am not going to go through his note of the meeting of the 22nd in any great detail because it all looks -- it's document at Tab 8. And as I said, that all looks to me like it was a very technical meeting on the mechanics of the transposition of this directive, and I think in fairness as well, Mr. Towey's note that he made

which records this meeting also records that those were the matters under discussion?

A. Yeah, with the Parliamentary Draftsman?

48 Q. Yes.

A. Sure.

49 Q. And then there was the meeting on the subsequent day, which was the meeting with Mr. Nesbitt, and the note of that that was made by Mr. McFadden is at Document 9. Document 9, the next document, Mr. Gormley?

A. Correct.

50 Q. And all -- apart from noting the attendees, the date and the duration of that meeting, all that Mr. Gormley in fact recorded was that famous Trips case which I think a decision in fact hadn't come down yet in relation to it?

A. The?

51 Q. This Trips case.

A. I would like to talk about that because how it arose. And it became a note by Mr. McFadden at the time because when we were discussing the impact of this new directive on the application, on the application of the competition that had taken place, I had been dealing in the office with this particular case, and it had to do with an application by Clonmel Chemicals for what's called a compulsory licence under the Patents Act of 1964. The reason why I considered

it relevant in these circumstances was that the application by -- since Clonmel Chemicals made their application, the law had changed in two respects: No. 1. There was a new Patents Act and this new Patents Act was there to give effect to the European Patent Convention; and the second thing that happened was that there was a new provision introduced in Trips, in the Trips agreement. Now the application for a compulsory licence was under a section of the old act and it said that in areas of food or drugs you could -- a person could apply to the Controller of Patents for a compulsory licence. They had done so; Clonmel Chemicals. As I said, the law -- after -- soon after -- well I think it's about two years after the application was made, the decision to grant was made by the Controller. But in the meantime, this Trips agreement had more or less outlawed compulsory licences like this. And that's why it was considered relevant. It was in train at the time the case was, and Mr. McFadden made a note of it to, for us to look it up because I mentioned it. So that's how I recall it.

52 Q. And that's how it became material to what was under discussion at that meeting?

A. Yes, that's correct.

53 Q. Now, that meeting, as you say, arose from your letter of

the 18th April and it was primarily to discuss the draft licence and also the proposition that the licence now be issued under the new statutory framework?

A. Yes. And to discuss the impact of this new directive.

There was a general discussion because we were wondering how far back it goes and we know the extent of it, etc., the ramifications, so, yes, we had a very long discussion on that I recall.

54 Q. Now, you know that Mr. Towey prepared a very careful note of what happened at the meeting of the 22nd; that's the previous day?

A. On the 22nd, yes, so I am told, yes.

55 Q. And do you have a copy of that note with you? We can just hand it up to you.

A. No, I don't.

56 Q. It's been in evidence before. It's a very old document that we have been over time and again in the Tribunal. I am not going to refer it all to you.

Have you seen that before, Mr. Gormley?

A. I don't recall seeing this before, no.

57 Q. Okay. I'll just take you through it very briefly. Not an awful lot turns on this. I'll open it for you.

MR. O'DONNELL: Maybe if he could be allowed read it and when you have read it --

A. Do you want me to read it out or read it to myself?

MS. O'BRIEN: No, no...

A. This seems to refer to a meeting of the 22nd April. Now, what I would say about the meeting on the 22nd April, the meeting of the 22nd April was confined merely to drafting and drafting matters and I -- nothing else was discussed there on that day, as far as I recall.

58 Q. Do you think it is possible that Mr. Towey might have mentioned it to you initially on the 22nd and then raised it again on the 23rd, because it was going to be counsel's advice that he sought, because just to draw your attention to the fact that Mr. Towey has made a very, very careful, meticulous and very detailed note in which he records that, and I just wondered would that have been a possibility and could that conceivably explain the reason that he has dated it on the 22nd in his careful note?

A. What I notice here is that this is a note of the 24th April, 1996. There were two meetings: there was one on the 22nd, one on the 23rd. There seems to be no reference to both meetings in this.

59 Q. No, no.

A. And I don't understand --

60 Q. You see, I suppose what I am trying to get at is this: Mr. Towey has very carefully noted there the advice that he

sought, "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 and 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 there you see he has recorded that he sought advice, you see that?

A. I am really perplexed by this I must say, because this happened -- it was on the 23rd at the meeting.

61 Q. And you remember that because you remember Mr. Nesbitt and you remember it being discussed, is that right?

A. Of course.

61 Q. And that's how you date it to the 23rd rather than the 22nd?

A. Of course.

63 Q. Okay. So you think that it must have been an error on Mr. Towey's part dating it on the 22nd?

A. Yes.

64 Q. Can I just draw your attention again, and I do so on the basis of what I pointed out to you at the beginning, that I

would be making the odd suggestion to you in the course of your examination to allow you to comment on it.

You see that Mr. Towey didn't record any of the discussion of that issue in his note?

A. What issue?

65 Q. The issue of the change of ownership, the discussion at the meeting on the 23rd April; that he omitted to record any of the discussion or the oral advice given at that meeting?

A. Yes.

66 Q. Now, can I just --

MR. O'DONNELL: Sorry, sir, I wonder would you go back to the top of that document because I don't have a copy of it and I am not sure that it was opened in this way to Mr.

McFadden. I didn't think so. It doesn't record the attendance of Mr. Nesbitt. So...

A. Yes, that's true.

MR. O'DONNELL: I just wanted to see it.

A. Correct, it doesn't, yes.

MS. O'BRIEN: And it refers to a meeting of the 22nd April, but it's your evidence, as I understand it, and Mr.

McFadden's evidence, which was clear yesterday, is that this issue wasn't discussed on the 22nd April, it wasn't raised. This was a meeting in the Office of the

Parliamentary Draftsman and that you were looking at the

drafting of the licence and you were considering -- this  
issue didn't arise on the 22nd --

A. No.

67 Q. -- at all?

A. At all.

68 Q. It was on the 23rd that it arose?

A. Exactly.

69 Q. So in noting the matter on the 24th, Mr. Towey must have  
been referring to what transpired at the meeting of the  
23rd, isn't that the case?

A. Except he doesn't have Mr. Nesbitt down here.

70 Q. No, no, he doesn't. That's all I was drawing your  
attention to. And then I am drawing your attention to the  
fact that he hadn't recorded any of the discussion to which  
you refer in your memorandum and which you have confirmed  
in evidence and indeed which --

A. I don't understand that, I must say.

71 Q. Okay. Now, can I just bring you back to your statement --

A. Yes.

72 Q. -- in relation to your recollection of what occurred on  
that date. Now, just before I do that, Mr. Gormley, can I  
ask you, are you satisfied that at the time that this issue  
was raised, that you fully appreciated the difference  
between this issue and the issue of ownership under the



licence?

A. Say it again please.

73 Q. Yes. What I just want to ask you is this: Did you fully appreciate the difference between the issue that Mr. Towey was raising for the first time on the 23rd regarding ownership and the issue that had been under discussion, certainly since the previous August, relating to the extent to which the Minister was permitted to fetter the entitlement of the licensee to dispose of ownership once the licence had been granted?

A. I don't recall any reference or even myself remembering the opinion of the 24th August -- or 15th August on the 23rd April.

74 Q. But what I am really trying to get at is: Did you distinguish between the consideration that would arise regarding a change of ownership in terms of the competition and a change of ownership after the licence had been issued? Were you satisfied that you appreciated the difference between those two issues?

MR. O'DONNELL: Sorry, I don't know what suggestion -- whether it's being put to him that he was aware that there was a difference?

CHAIRMAN: Well, let him answer, Mr. O'Donnell.

A. I understood it in relation to the way in which Mr. Towey

explained the situation on the day.

MS. O'BRIEN: And could you tell me now what you understood that issue was, the new issue?

A. I understood the new issue to mean that he explained that there was going to be a change. That originally it was anticipated that the new company, Digifone, would be -- before the licence would be awarded, would give 20% of the company to four named banks, I think they were, and that now it was decided that instead of the four named banks, that IIU would be taking up this equity interest in the company.

75 Q. And in your own mind at the time, what considerations did that issue give rise to in terms of advising on the validity of what was proposed?

A. Well, we thought whether or not this was a material change and, as I said, Richard -- you know, to me, as they began to explain it, I couldn't see any problem myself personally when Fintan Towey explained to us, you know, that what you have here now is somebody else taking up the equity interest in the company rather than the four named -- that it wasn't a material change. It didn't affect the service and it didn't compromise the service that Digifone, as a company, were to give under the application.

76 Q. I am just wondering at the time, what Mr. Towey had with

him was an extract from the Esat Digifone application,  
isn't that right?

A. Yes.

77 Q. And he had Mr. O'Connell's letter of the 17th April?

A. That's right.

78 Q. Isn't that right? And he had Ms. Finn's memorandum of the previous day in which she recorded a telephone conversation which she had had with Mr. O'Connell in which she had asked him what the position was in relation to ownership, and he had conveyed information to her and there was kind of a diagram in that and then a bit of a narrative, isn't that right?

A. That's correct.

79 Q. And they were the three documents that you had at that meeting on the 23rd when you were discussing it?

A. That Mr. Towey read from?

80 Q. Yes.

A. That's correct.

81 Q. Now, can I ask you, in the course -- was this discussion a lengthy discussion, do you remember?

A. Yeah, it was I suppose, time-wise it wasn't very long but as I said, it wasn't a superficial discussion.

82 Q. The meeting was what, an hour and 15 minutes I think, was that it?

A. Yes.

83 Q. And --

MR. O'DONNELL: An hour and a half I think.

MS. O'BRIEN: Yes, an hour and a half, and there were quite a number of matters that you had to discuss, that right?

A. That's right. It was at the end of this meeting that Mr. Towey raised this and as I said, I think he said "I am going to be looking for advice on some new development." And then he began to explain it and initially I felt, you know, at the time I wasn't very pleased, first of all, in learning in March that, for the first time, that this directive had come in.

84 Q. I am sure you weren't. I can understand that, Mr. Gormley.

A. And there were a myriad of problems, as I said. So this was an additional one. But as he -- so I was somewhat concerned and as he began to explain it, it didn't appear to be a great problem. I see. So we engaged, then, in the discussion, as I outlined.

85 Q. It's just that as you explain it, and you lay out your recollection in your memorandum, you don't refer to any consideration of the RFP document?

A. No, we didn't refer -- I don't recall us discussing the RFP document.

86 Q. You weren't aware, then, Mr. Gormley, or it doesn't appear

to have been discussed that there was a requirement in the RFP document that the contents of all applications had to be true and valid for 180 days?

A. No, and it didn't occur to me, no, definitely not.

87 Q. Likewise, just looking at the manner in which you have recounted your recollection, there doesn't seem to have been any teasing out or discussion of how the ownership as disclosed in the application, which as you know is a mandatory requirement, how that impacted on the evaluation itself that had been conducted?

A. Well, I remember discussing, you know, that whether or not this change would impact on the losing bidders and we were satisfied that it didn't by virtue of the nature of the change itself.

88 Q. I don't quite understand how it would have impacted on the losing bidders. Can you just explain that to me a little more because I don't quite grasp it?

A. Well, I suppose it wasn't a change that would adversely affect them. In other words, that it was material to the extent that if they had an opportunity of having a change like this for themselves in their bid, that they would have perhaps done better.

89 Q. But what I am trying to get at is this: You were being told that this change occurred after the competition had

ended, am I right in that or were you told something different?

A. Well yeah, we were told it was, we assumed that the competition had ended, yes.

90 Q. The competition had ended?

A. Sure.

91 Q. So how could the other bidders have been affected because they hadn't won the competition, so how could that impact on their entitlement to alter what was in their bid?

A. At the time we were considering -- the same day in fact, we were considering the underbidders, and I think perhaps the Persona and they had some complaints, so we were -- I felt we were concerned that there is nothing -- we were concerned about them, that they wouldn't have anything to complain about as a result of this.

92 Q. I see. Now, we know from the portion of the application that Fintan Towey provided you, that that portion actually named the four financial institutions the Department had been told would be likely to take this, and that was --

A. That's correct.

93 Q. -- Allied Irish Bank, Investment Bank of Ireland, Standard Chartered Bank and Advent International. Advent International probably wouldn't have meant very much to you at the time because it was an international venture capital

company but certainly AIB, IBI and Standard Chartered would have?

A. Correct.

94 Q. And I suppose in those days you'd agree that their ability to fund this would have been undoubted; they were very substantial institutions, isn't that right?

A. Sure.

95 Q. Now, again, looking through and reading through your recollections of the discussion and how that discussion developed on the 23rd, I don't see any inquiries being made as to what kind of financial institution IIU was?

A. Well, there wasn't an inquiry, but the advice was that provided they were good for the money and provided that the money was clean money, it wasn't something that the Minister -- you know, it was acceptable.

96 Q. Now, just going back, as I say, to your statement. You said just at paragraph 7, you said it seemed to you that the question regarding IIU was one that, for you, invited an immediate response.

A. Yes.

97 Q. I just wondered why it was that particular issue that you felt required that priority as opposed to all of the other issues that had arisen, and there were certainly many at that stage?

A. I think I'll explain it in this context: That as I recall, Mr. Towey said he was going to be looking for written opinion on this matter -- on a matter -- on this matter.

And as he began to explain it, it became very interesting and fairly straightforward, I suppose you might say, and it was one that engaged us at the table to respond to the problem at the time.

98 Q. To discuss it?

A. To discuss it, yes.

99 Q. It was a bit of light relief after discussions of the regulation and the draft licence I am sure?

A. Well, I don't think it was that but, you know, it did engage us and it prompted us to, you know, to talk about it and discuss it.

100 Q. You say there as well that you remember Mr. Nesbitt taking a lead role and that he analysed the situation and he explained why Esat Digifone had won the competition. Do you see that?

A. Yes.

101 Q. I am just not clear how Mr. Nesbitt would have known why Esat Digifone won the competition.

A. Well, I explained it in general terms about what the, you know, what they promised and how they -- that they were obviously better than the other competitors.



102 Q. But neither you nor he had any access to the evaluation report, had you, at that stage?

A. I don't recall. I don't recall at that stage having any.

103 Q. I am just rather surprised that it was Mr. Nesbitt explaining why they won it when Mr. Towey, who had been -- had a very significant role in the actual evaluation wasn't the one who was being asked well why did they win it? And why was it a mandatory requirement that all applicants disclose their ownership of their intended licensee and how was it that that bore on any fundamental or any other aspect of the evaluation process? It just slightly puzzles me. I am slightly surprised --

A. Well, they were the successful bidders and they offered the best in the application.

104 Q. But there seems to have been no consideration of those kind of issues, what happened in the competition and whether this could possibly have amounted to a breach of either the rules of the competition or could have a material impact on the understanding which gave rise to Esat Digifone winning the competition which might have been the kind of issues that one would have thought would have arisen or have been canvassed in the course of that meeting?

A. Yes.

105 Q. None of those were discussed, is that right?

A. Pardon?

106 Q. None of those arose?

A. No, he just explained that they won it because they were the better among the -- in the competition, they offered the best by way of service, etc., experience and whatever.

107 Q. Now, you say that Mr. Nesbitt went on to explain that IIU holding 25% wouldn't be a problem because it really wouldn't have any impact on control of the intended licensee?

A. Yes.

108 Q. So, you were clear that you were discussing not just the fact that IIU, Mr. Desmond's company, was going to stand in the shoes of the four financial institutions, but was also intended to have, in fact did have at that stage because the shares had already been issued and allotted, did have a 25% interest; that that was also discussed?

A. Yes, yes.

109 Q. Now, again in your statement, at paragraph 10, it's just something I want to clarify. You say that you have a clear -- you are clear in your recollection that the discussion of IIU's participation was by no means a superficial one and in your mind, all of you -- that's you collectively -- "all of us "as you put it -- were clear at the end that the participation of IIU in place of the four named banks was

not a problem?

A. That's correct.

110 Q. So that was at the end of that meeting, is that correct?

A. That was my impression, certainly.

111 Q. Now, what I want to do now is just leave your statement for the moment, Mr. Gormley, and just refer you to the evidence of Mr. Towey and also the evidence of Mr. Nesbitt, just brief sections of it. And again, as I indicated to you in the preamble to your examination, I am just bringing these extracts of their evidence to your attention to enable you to have an opportunity to comment on them.

A. Sure.

112 Q. Now, Mr. Towey in his evidence to the Tribunal, did indicate that it was his understanding that advice had been given but he did not recall oral advice being given himself. That was his evidence.

MR. O'DONNELL: Sir, that's not strictly true. We can go through various aspects of the transcript and I have a plethora of aspects of the transcript which we can quote at each other. But it is clear that he recalls oral discussions with Mr. Nesbitt. What he can't be specific about is when those oral discussions took place, whether they took place before or after the giving of the opinion on the 9th May, but it is not true and unfair to put to

this witness that Mr. Towey said -- did not say that advice was given at this meeting. He made it clear on a number of occasions that he wasn't prepared to rule that out and that he wasn't prepared to accept that it could have taken place on this, as well as possibly other days. And given that there were only two days on which they met prior to the giving of the opinion, it's hard to see what other days it could be. So I don't think it's proper to put to this witness that Mr. Towey accepted that he didn't get -- doesn't recall oral advices.

Just, as an example, sir -- there will be others -- Day

361. Question 90:

"Question: Would you agree with me it must have been likely that the ownership conformity was discussed at that meeting considering what had taken place the day before?

Answer: I think it's likely in the context that the issue was being referred to Mr. Nesbitt, that there was some kind of a discussion of it, yes."

And that's Day 361. There are other extracts from Mr. Towey's evidence which I can refer you to, sir. And I think it is inappropriate, therefore, to suggest that Mr. Towey didn't discuss it, but rather that he didn't have a clear recollection of on which date it was discussed but

couldn't rule out this.

Just one more example, sir: Day 360, questions 13 to 15.

"Answer: Of course we met and discussed it on the 23rd as well. I don't have a specific recollection of a discussion at that meeting but I believe I may have had discussions with senior counsel, I don't know when so I can't exclude it was then."

MS. O'BRIEN: Sir, I am going to check very carefully through Mr. Towey's transcript over lunch, and I will come back to it after lunch. But it is certainly my recollection that it was Mr. Towey's evidence that he had not recalled oral advice and that he only -- it was only brought to his attention that oral advice had been given by Mr. Nesbitt after the matter had been discussed shortly before he reattended to give evidence here in June of this year. As I said, I will check the transcript very carefully, but the portions which Mr. O'Donnell has now opened do not suggest that Mr. Towey had a recollection. What they suggest is Mr. Towey accepted that it was likely that the issue had been discussed at the meeting of the 23rd, which is something very different. But that's not in fact the portion of Mr. Towey's evidence that I want to bring to the attention of Mr. Gormley.

The portion of Mr. Towey's evidence that I want to bring to

the attention of Mr. Gormley --

MR. O'DONNELL: Sorry, sir -- certainly, sir, with respect

--

CHAIRMAN: Please let Ms. O'Brien --

MR. O'DONNELL: Except that it's a long way from saying

that he didn't recall oral advice being given. All he

could say was -- the extracts we have quoted from make it

clear that he believes oral advice was given but he can't

identify the day on which it was given. What's being put

-- the question, line 6 of that page is that his

understanding was advice had been given but he did not

recall oral advice being given. That's not what Mr. Towey

says. What Mr. Towey says is --

CHAIRMAN: My recollection, Mr. O'Donnell, was that Mr.

Towey was triggered by a comparatively recent meeting with

Mr. Nesbitt, in comparatively recent times that Mr. Nesbitt

mentioned to him that he believed he gave oral advices and

matters proceeded from there.

MR. O'DONNELL: Well that may be so, sir, but that doesn't

make his evidence less true, and what his evidence was was

that he recalled having discussions with senior counsel, he

didn't know when they were, so he couldn't exclude that it

was on the date in question. And I do think it's

inappropriate to put to this witness that he said oral

advice wasn't given. What he says is that he can't recall whether it was on this day or on another day, and if it's put on that basis, I have no difficulty.

MS. O'BRIEN: I am going to open the transcript, sir, because this has to be resolved.

MR. O'DONNELL: Sorry, is it being put to this witness --

CHAIRMAN: Please, Mr. O'Donnell...

MR. O'DONNELL: Because I am afraid we are going to end up in the situation where Mr. Gormley's credibility is going to be challenged. Mr. Gormley has said on oath that oral evidence was given by Richard Nesbitt and that he was present when that oral evidence was given. Now, is it now going to be put to Mr. Gormley that that's a lie? If it is, it should be put to him now.

MS. O'BRIEN: It's not -- I have no intention of putting that to Mr. Gormley.

MR. O'DONNELL: Well then, why is he seeking --

CHAIRMAN: Mr. O'Donnell, would you please allow matters to proceed.

MS. O'BRIEN: I'll put my question into context and I am going to open the transcript now, sir, on Day 359.

Question 133, page 140:

"Question: Let me ask you, first of all, Mr. Towey, and I am not trying to shut you down at all and I

am very interested in knowing what you have to say.

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

Answer: I don't have a specific recall, no.

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

Answer: I have no specific recollection, that's correct.

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

Answer: Well what I am going to say that Mr. Nesbitt has recollection of discussing the ownership issue with me, and I don't recall the specific meeting but there were limited opportunities when I would have met Mr. Nesbitt and had that opportunity to have that discussion. So as a result of that I am surmising that it may be possible that that exchange took place on the 23rd but, as I say, I don't actually remember it myself.

Question: Can I just ask you this: When did Mr. Nesbitt first tell you that it was his impression and his understanding of what had been



discussed at the meeting of the 23rd

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

Question: Now, you say in recent weeks or months.

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

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

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

Answer: It may have been, I can't say.

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

Answer: Others would have been present also.

Question: Others would have been present as well.

And do you know whether a note of that interaction was kept at that time?

Answer: I wouldn't have kept one.

Question: You wouldn't have. Do you know whether anyone else kept a note of that interaction?

Answer: I don't know that anybody did.

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

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

Question: Who were they? Who were potentially the other witnesses?

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

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

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

I should add, sir, that it was Mr. O'Donnell who put to Mr. Towey in his cross-examination of him the following day that there had been no advice given on the 23rd and that in fact the advice had been given on the 14th May.

But that is not in fact what I wanted to draw Mr. Gormley's attention to. What I wanted to draw his attention to was Mr. Towey's evidence in relation to his assessment of any discussion or any consideration of the issue that might have occurred on the 23rd April of which he had no recollection. And can I refer you firstly, and it will go there on the monitor beside you, Mr. Gormley, can you make that out?

Now, the first extract I want to refer to was on Day 359, which was the 9th July of this year, page 139. If I can refer you to the question that I put to Mr. Towey first at Question 129.

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

Answer: Any?

Question: Yes."

It's page 139. And in fact this just shortly precedes the

exchange that I have just read out. It's at page 139.

Question 129:

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

Answer: Any?

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

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

Question: It was exploratory?

Answer: But I know Mr. Nesbitt recalls discussing the ownership --"

So, that's Mr. Towey's evidence there. And again on the following day, Day 360, at page 98, the matter was returned to, I think it was in re-examination, at Question 239:

"Question: And in fairness you, you said yesterday, and I am sure you'll confirm it again, that even if the matter was discussed and some views were given at a meeting like that, you wouldn't have considered those definitive; you would have

expected them to be followed up, isn't that correct?

Answer: Oh yeah. I mean, if an informal view was given, I wouldn't have regarded that as the definitive article. So that would have been my view. I don't know whether an informal view was given. Maybe it was at that stage."

And I just wanted to draw that to your attention because it was Mr. Towey's evidence that whatever was discussed at that meeting, which in any event he didn't recall, he would not have considered that definitive advice. He would have considered that as something that had to be followed up by definitive advice, do you understand the point I am making?

A. Yes, that may be the case, but the views expressed were quite clear that they were, on the 23rd, that there was no problem in relation to the IIU.

113 Q. Also, I have to just bring to your attention again, Mr. Gormley, and again to enable you to comment on it, that it was Mr. Nesbitt's evidence that he did not give advice at that meeting of the 23rd April?

A. Well, I say he did.

114 Q. Now, following that meeting -- yes, just one other matter before I move on that I want to ask you about arising from the contents of your memorandum. If I could refer you to,

if you bear with me, it's paragraph 12.

You say that you were somewhat surprised when reading

Mr. Nesbitt's intended Statement of Evidence and Mr.

Towey's intended Statement of Evidence to see that they did

not make any reference to the details of those discussions.

"I have no doubt in my mind that these discussions took place"

Now, can I just ask you, when were you reading

Mr. Nesbitt's memorandum and Mr. Towey's memorandum?

A. Oh I think, you know, sometime -- we saw a notice of his intended evidence sometime, some days before it was submitted to the Tribunal I understand.

115 Q. So that would have been -- well Mr. Towey gave evidence in June and Mr. Nesbitt gave evidence in July.

A. Yes.

116 Q. So before June you would have known that Mr. Towey was not referring to what occurred at the meeting of the 23rd?

A. That's correct.

117 Q. And before July you would have known that Mr. Nesbitt, not only was not referring to the discussions but was saying in his memorandum that he gave no advice on that date?

A. Yeah, I would even go back further in relation to Mr. Nesbitt. Mr. Nesbitt did an opinion for us for the Office on the 26th February 2009 in relation to the waiver

of privilege. And when we saw in that -- Mr. McFadden and myself, we were asked to comment on his opinion -- and we saw in that that he made no reference to this consultation on the 23rd, we drew that to the attention of the Office.

118 Q. Of the Office?

A. Yes.

119 Q. Whose attention? To whose attention would you have drawn that matter to?

A. The person handling it at the time: Mr. O'Daly.

120 Q. Mr. O'Daly. And do you recall any discussion at the time as to whether you should consider bringing that information to the attention of the Tribunal that there had been this meeting on the 23rd and that there had been this discussion of which you have a recollection?

A. No, I don't recall. But, you know, I think that perhaps we had hoped that when Mr. Nesbitt would be giving his evidence and Mr. Towey would be giving his evidence before the Tribunal, that perhaps that there would be no need for us to bring this to the attention --

121 Q. But this was additional information, Mr. Gormley. This wasn't the same evidence that Mr. Towey or Mr. Nesbitt were going to give. Mr. Nesbitt was going to say that he amplified, on a written opinion on the 14th May in the context of a discussion as to the strategy that the

Department would adopt in meeting the disappointed applicants, and Mr. Towey's evidence was that he had no recollection of the meeting of the 23rd. So this wasn't the same information. This was very different information, isn't that right?

A. Yeah, I suppose you could say that. But I mean this is the first opportunity we have had to discuss it here.

122 Q. Now, after the meeting on the 23rd, on the 24th April you received Mr. Towey's letter, or I think minute, as you refer to it. It's at Divider 11 in the Book of Documents, in the document section of that book.

A. That's correct.

123 Q. You have that?

A. Yes.

124 Q. And I don't know if I need to read it all out, but he addresses it to both of you and he refers to both meetings, you see that, on the 22nd and 23rd, and he encloses a report that he had undertaken to provide your Office with and also a consolidated text of Section 111 of the 1983 Act which incorporated amendments contained in the intervening Statutory Instrument, and he had also confirmed that he had consulted internally within the Department as to whether the European Commission should be consulted in relation to the terms of the licence and the outcome of that



consultation.

And then if we go to the third paragraph:

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

So again Mr. Towey seems to have been, it seems, repeated the same error in that he again refers to the meeting of the 22nd rather than 23rd April?

A. Yes.

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

So you see there that he states and re-states in the most formal terms his requirement for an opinion on the matter?

A. That's right.

126 Q. And he doesn't, I think, make any reference, you'd agree with me, to any other advice that he had received on it?

A. No, but I will say that, as I said before, that he prefaced, I recall he prefaced his request -- when he mentioned this new issue, he said that he'd be seeking legal advice on it. So this was expected, and also I don't consider it unusual for him to ask for this, even though we already had discussed and expressed the views that it was okay.

127 Q. So you knew that Mr. Towey was going to write to you looking for a formal opinion on the matter, notwithstanding the discussion that you had had the previous day?

A. That's correct. I expected it.

128 Q. And then if you just go over to the next divider, you very promptly, then, instructed Mr. Nesbitt. It's a letter of the same date:

"Re proposal of the Minister for Transport, Energy and Communications to grant a licence to Esat Digifone to be the second provider and operator of a GSM mobile telephony service in Ireland and Commission Directive 96/2/EC amending Commission Directive 90/388/EEC and minute of the

Department of Transport, Energy and Communications dated 24 April, 1996."

"Dear Richard,

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

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

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

So, then over the page, you say:

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

So that's your letter to Mr. Nesbitt instructing him that an opinion on the issue in the third paragraph was required, isn't that right?

A. That's correct.

129 Q. And, as you say, that was one of a large number of issues on which legal advice was still awaited by the Department, isn't that right?

A. That is correct.

130 Q. Now, can I just refer you to the second paragraph of that letter, there is just something I want to ask you about.

You enclose a copy of the relevant papers?

A. Yes.

131 Q. And that, I take it -- no reason to think it wasn't -- was the copy of Mr. O'Connell's letter of the 17th April, Ms. Finn's memorandum, the extract from the Esat Digifone application?

A. That's right.

132 Q. Together with a new draft Article 8 of the proposed licence. So that's a new draft Article 8 that you are also enclosing, isn't that right?

A. Correct.

133 Q. And you say "... which is relevant and your opinion on the issues set out in that paragraph would be appreciated." Do you see that?

A. Yes.

134 Q. Now, it seems to be suggested in that paragraph that the draft of Article 8 is relevant to the request which Mr. Towey had made for an opinion on the ownership conformity issue, do you see that?

A. Yes, that the two of them are -- go hand-in-hand, yeah.

135 Q. Well, could you explain to me how that can be the case, how

Article 8, a draft of Article 8 could have been relevant to the opinion on which he had been requested to provide by Mr. Towey?

A. Well it had to do with ownership.

136 Q. Well, how did a draft of Article 8 have to do with ownership as disclosed in the application lodged by Esat Digifone and the change of ownership that had occurred?

A. Well, Article 8 had to do itself with ownership and also this question had to do with -- Article 8 had to do with ownership and what can be, you know, what changes could be brought to ownership in the licence. And the matter in the "relevant papers" had to do with ownership and what had transpired.

137 Q. But you see, here again, Mr. Gormley, I have to ask you how can Article 8, which was a draft article to be inserted into a licence which hadn't yet been issued, have had any bearing on a legal consideration of whether a change of ownership of the intended licensee as declared in the application lodged on the 4th August was consistent with the information that had been furnished?

A. As I say, it had to deal with that aspect of ownership changes that was going to be brought in Article 8.

138 Q. But you see, the opinion that Mr. Towey was looking for and that he had carefully explained at the consultation meeting

on the 23rd April and that he had again very carefully and meticulously explained in the third paragraph of his letter of the 24th April, that whether, having regard to the fact that there had been a competition, that there had been a mandatory requirement on applicants that lodged bids to declare the ownership of the intended licensee by which they would operate the licence if awarded -- if they won the competition, a consideration of that. What I can't quite understand is how Article 8, a draft relating to ownership restrictions in a licence that hadn't yet been issued, could have been material to any consideration which would bear on that opinion?

A. The question in the opinion -- we saw them as being hand-in-hand, being relevant.

139 Q. You see, that's what I was trying to ask you at the beginning, is that it does seem from the documents and from the evidence the Tribunal has heard that there does seem to have been this tendency to see these two issues as walking hand-in-hand, an issue which arose from a competition process which was over, which was historic, and an issue into the future regarding the extent to which the Minister could control ownership of a prospective licensee.

A. Yes.

140 Q. And it seems to the Tribunal, looking at that paragraph,

and indeed as well looking at your memorandum of the matters that were discussed at the meeting of the 23rd April and, as we'll see when we come to look at the opinion, that there doesn't seem to have been a clear distinction in the minds of those that were considering this issue at the time between the issues that arose from the change which had occurred prior to the licence being issued and the issues which arose for consideration regarding the extent to which the Minister could fetter and fix ownership after the licence had issued, do you understand? I don't know if I am making myself clear. I may not be.

A. All I say is at the time that we considered that Article 8 and the request for advice in relation to the restructuring were all the one, as it were.

141 Q. You considered they were all the one. When you sent this letter of instruction to Mr. Nesbitt, and this is also a question I asked Mr. Towey, what did you expect to receive?

A. We expected him to address the question that had been raised by Mr. Towey on the 23rd and also to advise on the new draft Article 8, both of which related to ownership and change in ownership.

142 Q. And you were expecting, I take it, an opinion which would address the change that had occurred that IIU was now to

stand in the shoes of AIB, IBI, Standard Chartered, Advent, whether that was material, what impact it had, what considerations might arise in terms of the competition, whether it was a material change, not a material change; that this was only a matter of finance and once it was clean finance and the finance is there, that would be acceptable, would that be fair to say?

A. Well, we wanted them to more or less -- I expected him to confirm what his advices were, or what his views were on the 23rd for the purpose of this -- for the purpose of the request by Mr. Towey.

MS. O'BRIEN: I am just about to move on to another matter, sir.

CHAIRMAN: It's just after a quarter to. I think, does it suit you if we resume at two o'clock?

A. Thank you.

THE TRIBUNAL ADJOURNED FOR LUNCH.

THE TRIBUNAL CONTINUED AFTER LUNCH AS FOLLOWS:

143 Q. MS. O'BRIEN: Thanks, Mr. Gormley. Now, having sent your Letter of Instruction to Mr. Nesbitt on the 24th, I think you furnished him with a further revised draft of the licence, isn't that right, on the 3rd May?

A. I think so.

144 Q. And following that revised licence, or revised draft



licence, you then received Mr. Nesbitt's opinion, which is at Tab 19 of the Book of Documents. And just in your statement, paragraph 14, what you told the Tribunal in relation to it, is that Mr. Nesbitt's written opinion was provided to the Attorney General's Office on the 9th May. "On reading it, I was satisfied that he had dealt with the question raised by Mr. Towey concerning the restructuring of the consortium. I recall thinking that what he said in his opinion was applicable to both the pre-licence situation and to the draft licence itself. I felt the opinion was echoing or reconfirming the advice given by Mr. Nesbitt at the meeting of the 23rd April, 1996. He had made it clear, and was doing so again in writing, that in considering whether a change of ownership within the consortium was of legal significance, the real issue was whether such a change compromised the ability of the joint venture to deliver the service in the manner proposed in its application."

For what it is worth, you agreed with the contents of the written opinion. That's what you informed the Tribunal?

A. Yes.

145 Q. And could we just briefly go to the opinion itself. The covering letter of the 9th May, 1996, first.

Mr. Nesbitt enclosed his suggested amendments to the Esat

licence, that's the draft that you had sent him. He suggested amendments to the Statutory Instrument, that was the Statutory Instrument to transpose the mobile directive given. And some general advices. And he told you that he was sending his views on the complaint made to the Commission under separate cover. You see that?

A. Yes.

146 Q. And he went on then to say that he remained of the view that the Minister should not drag his feet in issuing the licence, and he referred to the possible outcome of litigation.

And then, in the final paragraph, he referred to one final matter, and it occurred to him that the Minister might wish to impose on the persons backing Esat Digifone an obligation to stay with their commitment to back Esat Digifone for a given period, say three to six years. It could be possible to include in the licence a condition that the licence shall not be auctioned under an appropriate worded commitment until an appropriate worded commitment is to hand, and he confirmed that he did not know enough about the terms of the application to know what sort of commitment could be sought or from whom. However, it is a matter worth considering. And in his opinion, a sustainable condition to attach to the grant of the licence

to carry on an activity which by definition means that somebody else will be deprived of the opportunity to carry on that activity.

So, that was Mr. Nesbitt's covering letter?

A. Right.

147 Q. And then with that you have his opinion which he headed "Advices," isn't that right?

A. That's correct.

148 Q. Now, in the first paragraph of that opinion, he referred to having had an opportunity to consider the issues which had arisen relating to the introduction of a Statutory Instrument and to settling the terms of the draft Esat Digifone telecommunications licence which the Minister wished to issue, isn't that right?

A. That's correct.

149 Q. And then he has a subheading. So, in effect what he is saying in that first paragraph is that he has now had time to consider both the draft licence and the issues relating to the statutory framework under which it would be issued, isn't that right?

A. That's correct.

150 Q. And then he has a subheading "The Draft Licence," isn't that right?

A. That's correct.

151 Q. And in that paragraph below that, I am not going to read it out, but he just explains the mechanics; that he has marked up the draft licence that you had sent him showing his amendments, isn't that right?

A. That's correct.

152 Q. And then the next paragraph, he says that the terms of the amendment he suggested to Articles 1, 2, 4 and 5 should be self-explanatory. So he said that what he has marked up for those articles speaks for itself, isn't that right?

A. That's correct.

153 Q. And then he goes on to consider and to comment on the amendments that he has made to the draft which, by definition, weren't self-explanatory and required some comment, isn't that right?

A. That's correct.

154 Q. And it's the next three, in fact four paragraphs really which are material to our consideration of the opinion, isn't that right?

A. Yes.

155 Q. Dealing with Article 8?

A. Paragraph --

156 Q. It's just the third paragraph on the first page I think it starts. He says: "The amendments" --

A. Oh, yes.

157 Q. "The amendments I have suggested to Article 4 are more substantial. Article 8 imposes conditions material to the ownership of the licence and the management of the licence service, most particularly the ownership of shares in the licence company. I view these matters as being particularly sensitive and an area where the Minister's hand is substantially tied. The Minister agreed to give the licence in question prior to the introduction of the Commission Directive 96/2/EC. However, as a matter of law I am forced to conclude that if the licence document includes terms and conditions which are not sustainable under the Directive, a licensee, in my opinion, is free to apply to the Courts to have non-conforming provisions struck down."

A. That's correct.

158 Q. Then he goes on to say -- so what he is saying in that paragraph is that even though the competition proceeded and concluded prior to the introduction of that directive, that nonetheless the Minister is bound to comply with the Directive in fixing the terms of the licence, isn't that right?

A. That's correct.

159 Q. Then he goes on to say: "If one analyses why the Minister is concerned about the ownership of shares in the licensee,

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

Then he goes on to say: "In the circumstances I have proposed changing Article 8 quite fundamentally." And he goes on then to outline the amendments that he has made to Article 8, and I don't think we need to open them.

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

That really concludes his consideration and comment on Article 8, isn't that right?

A. Yes.

160 Q. Now, I think it's the second paragraph on that page to which you attach significance in terms of the matter on which Mr. Towey had first sought advices on the 23rd and had reconfirmed his request for advices in his letter of the 24th, and which had prompted you to write a Letter of Instruction to Mr. Nesbitt, isn't that right?

A. That's correct.

161 Q. And I think you say in your Memorandum of Information, that in that paragraph, as far as you were concerned, Mr. Nesbitt was echoing the kind of matters that were discussed at the meeting of the 23rd?

A. That's correct.

162 Q. And can you just draw my attention to the portions of that paragraph which, in your evidence, echoed the matters that were referred to at the meeting of the 23rd?

A. Well, it says, in the first part of it, it says: "If one analyses why the Minister is concerned" - and that suggests to me that it's a present concern - "about the ownership of shares in the licensee, the only legitimate concern he can have, if there is a change of ownership the service that has to be provided will in some way be compromised." So this kind of reechoed, when we were talking about, on the 23rd, the advice in regard to IIU, this was the principle he said, that it would only be a compromise in the delivery

of the service that would be important or objectionable.

163 Q. Yes. And then further: "I do not think it is tenable to suggest that the licensee has been awarded the licence because of the parties who own the licence. Rather the licensee has been awarded the licence because its plans and proposals were the most meritorious and provided a funding plan which looked feasible. There is no reason why any of these matters can be compromised. However, I do accept that there was a possibility that it might. It is also a real issue in the mind of the public."

A. Yes.

164 Q. They are the matters which you regarded as echoing what he was saying at the meeting of the 23rd?

A. Yes, exactly.

165 Q. He didn't echo any of the other matters that you remember he said at the meeting of the 23rd, isn't that right?

A. Well, I suppose in some -- I mean -- on the meeting of the 23rd he was -- he referred to the compromise, the fear of compromising the service and that did not happen in the case of IIU because they were just equity investors.

166 Q. But there is no reference there to IIU, is there? There is no reference to --

A. No, no.

167 Q. There is no reference there to the materiality of the



change and that this was purely finance and that it wouldn't compromise the service, and that all that you had to be satisfied of is that the finance was there; provided it was there and it was clean, that there was no problem?

A. Yes, but I was reading this in relation to -- with this, together with his previous views on the 23rd.

168 Q. So you were joining up your recollection of what was discussed on the 23rd to this paragraph?

A. Yes, exactly.

169 Q. To form the view that it related to the issue that had been raised by Mr. Towey on the 23rd, written to you on the 24th, and that you had instructed the ownership conformity issue?

A. Yes.

170 Q. Right. And I suppose if you looked at that without knowing what had gone before, you could possibly understand how you might think that it didn't, that it related solely to Article 8, isn't that right?

A. Maybe for an outsider.

171 Q. Right. Now, can I just ask you to go forward to Document 22, which is the submission that you and Mr. McFadden made to the Attorney General on Friday the 10th May.

A. Yes.

172 Q. And I don't know if you want me to read the entire of the

title out of the document again? It was the proposal to grant the licence. It was, secondly, the stamped draft of the regulations. Thirdly, the stamped draft of licence. And fourthly, the advices of Mr. Nesbitt that you were bringing to the attention of the Attorney General. If I can just refer you to paragraph 2.

"Richard Law Nesbitt Esquire, SC, was briefed with the said draft regulations and draft licence and asked to furnish his advices in relation to the validity thereof, and the same have now been received and have flag 'D3' thereon."

Do you see there?

A. Yes.

173 Q. You see that paragraph?

A. Yes.

174 Q. I think Mr. McFadden, in fairness, in his evidence, confirmed that neither you or he had actually flagged for the Attorney General that Mr. Towey had sought the additional advice in his letter of the 24th at the meeting on the 23rd, and that you had conveyed that on the 24th also?

A. We hadn't flagged it deliberately, but he had -- the Attorney General was given the material.

175 Q. Yes, he was given Mr. Towey's letter?

A. Yes.

176 Q. And at paragraph 2, and again I am just bringing this to your attention, Mr. McFadden, as I indicated to you at the outset -- Mr. Gormley, I am very sorry, as I indicated to you at the outset, merely to enable you to comment, if you wish, that when you and Mr. McFadden referred to Mr. Nesbitt's advices in that submission of the Attorney General, you did so in the context that they were advices on the draft regulations and the draft licence, do you see that?

A. Yes, yes.

177 Q. Now, in fact the Attorney General seems to have considered that on Sunday the 12th May, when he signed it. See he says: "I am very grateful for the speed in which the matter has been completed. The complexity of the issues, the volume of the paper and the shortness of the time available has meant that my review of this work has been only cursory. I am obliged and am very happy to rely on the excellent professional work of the two legal advisors, the Parliamentary Draftsman. The only document I have altered is 'D7' (Minutes to Department) and I have made suggestions for change. It is not practical in the time available for me to conduct a detailed examination of the drafts.

"I agree with the contents of this minute."

You see that?

And then if I can bring you forward to Divider 24. That's the letter signed by you and approved by the Attorney General as sent to the Department on the 13th May under a cover of which you furnished the Department with the draft licence and the draft regulations. Have you been able to locate that, Mr. Gormley?

A. Number?

178 Q. Number 24. I am just going to refer you to the first paragraph of that.

"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, SC, dated 9 May, 1996, concerning same."

You see that?

A. Yes.

179 Q. And you see there that you have described those advices in your letter to the Department as advices on the draft licence and on the draft regulations?

A. And general advices, I think.

180 Q. I don't think so, Mr. Gormley. But if you can draw me to

the -- draw my attention to anywhere that you have referred to those as general advices, I'd be very grateful?

A. Let me see. "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, SC, dated 9 May, 1996, concerning same."

181 Q. "Concerning same"?

A. "Concerning same," yes.

182 Q. I don't think there is any further reference to those advices, is there? Again, I am just drawing your attention to that.

A. Yes.

183 Q. Just, finally, Mr. Gormley, I just want you to -- want to refer you to an exchange of correspondence that passed between the Tribunal and the Chief State Solicitor's Office some years later in 2002, when the Tribunal was undertaking its preliminary investigative work in relation to aspects of inquiries into the GSM process. I don't know if you have a copy of that correspondence? It was opened yesterday in the course of Mr. McFadden's evidence, but -- We'll hand them up to you there. There is a small number

of documents that are stapled together, and I think there is one separate to that stapled bunch. Now, the first letter was the 15th March, 2002, which was at a relatively early stage of the Tribunal's inquiries into this matter.

A. I would say in relation to this, I was away from the office for a period of five years leading up to, I think it was the end of March 2002.

184 Q. Right. So from the end of March 2002, you were back in the office?

A. Yeah, towards the end -- yeah, March or April.

185 Q. Well, this correspondence, whilst it begins on the 15th March, it actually continues through to the 30th September.

A. Yes.

186 Q. "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 24th April, 1996, from Fintan Towey to Messrs. Gormley and McFadden of the Office of the Attorney General, which I enclose for you 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 both in relation to the beneficial ownership of Esat Digifone and the financing 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 way of written advice.

"I look forward to hearing from you in early course."

And just to put that in context. The Tribunal always had a copy of Mr. Towey's letter of the 24th April, but that was within the Departmental files and no privilege was claimed over it. What the Tribunal had only recently received on a without prejudice basis, subject to the continuing privilege asserted by the State, was Mr. Nesbitt's opinion of the 9th May, and indeed, the other opinions that were furnished by Mr. Nesbitt and by other counsel in relation

to the GSM process from start to finish.

So that was the request made on the 15th March, 2002.

Now, that letter enclosed a copy of Mr. Towey's letter of

the 24th April, so that it was quite clear that the

Tribunal's request for assistance, request for documents

and for a narrative account related to Mr. Towey's request

of the 24th April, 1996, on the ownership conformity issue.

MR. O'DONNELL: Sorry, sir, I am wondering is it a question

that's being put to this witness as to whether he saw this

or not? I have no objection to it being put, but I think

it should be put rather than simply Ms. O'Brien reading out

what her analysis of the documents are.

MS. O'BRIEN: I haven't made any analysis of the document,

I have simply read out the document and --

MR. O'DONNELL: What's the point in reading it out if he is

not going to be invited to comment on it? The most obvious

comment: Did you see it or did you not?

CHAIRMAN: We'll deal with it.

MS. O'BRIEN: I'll come to all of that when I have finished

the correspondence.

187 Q. Now, Mr. Shaw responded on the 15th May: "I refer to your

minute of the 16th March which you may recall that I have

no record of receipt. I now enclose herewith reply that I

have received from the Department of Public Enterprise for



your attention."

The final part relates to another matter that isn't relevant. And with that is appended a letter from Mr. Hodson, who was then a Principal Officer in the Department of Public Enterprise, dated the 13th May, 2002. And Mr. Hodson, although never a witness to the Tribunal, nor involved at any stage in the GSM process, had taken on the role liaising, I think, with Mr. Shaw in relation to Tribunal requests.

"I refer to your minute of the 16 April, 2002, enclosing a copy of a letter of the 16 March, 2002, from the Tribunal.

"All documents which I have found and which are relevant to the matters referred to in the Tribunal's letter have already been furnished to the Tribunal. I am not aware that there are any other documents in existence in the Department on this matter which have yet to be discovered to the Tribunal.

"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. Mr. Towey suggests that the matters 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."

You see that?

A. Yes.

188 Q. So that's the information the Tribunal was furnished with at the time.

A. Yes.

189 Q. Did you see the Tribunal's letter of the 15th March? Was it ever brought to your attention at the time Mr. O'Daly was making inquiries of you to enable him to respond to a request of the Tribunal?

A. I don't recall it being brought to my attention.

190 Q. Were you ever -- was the letter from Mr. Hodson brought to your attention?

A. No, I don't recall it.

191 Q. Now, the 27th May, 2002, was the Tribunal's response.

"Dear Mr. Shaw,

"I refer to recent correspondence and, in particular, yours of 15th May last enclosing a minute dated 30th May, 2002, from Mr. Aidan Hodson, Principal Officer of the Department.

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

to his letter. Having read the opinion of Mr. Nesbitt, dated 9th May, 1996, it would appear that Senior Counsel did not address the specific question raised 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."

The Tribunal then goes on to ask Mr. Shaw to identify the papers referred to by Mr. Towey in his letter of the 24th April, and indicates that it "would be obliged to hear at your very earliest convenience concerning the matters."

Now, the Tribunal again wrote on the 16th May -- 16th September, I should say, 2002, to Mr. Shaw.

"I refer to recent correspondence, and I am writing to seek your assistance in connection with the enclosed document."

That is the letter dated the 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.

I better pause there because I don't think it's on the monitor at the moment.

A. I don't have the letter, I think.

192 Q. Now, just continuing on there. The first paragraph really is just an initial recital referring to the letter of the 24th April, 1996, again.

"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.

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."

And you see there that what the Tribunal had requested on the 16th September was to arrange a meeting with you and with Mr. McFadden with a view to ascertaining what advice, if any, whether oral or otherwise, was transmitted to the Department in connection with Mr. Towey's request.

A. Yes.

193 Q. You see the difficulty the Tribunal is in, do you -- was in, Mr. Gormley in relation to this?

A. Well, I remember attending in October, the following

October, and none of this was put to me or to anybody else --

194 Q. I see.

A. -- by the Tribunal lawyers. It wasn't even referred to.

195 Q. Now, can I refer you to Mr. Shaw's letter of the 30th September.

"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 important observations made by the Office of the Attorney General in relation to the aforesaid documents. In this regard please find enclosed a copy of a minute from Mr. Liam O'Daly of the Office of the Attorney General dated 8th July, 2002, to me which contains the relevant observations.

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

Now, you see there, Mr. Gormley, that the Tribunal was told that the documentation which had been furnished to the Tribunal from the Office of the Attorney General and the observations thereon contained in the letter from Mr. O'Daly is what "that office" - that's the Office of the Attorney General, including you and Mr. McFadden - could furnish or could say material to the issues which the Tribunal had raised. So, you see, that that is what the Tribunal was informed on the 30th September, that apart from what was in Mr. O'Daly's letter, which I'll refer you to now, you and Mr. McFadden had nothing more to say in excess of the observations in that letter. And I just want to bring that to your attention also.

A. I must say, I don't recall this.

196 Q. Okay. Now, I just want to bring you to Mr. O'Daly's letter. And again, it's been opened I think word for word and at length, so I don't think I need to open it fully again. But it's "re Moriarty Tribunal."

"I refer to your minute dated 27th June, 2002, enclosing correspondence dated 27th May, 2002, in relation to certain papers provided at a meeting of the 22nd April, 1996. By

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

And Mr. O'Daly then lists all the documents from paragraph 1 to paragraph 11. And then having done so, he says the following points have been made in relation to the documents:-

"1. Pages 1 and 2 of Mr. Law Nesbitt's advice of the 9 May, 1996, appear to deal with the matters raised in the Department's minute of the 24th April, and there is nothing on the file to suggest that the Department thought otherwise.

"2. In relation to the draft letter sent by fax on the 30th April, 1996, the Department does not appear to have furnished this office with any reply received from Mr. O'Connell or indicated whether there was one."

I think that's, in fact, a letter that was ultimately sent on the 1st May by the Department to Mr. O'Connell, and that you and Mr. McFadden may have had a role in approving?

A. I think we settled the --

197 Q. Yes, I think you settled the draft. And then, finally:

"Article 8 of the proposed Esat licence which deals inter

alia with the ownership of the licence was drafted by E  
Bacon of the Parliamentary Draftsman's Office in  
consultation with the Departmental officials. Mr. Law  
Nesbitt advised fully in relation to the draft.

"I trust that this documentation from our files is what is  
required by the Tribunal. Please convey to the Tribunal  
that if this office can be of any further assistance, they  
should not hesitate to contact us. I enclose herewith  
directions of the Attorney dated 3rd July and so forth. I  
will be on Annual Leave for the next two weeks. If you  
require any assistance or directions in relation to this  
matter, please contact Mr. McFadden in this office."

So the Tribunal was told by Mr. Shaw that this was the  
entirety of the observations and the entirety of what you  
and Mr. Gormley could say about -- you and Mr. McFadden  
could say about the issues that had been raised in the  
letter of the 24th April.

A. But the documents --

198 Q. That the documents could say about it. This was the entire  
of the observations. If I just refer you again to the  
final paragraph of Mr. Shaw's letter of the 30th:-

"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 those issues." And that is what the Tribunal was told on the 30th September, 2002. Do you see that, Mr. Gormley?

A. What letter, sorry? What are you quoting from?

199 Q. I am quoting from Mr. Shaw's covering letter under cover which he forwarded to the Tribunal, Mr. O'Daly's letter to him in relation to the inquiries which had been made by the Tribunal in relation to this whole issue of advice received in response to Mr. Towey's request for advice on the legal conformity issue. And Mr. Shaw informed the Tribunal that other than the comments made in Mr. O'Daly's letter to him, that that represented the entirety of what the Attorney General's Office, specifically including yourself and Mr. McFadden, had to say on that issue. And I just want to bring to your attention that that was the state of the Tribunal's knowledge as of the 30th September.

A. Well, I read this to mean the documents.

200 Q. Fair enough.

MS. O'BRIEN: Thanks, Mr. Gormley.

CHAIRMAN: There may be some further questions that some other counsel may have for you, Mr. Gormley.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. SHIPSEY:

201 Q. MR. SHIPSEY: Mr. Gormley, I appear for Mr. Dermot Desmond and IU. I hope you can hear me from back here?

A. Yes.

202 Q. Mr. Gormley, I have a few questions that I want to ask you about a number of periods of time; 1996, 2002 and then again in 2008 and 2009. But can I first ask you, you have been here over the last number of days, have you?

A. Yes.

203 Q. And have you been here for all of Mr. McFadden's evidence?

A. Yes.

204 Q. And you and Mr. McFadden were working on this project in 1995 and 1996, is that correct?

A. That's correct.

205 Q. And do you agree with the evidence that was given by Mr. McFadden to the various counsel over the last number of days?

A. Yes, wholeheartedly.

206 Q. And is there anything that you take issue with or anything you wish to contradict him on or amplify in relation to his evidence?

A. No, no, Mr. Shipsey.

207 Q. In 1995 and 1996, you and he were the Attorney General team, as it were, working on the question of the second mobile phone licence, is that correct?

A. That's correct, Mr. Shipsey.

208 Q. And you had engaged Mr. Richard Law Nesbitt, Senior

Counsel, back in the summer, late summer of 1995 to provide an opinion, and you had had a meeting with him I think back at that time, is that right?

A. That's right.

209 Q. In the course of procedure for the competition for the licence and then the award of the licence, am I correct in understanding that there were, in total, three meetings between you and Mr. Nesbitt in connection with the second mobile phone licence that you can recall? One in the summer of 1995, one on the 23rd April of 1996, and another one in May of 1996?

A. Oh, yes, correct.

210 Q. And do you recall any meetings apart from that?

A. I think there was a -- I think there was a meeting on the 3rd May, 1996.

211 Q. Yes. And in relation to the meeting of the 23rd April of 1996, do you have a good recollection of that meeting?

A. Yes, I do.

212 Q. And it's a long time since April of 1996, we have some 14 years have passed since that. Is there anything that the passage of time has done to impair your recollection other than the mere passage of time, that you have come to this Tribunal?

A. No.

213 Q. And if you had been asked at any time between April of 1996 and March of 2010 as to whether there had been a discussion or oral advices given at that meeting of the 23rd April of 1996, would you have been able to do so?

A. Yes.

214 Q. Would you have been able to answer the Tribunal's lawyers who were present on the 18th October of 2002, if they had asked you any questions about what transpired at the meeting on the 23rd April, 1996?

A. Yes, and let me say that there was nothing that happened during the course of that meeting that prompted me to refer to that meeting. There is nothing about the discussions that took place.

215 Q. There appears to be something of a criticism emanating from the Tribunal's legal team as to why nobody on the State side, be it the Department or the Attorney General's Office, referred to any oral advices being proffered at that meeting in April of 1996. But I just wonder was there anything to prevent or any impediment to any of the Tribunal counsel asking you questions at that meeting in October of 2002?

A. No. And I wasn't asked any question whatsoever at that meeting in October 2002.

216 Q. Ms. O'Brien has referred to a letter of, I think the 16th

September of 2002, where there is reference in the body of the letter to Mr. Shaw asking if Mr. Shaw 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. Do you recall seeing that letter?

A. No.

217 Q. And, again, just from the terms of that letter, it would seem that the purpose of Mr. Davis in writing to Mr. Shaw on the 16th September, was to set up a meeting with you and Mr. McFadden for the purpose, as it says, of ascertaining what advice, if any, whether oral or otherwise, was transmitted to the Department and Mr. Towey. You see that in the letter now?

A. I suppose that's correct, yeah.

218 Q. And as you have just said, no such request was made by either Mr. Coughlan, Ms. O'Brien or Mr. Healy at that meeting? No request of you as to whether any oral advice had been obtained?

A. None, no, no, no. And I would say that if there was something to prompt -- that would have prompted me at that meeting, I would, without being asked, have referred to it

at the meeting of the 23rd.

219 Q. Now, you have heard Mr. McFadden's evidence, and it has gone unchallenged in relation to that meeting of October of 2002. I just wonder, and there has been no questioning of you in relation to that meeting, but I'd like to find out from you, did you leave that meeting of the 18th October of 2002 with any impression as to what the Tribunal legal team then thought about the explanation that had been proffered by Mr. Nesbitt and Mr. McFadden at the meeting?

A. Yes, I left with the impression that they were happy with the explanation given by Mr. McFadden and Mr. Nesbitt.

220 Q. Can I just ask you, what gave you that impression? Can you tell the Chairman what it was as you and Mr. McFadden were perhaps walking from Dublin Castle back to the Attorney General's Office, what gave you the impression or led you to believe that you had satisfied or you collectively had satisfied the Tribunal that the legal advice requested by Mr. Towey on the 23rd or 24th April, 1996, had in fact been obtained?

A. Well, Mr. McFadden had pointed out to them at the meeting where it was in the opinion. Mr. Nesbitt, who was the writer of the opinion, told them it covered this point. And I wasn't asked anything. So, I was quite happy that they were satisfied that this covered it.

221 Q. And there was no follow-up, that you are aware of, or no follow-up that was communicated to you after the meeting looking for further clarification or amplification on anything that transpired at the meeting?

A. No. And of course there was the report by Mr. McFadden to the then Attorney General, you know, which explained it.

222 Q. And did you see that report that Mr. McFadden prepared which went, I think, to Mr. Rory Brady, who was the then Attorney General?

A. I don't know whether I saw it then or not, but I have seen it, yes.

223 Q. And do you agree with the contents of it?

A. Yes, I do.

224 Q. Now, I just want to be clear on behalf of Mr. Desmond and IIU as to your state of knowledge of the involvement of IIU in the Esat Consortium in April of 1996. Would I be correct in understanding that you learnt, for the first time, of the involvement and the participation of IIU in the Esat Consortium when Mr. Towey referred to it at the meeting which you held in the Attorney General's Office with Mr. Nesbitt and Mr. McFadden and Mr. Towey on the 23rd April?

A. That's correct.

225 Q. And is it also the case that insofar as that issue arose,

there was a fairly substantial discussion about it?

A. Yes, there was. And an explanation as well.

225 Q. And your recollection, and you have given evidence, as has Mr. McFadden, that what amounted to oral advices were given by Mr. Nesbitt at that meeting to the effect that he did not believe that there was a legal impediment to the involvement of IIU, would that be fair?

A. That is fair.

227 Q. And that's a view that even provisionally you and Mr. McFadden either appeared to share or stated that you shared at that meeting, is that correct?

A. Yes.

228 Q. And so Mr. Towey, leaving that meeting, was and had requested a written opinion, but he would have had the benefit of Mr. Nesbitt's oral views and your views and Mr. McFadden's, would that be correct?

A. That's correct.

229 Q. However, he did want a written opinion, isn't that correct?

A. Yes.

230 Q. And you knew that he wanted a written opinion?

A. Yes, because I seem to recall that he signalled it before he explained the problem, and at the end as well he said he would be looking for the legal opinion --

231 Q. And your --



A. -- in writing.

232 Q. And at that stage you were an experienced member of the Attorney General's Office. You had been there for a number of years, certainly 10 or 15 years at that stage, would that be correct?

A. Yeah, 11, I think.

233 Q. 11. And you knew that a written opinion was requested?

A. Yes.

234 Q. And you communicated that request for a written opinion to Mr. Nesbitt, you and Mr. McFadden jointly on the 24th? I think it may have been sent on the 25th, but it's dated the 24th April of 1996?

A. Yeah, it was prepared on the 24th, and I think there was a slight delay because we had to get -- I recall that the relevant papers which he referred to, he had given them to Mr. -- Mr. Nesbitt had taken them away with him on the 23rd, and when he sent over the, Mr. Towey sent over the request for the opinion, those papers weren't with it, so we had to request them, and they were sent by fax, and I think it was sent out the next day.

235 Q. Can I just ask you this: Having requested that opinion in writing of Mr. Nesbitt, is it conceivable that you and Mr. McFadden would have sought the sanction of the then Attorney General, Mr. Gleeson, to approve the licence and

the draft regulations without receipt of that written opinion from Mr. Nesbitt?

A. Yes, of course. I mean...

236 Q. Is that conceivable or inconceivable?

A. Inconceivable.

237 Q. And when you got the opinion from Mr. Nesbitt on the, I think it was the 9th May of 1996, did you discuss it with Mr. McFadden before preparing the minute to be put before the Attorney General, Mr. Gleeson?

A. Yes, we did. I did.

238 Q. Were you in any doubt in relation to the opinion but that it covered the question that had been first raised on the 23rd April of 1996?

A. No.

239 Q. If you had been in any doubt in relation to that opinion or if you felt it required amplification or clarification, was there any impediment to you going back to Mr. Nesbitt and picking up the phone to Mr. Nesbitt and saying, "Richard, you haven't actually answered the question"? Was that -- was there any impediment to you doing that?

A. No impediment, no.

240 Q. In terms of your responsibility to the Attorney General, I assume that the Attorney General is a very busy person who has to deal with, ultimately with all of the issues that

come into the Attorney General's Office?

A. That's correct.

241 Q. And I take it you would know that in certain circumstances it wouldn't be possible for the Attorney General to read everything that is placed before him by his staff in very considerable detail?

A. I suppose that's correct, but -- yes.

242 Q. And therefore, I take it that both you and Mr. McFadden would be careful to bring to the attention of the Attorney General the matters that may be concerning you and Mr. McFadden so that he would have an opportunity to take a view in relation to them, would that be fair?

A. That is true.

243 Q. Now, I don't know if you, over the years, have been a keen follower of Tribunal business, but I'd like to find out from you when you first became aware that the view, even on a provisional basis, was being taken by the Tribunal that in fact you and Mr. McFadden had not obtained the written legal advice that had been requested by you of Mr. Nesbitt in April of 1996? When did you first learn that this Tribunal was of the view that you had, not to put it too bluntly, but that you had failed in your duty to get the opinion that Mr. Towey had requested you to obtain from Mr. Nesbitt?

A. Well, I know when we were brought -- when we went to the Tribunal in October 2002, there was a query by the Tribunal as to whether or not the opinion covered this.

244 Q. Yes, and I think you said earlier that you believed that you had satisfied the Tribunal at that point?

A. Sure.

245 Q. And from October 2002, when was the next time that it became clear to you that you were, in effect, wrong in relation to your understanding that you had satisfied the Tribunal that Mr. Nesbitt's opinion of the 9th May, 1996, had answered the question that you had raised? When did you learn that you were wrong in relation to your understanding of the Tribunal's position?

A. I think once the consideration of the question of waiver of the opinion.

246 Q. So we're talking about sometime in late 2008 or 2009?

A. Yes.

247 Q. And that arose both in the context of a ruling by the Tribunal on the privilege issue, is that correct, and then subsequently in relation to certain provisional findings?

A. That's right.

248 Q. And you know and will have heard a number of counsel being very coy in relation to disclosure in relation to the provisional findings, and I am not, at this late stage,

going to alter that protocol, but would it be fair to ask you, Mr. Gormley, that your coming here to give evidence to the Chairman is with a view to correcting and ensuring that the Tribunal don't fall into error in relation to a finding about Mr. Nesbitt's opinion and whether it did or didn't deal with the ownership issue?

A. Certainly.

249 Q. And again, it is, of course, a matter for the Sole Member, having heard all of the evidence, to determine what facts he will find, and you will be aware and you will have heard the assurance, or reassurance from him that he will base that upon evidence and not on any working hypothesis or assumptions. And if I understand your evidence, and certainly Mr. McFadden's evidence, you want the Sole Member to find that you and Mr. McFadden asked the question on behalf of Mr. Towey and obtained the answer from Mr. Nesbitt in his written opinion of the 9th May, isn't that correct?

A. That's correct.

250 Q. And, Mr. Gormley, although there is reference and some emphasis in this particular part of this particular module being placed on whether oral evidence was given, when oral evidence was given, either on the 23rd -- sorry, oral advice was given, sorry, oral advice was given on the 23rd

April, 1996, or on the 14th May of 1996, but would I be correct in saying that you and Mr. McFadden, having sought a written opinion from Mr. Nesbitt, were not going to be satisfied unless you got that written opinion?

A. Yes.

251 Q. You weren't going to operate, and you weren't going to knock on Mr. Gleeson's door and say: "Well, actually we don't need to worry about legal advice in relation to the involvement of IIU and having that in writing because Richard Nesbitt told us on the 23rd April, 1996, that we didn't have to worry about it"? That was never going to be enough once you had requested a legal written opinion, isn't that correct?

A. Once requested, yes, we would have had a duty to.

252 Q. And if I understand you, and also Mr. McFadden, correctly in relation to the oral evidence, what the evidence that you have given in relation to the oral evidence does is that it was oral advice given which was confirmed in substance in the opinion of the 9th May of 1996, is that correct?

A. That's the way I saw it.

253 Q. Now, when you were at the meeting on the 18th October of 2002 with the Tribunal counsel and when it was being suggested to Mr. Nesbitt by Mr. Healy that his opinion

didn't deal with the question and didn't answer the question that had been raised, were you surprised that this was being suggested by Mr. Healy at that meeting?

A. I don't recall being surprised at that meeting.

254 Q. Is it as Mr. McFadden has suggested, you felt that Mr. Healy was probing and testing whether in fact Mr. Nesbitt believed that he had provided an answer to the opinion?

A. I didn't know whether he was, Mr. Healy was, when he was commenting on the opinion, whether he was talking about the -- how wide the opinion was, the quality of the opinion or, I didn't -- I didn't take it, necessarily take it to mean that he didn't accept that it addressed the point.

255 Q. And whatever about the questions that had been raised, you agree with Mr. McFadden that Mr. Nesbitt robustly defended his view that the opinion addressed the issue?

A. Sure.

256 Q. Now, you would agree with me that were the Tribunal to conclude that neither IIU nor Mr. Dermot Desmond was legally vetted before the award of the second mobile phone licence, that that would reflect poorly -- well, firstly on you, Mr. Gormley, because you know you were asked for an opinion, or asked to obtain an opinion as to whether it was permissible for IIU to be substituted for the four

financial institutions, isn't that correct?

A. Yes.

257 Q. And it would reflect poorly on Mr. McFadden, and reflect poorly on the then Attorney General, albeit that he may have only looked at the documents in a cursory manner?

A. Yes, but the advice or the view expressed was that subject to IIU having the finance, and I don't think we -- well, I didn't know who IIU was at the time -- having the finance and money.

258 Q. I know you are strongly of the view that the opinion does give the answer to the question that was raised, but were the Sole Member to decide that in fact that wasn't addressed, that would reflect poorly on you, wouldn't it?

A. Yes, I suppose, yes.

259 Q. And it would be damaging to your reputation, to Mr. McFadden's reputation, and perhaps even to Mr. Gleeson's reputation?

A. Yes.

260 Q. And of course, from the perspective of IIU and Mr. Desmond, it would be open to the inference that something improper occurred where a licence was awarded to the Esat Digifone Consortium comprising Mr. Desmond and IIU without the question of whether IIU could have been involved in that consortium being considered, isn't that right?



A. Yes.

261 Q. And based upon your knowledge and your intimate involvement with the issue back in April and May of 1996, that would do you an injustice, Mr. McFadden an injustice, Mr. Gleeson an injustice, and IIU and Mr. Desmond an injustice, isn't that correct?

A. Yes.

MR. SHIPSEY: Thank you.

THE WITNESS WAS EXAMINED BY MR. LEHANE AS FOLLOWS:

MR. LEHANE: Thank you, Mr. Chairman.

262 Q. Mr. Gormley, my name is Darren Lehane, and I appear for Mr. Denis O'Brien. Mr. Kelly, unfortunately, Judge, has a slight speech problem so I am going to be doing the cross-examination.

CHAIRMAN: I am aware of that. As leader I have to offer him the courtesy.

MR. LEHANE: Yes, sir, and I am doing very much at Mr. Kelly's direction.

263 Q. Mr. Gormley, first of all, Mr. O'Brien has quite rightly pointed out that the GSM competition or process fell into two halves, namely the process leading up to the award of the right to negotiate the licence, if we call that the competition or the evaluation stage, and secondly, the negotiation of the licence. So, when people submitted

bids, Mr. Gormley, what they won was the right to negotiate, isn't that right? Now, your first involvement in this process, Mr. Gormley, began in April 1995, isn't that right?

A. Yes.

264 Q. Now, I don't plan, Mr. Gormley --

A. Yeah, around then, maybe a little earlier.

265 Q. And it was very much that you and Mr. McFadden were being appointed, as the Chairman has pointed out, to operate as the legal team --

A. That's correct.

266 Q. -- to the Department in the evaluation and licensing process, isn't that right? And we see, Mr. Gormley, that in a series of letters from the Department to the Attorney General's Office, they are very much asking you to deal with specific issues as they arise, and these are set out, and I don't propose to open them, in Book 89 A, the documents leading to the award -- or, sorry, leading up to the first opinion, isn't that right, Mr. Gormley?

A. Yes, that's right.

267 Q. And if I could turn, and just look at that first opinion that Mr. Nesbitt provided to the Department, Mr. Gormley, which is located at Tab 3.1 of Book 89, the big book. And again, this has been read many times before. So if you

turn to page 5, we see Mr. Nesbitt saying -- do you have it there, Mr. Gormley?

A. Yes, I have it.

268 Q. "In my opinion the identity of the party licensed is only of material importance if a change in identity restricts open competition in the provision of mobile phone services.

Under the Act the Minister is given power to impose whatever terms and conditions he considers appropriate.

However, the terms and conditions must be connected to the achievement of the objectives of the Act. 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 phone operation, such conditions could be subject to

attack. Clearly the Minister is entitled to insist on

information about changes and prescribe by way of condition

changes which will be unacceptable and lead to the loss of

the licence. Such conditions must be objectively

justifiable."

And am I right, Mr. Gormley, in suggesting that what

Mr. Nesbitt is doing there in August of 1995, is expressing

a very clear view on how the Department should deal with

changes in ownership?

A. That's correct.

269 Q. And that it should only intervene in these very limited circumstances?

A. That's right.

270 Q. Okay. And, Mr. Gormley, if we now jump back into the competition itself, and if we look at what were people telling the Department that they were going to provide, we see that, and this is relevant to the RFP documents, which are the rules of the competition, because as you'll recall, Mr. Gormley, and it's been pointed out many times here today and over the past couple of days, the rules of the evaluation process contained in the request for tenders, paragraph 3 of which stated: "Applicants must give full ownership details for proposed licensee."

Now, I believe my solicitor has handed up the last day, I wasn't here -- if we put it up on the screen, Mr. Gormley, and you can look at it on the monitor, excerpts from the Andersen evaluation report, just to see how Mr. Andersen -- I am looking for page 10, please.

Now, Mr. Gormley, this was opened yesterday. Can you see it on the screen? So, what we are seeing here is how Andersen Consulting in the report, or sorry, the evaluation report is describing the application that was made by Esat.

So: "A5 will operate an Irish limited liability company

which has been incorporated in Ireland under the name of Esat Digifone. The participants are two operators, namely Esat who operates in Ireland on the basis of a VAS licence, and the Norwegian carrier Telenor. However, Communicorp Group is the shareholding company behind Esat, and 34% of these shares are held by Advent International plc."

And this is the important bit now, Mr. Gormley: "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." And you see that?

A. Yes.

271 Q. The important bit I submit there, Mr. Gormley, is the reference to "Institutional investors"?

A. Yes.

272 Q. And I say that's important, Mr. Gormley, because in the application that Esat submitted, it identified the institutional investors and it broke down that 20%, Mr. Gormley. It said that it had received written investment commitments from four named financial institutions, I think of which were AIB, Investment Bank of Ireland, Standard Life Ireland and Advent International. And would you agree with me that the importance that the evaluation report was placing on those institutional

investors can be seen by the fact that the report refers to it simply as "Institutional investors" and doesn't seek to name it? In other words, what the report is concerned with is the money aspect of it?

A. Yes.

273 Q. Thank you. Now, the ownership issue, Mr. Gormley, if I am right, became an issue causing concern or, rather, a request for assistance in April of 1995, isn't that right?

A. '96.

274 Q. When Mr. Towey asked for a legal opinion or advices on changes in ownership, isn't that right?

A. Yes. April 1996.

275 Q. In April 1996. And I don't know if you are aware of this, Mr. Gormley, but in his evidence to the Tribunal, Mr. Towey was asked about why he went looking for this legal advice. And I don't know whether you were following the transcripts at the time?

A. I don't recall seeing that.

276 Q. And, Chairman, rather than handing up extracts to put them on the screen, I propose just reading from relevant extracts.

In his evidence to the Tribunal, Mr. Gormley, on Day 361, Mr. Towey stated that he wasn't so much concerned with the change in the identity of the investor being introduced.

What he was concerned about was whether or not that that was permissible by the rules. In a sense what he was seeking to do was get an opinion out of an abundance of legal caution, Mr. Gormley. Mr. Towey, being a very careful civil servant, wanted to ensure that there was nothing procedurally wrong with allowing IIU to come on board.

A. Yes.

277 Q. And he said this -- I'll just read out one exchange in relation to this which occurred on Day 361.

"Question: And I have to suggest to you that the reason that you did consult with the Attorney General's Office was out of an abundance of caution and out of a concern to ensure there was nothing procedurally wrong by allowing IIU to come in in replacement for the other four?

Answer: They were the reasons, yes."

Now, would you accept that Mr. Towey had no idea what both yourself, Mr. McFadden, Mr. Nesbitt and whoever else the Attorney General's Office sought to consult might say in relation to the ownership issue?

A. He didn't give any indication.

278 Q. I mean, he can't predetermine, or he can't look into the

depths of his heart and know what you guys are going to say?

A. Well, he didn't preface his question by saying "I think this..."

279 Q. Exactly. Would I be correct -- would you agree with me, Mr. Gormley, that that, in itself, illustrates that there was nothing sinister going on, in the sense that Mr. Towey seeks legal advice and he asks for legal advice on the ownership issue?

A. Yes, I agree with you.

280 Q. Thank you, Mr. Gormley. Now, you meet with Mr. Towey on the 22nd April, isn't that right?

A. Yes, for the drafting.

281 Q. For the drafting meeting. And there is a bit of dispute as to whether or not the ownership issue was first raised on the 22nd or the 23rd April, isn't that right?

A. That's right.

282 Q. But the dispute is simply in relation to the dates as such, but nobody is disagreeing that the issue was raised quite properly and advice was sought.

A. Yes, but it was raised on the 23rd.

283 Q. You are quite emphatic, as is Mr. McFadden, that the issue was raised on the 23rd. And if you just bear with me, Mr. Gormley. And as a result of that meeting on the 23rd,



we see Mr. Towey writing a letter on the 24th April, 1996,  
to yourself and Mr. McFadden, isn't that right?

A. That's correct.

284 Q. And again, this has been opened on many occasions, but if  
you want to have a quick look at it, it's at Tab 11 of the  
big book, Mr. Gormley. And he says: "I would also like to  
reiterate our requirement for a legal opinion on the  
restructuring of the ownership of Esat Digifone. Relevant  
papers were provided at our meeting on 22 April. In  
particular, the question of whether recent correspondence  
suggests any change in the identity of the beneficial  
owners of the company which could be considered  
incompatible with the ownership proposals outlined in the  
company's application must be addressed. Before the  
ultimate award of the licence, it is now considered that it  
would be preferable to seek warranties in relation to both  
the beneficial ownership of Esat Digifone and the financing  
package for the project. This is considered prudent given  
the nature of the concession being given to the company.  
Perhaps you would advise, however, whether such a  
requirement could be challenged by Esat Digifone as an  
imposition not envisaged in the competition process or  
otherwise unreasonable on legal grounds."

I think it's only the first bit there that's relevant, but

what he is asking you for formally in writing is legal advice.

A. That's correct.

285 Q. Isn't that right? And would it be common that meetings would be held between officials of the Attorney General's Office and civil servants at which views or legal advice would be given in an oral manner at that meeting, sorry -- would it be common, Mr. Gormley, that advice would be given orally at meetings between officials of the Attorney General's Office and civil servants, and that that would be followed up with a request in writing for advice in writing?

A. Yes, there would be, yes. There is nothing unusual about following it up with a request in writing.

286 Q. And that would be something indicative of a careful civil servant who wants it in writing?

A. Sure.

287 Q. And just in relation to the meeting of the 23rd, you gave advice at that meeting, is that right?

A. Yes, well, Mr. Nesbitt, yeah -- we gave, whether you want to call it views or advice, yes we did.

288 Q. And would you like to tell me your views, just very briefly? I know you have already gone into this in detail with Ms. O'Brien, but what was your view that you expressed

on the 23rd April?

A. That it was no problem.

289 Q. And of course you were giving that advice in a context where you had been part of the State's legal team dealing with the GSM process from April, isn't that right?

A. That's correct.

290 Q. And in the context where you had a lot of documentation in relation to the evaluation process since April of 1995, isn't that right?

A. Yes, but it was more in the context of the application and the papers that Mr. Towey, when he was explaining it, used.

291 Q. But -- and again, I don't want to go back to the opinion of Mr. Nesbitt of August of 1995, but in the documentation that was sent to Mr. Nesbitt in August 1995 would have been included the RFP, isn't that right?

A. Yes, that would be right.

292 Q. So that would have been informing the general discussion, isn't that right? Sorry, I'm saying the documentation which was being produced intermittently in relation to this process would have been in the background, isn't that right, as to awareness?

A. Yes, but we made no reference to it, to either the opinion or to the RFP on the meeting of the 23rd.

293 Q. But Mr. Nesbitt would have had it?

A. Oh, yes, of course.

294 Q. Very good. Thank you, Mr. Gormley. Now, you then send off to Mr. Nesbitt, on the 24th April, 1996, the same day, very efficiently, looking for advices, isn't that right?

A. I think it went on the 25th, but the letter was drafted on the 24th.

295 Q. It's dated the 24th?

A. Yes.

296 Q. And again you'll find that at Tab 12 of the big book, Mr. Gormley. It's just going up on the screen now.

A. Yes.

297 Q. And we see: "Re proposal of the Minister for Transport, Energy and Communications to grant a licence to Esat Digifone Limited to be the second provider and operator of a GSM mobile telephony service in Ireland and Commission Directive 96/2/EC amending Commission Directive 90/388/EEC and minute of the Department of Transport, Energy and Communications dated 24 April, 1996.

"Dear Richard,

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

The 'Consolidated text' of Section 111 is not enclosed as it does not incorporate the more recent draft of the

proposed amendments thereto.

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

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

So would you agree with me, Mr. Gormley, that that letter has to be viewed in the context of the discussions which took place between you and Mr. Nesbitt on the 23rd April?

A. Yes, certainly.

298 Q. And Ms. O'Brien, in her examination of you earlier on, was asking why the new draft Article 8 was being included in this request or opinion for advices in circumstances where you were looking at changes to the ownership makeup prior to the grant of the licence. And could I suggest -- could I suggest to you or would you agree that you were providing that in an effort to be as comprehensive as possible in relation to the ownership issue, or, was it a case of when you were asked -- you were asking for an opinion on ownership, all ownership related stuff both pre and post licence, I know it hadn't been granted, would be sent to Senior Counsel?

A. Yes.

299 Q. Thank you, Mr. Gormley. And again, in the information which was being sent to Mr. Nesbitt, we saw the extract from the Esat Digifone application, we see the letter of 17 April, 1996, from Mr. Owen O'Connell in William Fry, and we see the very helpful little chart setting out the ownership percentages, isn't that right, Mr. Gormley?

A. Yeah, drawn up by Regina Finn.

300 Q. So Mr. Nesbitt would have had a comprehensive brief in relation to the change in the ownership which were now being mooted or advice was being sought of, again in the context where he would have had in his little box or file of material relating to the GSM process, the RFP document?

A. Of course, yeah.

301 Q. Thank you, Mr. Gormley. Just bear with me a second. And, Mr. Gormley, if you could now turn to Tab 19 of the big book, which is the covering letter and opinion of Mr. Richard Law Nesbitt, dated the 9th May, 1996.

A. Yes.

302 Q. And if -- sorry, I should ask you, on receipt of both the covering letter and the opinion, what was your view as to the question of whether the original request for information or advice had been answered?

A. I was quite satisfied that it was.

303 Q. Were you? On your reading of the documents in and of themselves? Sorry, maybe I am not being clear, Mr. Gormley.

A. Sorry, I have a problem with my hearing at the moment.

304 Q. Mr. Gormley, you were coming at these two documents from a situation in which you had a lot of background information both from oral statements made in meetings and from your -- and your own advice that you have given evidence that you gave, isn't that right?

A. Yes.

305 Q. So, when you were looking at that opinion and covering letter, obviously you had that in the back of your head?

A. Yes, I read it in the context of what had gone before.

306 Q. But what I want to ask you: If you didn't have that information, that background information, do you think that the covering letter and the opinion, on their face, answered the request for information and advices that were sought?

A. I don't think so.

307 Q. Sorry, you don't think so?

A. Yeah.

308 Q. Well, if we look at paragraph 2 of the covering letter, Mr. Gormley, 9th May, 1996:-

"I am sending my views on the complaint made to the

Commission under separate cover. However, I remain of the view that the Minister should not drag his feet in issuing the licence. If there was to be litigation, so be it, but delaying does not achieve any end. Before issuing the licence you should make it clear to Persona solicitors that he is not holding his hand on the issue of the licence.

The form of the draft letter has already been discussed with you. My reasoning in this regard is that the Minister is committed to grant a licence. He is now between two competing interests. One, Esat who say they are entitled to the licence, and the other, Persona, who are indicating that the licence should not issue. Delay in issuing the licence would clearly damage Esat. If Persona wish to stop Esat getting the licence, they should be required to take appropriate legal action to restrain the issue. They would then be required to give undertakings to the parties affected, particularly Esat. This will concentrate their minds, particularly in circumstances where the Commission are likely to be making unsympathetic noises in relation to their complaint."

And again, if you turn to page 2 of the actual advices themselves, Mr. Gormley, and you see: "If one analyses why the Minister is concerned about the ownership of shares in the licensee, the only legitimate concern he can have is



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

What would your view on that paragraph be, Mr. Gormley?

A. Yeah, that it covered the request for advice.

309 Q. So, again if you were coming at it, and maybe this is an unfair question, but again if you were coming at it from a situation where you don't have any background knowledge of the meetings that took place and the advices that were given orally and you read that paragraph, what would your view be in relation to whether or not the original request for advices had been answered?

A. I suppose perhaps you would think it didn't cover it.

310 Q. That it didn't cover the original request for advices. Why do you come to that view, Mr. Gormley?

A. Because -- maybe because it's written in the context of,

the heading is the "Draft licence".

311 Q. Okay. But again, Mr. Gormley, would it be your position that with the benefit of the oral advices that were given, both by Mr. Nesbitt and yourself, that you felt the issue was addressed?

A. Yes, certainly.

312 Q. Thank you, Mr. Gormley. Now, were you aware, and again I don't want to trespass into what may be privileged, but I understand yesterday Mr. O'Callaghan took Mr. McFadden through the Office of the Attorney General's awareness of various complaints that were being made both to the Minister directly and to the European Commission regarding the Persona complaint.

A. Yes.

313 Q. And the Minister and the Attorney General's Office would have been aware of these issues in April of 1996, is that right?

A. Yes.

314 Q. And one of the main planks or complaints of Persona, the Persona Consortium, and indeed one other consortium I think, was the issue of ownership, isn't that right, and whether the winning consortium --

A. Yes.

315 Q. -- had complied with the RFP?

A. Yes.

316 Q. So the issue of ownership would have been, and the consequences and its import, would have been something that you would have been very aware of in the Office at that time?

A. Yes.

317 Q. So, again, the advice being sought by the Department and the advice being given both by yourself, Mr. McFadden and Mr. Nesbitt in his opinion, is all being given around the same time as this?

A. Certainly at this time.

318 Q. Well, some of that advice, sorry, I should be more precise, is being given in that context.

So, just in conclusion on the advice issues, are you satisfied that the request for advice on the ownership issue made by the Department was answered appropriately?

A. Yes.

319 Q. Very good, Mr. Gormley. Now, very briefly in relation to matters from 2002 onwards. I know that you said, Mr. Gormley, that you have no recollection -- I mean, you never saw and you had no reason to see, the letter from the Tribunal to Mr. Shaw of the 15th March, 2002, seeking certain information regarding ownership?

A. Not until just today.

320 Q. Not until you were in here, yes. And similarly, you don't recall seeing the answer to that request which included a minute or a letter from Mr. Aidan Hodson dated the 13th May, 2002, is that right?

A. That's right.

321 Q. But have you had an opportunity to have a look at Mr. Hodson's minute, Mr. Gormley? I know that --

A. Not really. Only when it was put to me, when it was opened here.

322 Q. Well, I don't know if you want to open it there. I think Ms. O'Brien was going through it a while back, so it would have been handed up to you.

A. I have it here now. It's 13th May, 2002?

323 Q. Yes, 13th May, 2002. And it's up on the screen as well.

And just looking at the third paragraph in that letter,

Mr. Gormley:-

"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 this letter, 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. Mr. Towey suggests that the matters raised in his letter of 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."

Would you agree with me, Mr. Gormley, that this letter could be read as indicating that the response to the request contained in the letter of 24 April, 1996, was contained in the legal advice given by Mr. Richard Law Nesbitt on the 9th May, 1996?

A. Could you repeat it, please?

324 Q. Sorry, somewhat cumbersome. Would you agree that the third paragraph of that letter could be read as indicating that the opinion given by Richard Nesbitt on the 9th May, 1996, answered the queries raised in the letter of the 24 April, 1996?

A. It depends on what he means by the "context of the final identification of the provisions of the licence."

325 Q. But again -- sorry, Mr. Gormley?

A. It says "... to be dealt with in the context of the finalisation of the provisions of the licence, in particular Article 8."

326 Q. Okay, but I am talking about the previous sentence, Mr. Gormley. "Other than legal advice from Mr. Richard Law Nesbitt," but I take your answer.

Now, the Tribunal was also furnished with a memo, or a letter prepared by Mr. Liam O'Daly of the Attorney General's Office, dated -- well, I think it's the bottom of it, it's the 3rd July, 2002, which is attached to a letter from Mathew Shaw dated 30th September, 2002. Do you have a copy of that in front of you, Mr. Gormley?

A. I think so. Yes, there is no date on it -- it's attached to a letter you say of --

327 Q. Sorry, the letter is -- it's attached to a letter from Mathew Shaw to John Davis dated 30th September, 2002.

A. Yes.

328 Q. And behind that then is a letter from Liam O'Daly to Mathew Shaw, do you have that?

A. Yes.

329 Q. Now, Ms. O'Brien went through this with you a while ago, but I just want to ask you one or two questions following on from that.

Mr. O'Daly's response has to be read in the context of the second paragraph, where it states: "By way of assistance to the Tribunal, this Office has examined its files in relation to this matter, and I herewith enclose for immediate transmission to the Tribunal, subject to the Department waiving legal privilege in their respect, the following documents listed hereunder." And then there are

11 documents.

And then on the second page, Mr. Gormley, Mr. O'Daly states: "The following points are made in relation to the documents:-

"(i) Pages 1 and 2 of Mr. Law Nesbitt's advices of 9 May, 1996, appear to deal with matters raised in the Department's minute of the 24 April, 1996, and there is nothing on the file to suggest that the Department thought otherwise." Do you see that?

A. Yes.

330 Q. Would you agree with me, Mr. Gormley, that that's a fairly comprehensive response from Mr. O'Daly that the opinion of Mr. Nesbitt dealt with the request for information contained in the letter of the 24th April, 1996?

A. Yes.

331 Q. And that Mr. O'Daly made that based on the documentation, that that's what he says in the letter?

A. Yes, he says there is nothing on the file to suggest -- yes.

332 Q. I note that on the first page, the letter from Mr. Shaw to Mr. Davis in the third paragraph he states:-

"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."

And the important thing, I suggest, or not suggest, but I am just asking you to comment on is that whereas Mr. O'Daly's letter seems to deal only on the documentation, Mr. Shaw's letter makes reference to "or say" isn't that right?

A. Yes.

333 Q. Like, Mr. O'Daly doesn't say by way of assistance to the Tribunal: The Office has examined its files and has spoken to -- or has gotten the oral comments, or anything like that in it. So it's confined solely to the documents.

I don't know whether Mr. Gormley is tired, Mr. Chairman, or whether I'll plough on?

CHAIRMAN: I don't intend to bring Mr. Gormley back tomorrow.

MR. O'DONNELL: Given that I have yet to go into my questions with him, and I would sincerely hope to finish today, I wonder would it be possible to take even a five-minute break? I am just conscious, Mr. Gormley has been in since half past ten, and if we could just take a five-minute break.

CHAIRMAN: I am always conscious of the witness. We should



maximise time.

MR. O'DONNELL: In order to finish today, if we even took a five-minute break now.

CHAIRMAN: We'll take exactly ten minutes now and resume at five to four.

MR. COUGHLAN: Just -- that's fine.

CHAIRMAN: Ten minutes.

THE TRIBUNAL ADJOURNED AND RESUMED AS FOLLOWS:

334 Q. MR. LEHANE: Mr. Gormley, I'll only keep you a couple of more minutes. Mr. Gormley, if I could move on to the meeting of the 18th October, 2002, which you attended with other members of the State, or with other officials from the Office of the Attorney General and Mr. Nesbitt at the offices of the Tribunal. Could you tell me what views you expressed at that meeting?

A. I didn't express any views because I wasn't called upon to express any.

335 Q. Could you tell me what views Mr. Nesbitt expressed?

A. Well, he explained that his opinion covered this and I recall him, you know, justifying his opinion and explaining his opinion. And --

336 Q. Are you satisfied Mr. Nesbitt did it in a comprehensive manner?

A. Yeah, I suppose so, yeah.

337 Q. And what were your views coming away from that meeting of how the matter stood with the Tribunal?

A. I was happy that the -- I felt that the Tribunal lawyers were satisfied that we explained this.

338 Q. And did you discuss it with Mr. McFadden coming away from the meeting?

A. I think so, yes. We were both of the same opinion, I think.

339 Q. You were both of the same opinion. And given all that's transpired over the past couple of days and in light of your own experience, Mr. Gormley, are you satisfied that the request for advices made on the 24th April by Fintan Towey were addressed in the opinion of Mr. Richard Nesbitt and in the oral advices given by Mr. Nesbitt and the views expressed by yourself at various meetings?

A. Yes.

340 Q. And just one small point. You have been in the Office of the Attorney General for many years, isn't that right, Mr. Gormley?

A. Yes.

341 Q. And the Office of the Attorney General is a curious office, in the sense that it occupies the holder of that office, in addition to being the legal advisor to the Government, is also the guardian of the Public Interest, isn't that right?

A. Yes.

342 Q. And would I be correct in saying that that is something that permeates downwards to the staff, in the sense that you would feel a special degree of responsibility working in an office like that, given that it operates on that particular plain, and that would be something that you would be conscious of when you are going about your daily work?

A. Yes. I also want to say that the opinion was the opinion of the Attorney General.

343 Q. And not only was it the opinion of the then Attorney General, Mr. Gleeson, and I believe the expression yesterday was that when the opinion (sic) was giving his sanction, it was transubstantiated - I don't know if that was said - into the opinion of the Attorney General, but it has subsequently been approved --

A. Yes.

344 Q. -- by Mr. Rory Brady, Attorney General, and Mr. Paul Gallagher, Attorney General, isn't that right? Well, in the sense the view -- I don't know if that --

CHAIRMAN: We may be straying a little between into theology and jurisprudence at this stage, Mr. Lehane.

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

345 Q. MR. O'DONNELL: Mr. Gormley, just a couple of matters.

Firstly, just going back to your Memorandum of Information.

I think you were called to the Bar I think a couple of years after Mr. McFadden, in 1978. Mr. McFadden was called in 1975, I should say.

A. Yes.

346 Q. Whereas you were called in '78. So Mr. McFadden would have been senior to you at the Bar by a couple of years in any event. And I think you joined the Attorney General's Office in 1985?

A. That's right.

347 Q. And Mr. McFadden had already been there since 1981?

A. Correct.

348 Q. So he would have been senior to you in some respects?

A. Yes, I suppose.

349 Q. And it seems that the -- while the correspondence in some part is countersigned by both you, is it fair to say that the lead role of the two of you was probably played overall by Mr. McFadden rather than by yourself, particularly given that you were away for some period of time during this?

A. I wasn't away before --

350 Q. You were away between 1996 and 2002?

A. That's right.

351 Q. But during the period that you were involved, would it be fair to say that Mr. McFadden probably played, of the two,

the lead role between the two of you?

A. Yeah, I suppose.

352 Q. And I think you have no real recollection of relevant events until we get to the meeting of the 23rd April, 1996, isn't that right? That's your memorandum which is at Tab 3, I think it's item -- or Tab 1 in the booklet. I don't know if you have it there?

A. Yes, yes.

353 Q. And I think you used an interesting phrase in the course of your statement, you said that you recalled viewing the joint venture as a vehicle and the financiers as merely fuel providers?

A. Yes, that was my thoughts then.

354 Q. And does that remain your thought now?

A. Yes.

355 Q. And do I take it, then, that the fact that, to continue your own metaphor, that the consortium suggested they might get the petrol from one garage, so to speak, or four garages at one stage, wouldn't be something that would stop them getting the petrol from another different garage at another stage?

A. Exactly.

356 Q. That it was immaterial to you as to whether or not the petrol came from one garage or from four garages?

A. Correct.

357 Q. Provided that the vehicle was roadworthy?

A. Exactly.

358 Q. And again, possibly straying the metaphor almost to breaking point, provided that the petrol wasn't dirty?

A. Yes.

359 Q. And then in that sense, I think you also expressed the view that the Minister, your evidence this morning was that the Minister was under an obligation, and indeed, was under a duty to provide the licence to the consortium which had won the competition?

A. Right.

360 Q. And that was the Esat/Telenor Consortium?

A. Exactly.

361 Q. The Communicorp/Telenor Consortium. And I think it was put to you that obviously the winning of the competition entitled the successful consortium to negotiate with the Department. But am I right in thinking that your view was that any negotiations only related to conditions that would be attaching to the licence rather than to their overall entitlement to the licence?

A. Yes, and reasonable conditions.

362 Q. Yes. And as I think you also said, that those conditions had to be reasonable, they couldn't be imposed in an

arbitrary or unfair way?

A. That's correct.

363 Q. And I think in that context, you were aware of the opinion of Mr. Nesbitt of August 1995?

A. That's right.

364 Q. And you were also, I think, in March of 1996, aware of the new directive, the 1996 directive, and you knew that those conditions could only be imposed if they related to essential requirements of any licence holder?

A. That's right. Article 3(a) of the new, of the directive that was amended in 1992.

365 Q. That's right. It said that "Licencing conditions must not contain conditions other than those justified at the grounds of essential requirements."

A. Yes.

366 Q. And do I take it that it was your view at that time that the identity of the owners could never be an essential requirement?

A. Yes, of course.

367 Q. That it would never be appropriate for a Government to insist on one person rather than another person getting a licence of this sort, that what mattered was not the identity of the person getting the licence, but the service which that person could provide?

A. Exactly.

368 Q. And so, therefore, that informed your view when you were going to this meeting on the 23rd April of 1996 with Mr. Nesbitt and Mr. Towey?

A. When I was going to it I didn't -- when I was going to the meet I didn't expect this thing to come up.

369 Q. All right. Well, insofar as when the question arose, I suppose this wasn't something that you had never heard of or thought of before?

A. Yes, yes.

370 Q. And when Mr. Towey raised the issue, you say that Mr. Nesbitt emphasised the importance of the ability of the joint venture to deliver the service --

A. Yes.

371 Q. -- in accordance with the application form, and you say that it's in that context you thought of the joint venture as a vehicle and the financiers as providing fuel providers. Did Mr. Towey cavil or quibble with that as an analysis? Was there any argument or dispute about that?

A. No, nobody did.

372 Q. So insofar as you can say, did Mr. Towey appear to understand that as being the impact of, the import of Mr. Nesbitt's advice, that what mattered was the service rather than the identity of the financiers?



A. Yes, I think that's pretty well emphasised by Mr. Nesbitt.

373 Q. And again, you say that you had a general discussion, which you say was not a superficial discussion, it was, I think, a discussion on which you said you all engaged, and I dare say it was perhaps a little more interesting than some of the other more arcane matters that you had been discussing earlier on, but you all engaged in this discussion?

A. Yes.

374 Q. And is it fair to say that there was a consensus view amongst yourself, Mr. McFadden and Mr. Nesbitt as to what the answer to this legal issue raised was?

A. Yes, it was no problem.

375 Q. That there was no problem?

A. Yes.

376 Q. And that was a consensus view of all three of you?

A. That's the way I felt.

377 Q. You said your bit, albeit not as much as Mr. Nesbitt?

A. Yes.

378 Q. Is that right?

A. Yes, Richard Nesbitt took a lead role, as I say, in this.

379 Q. But that at the conclusion of that meeting, did you feel that Mr. Towey understood what the import of the advice being given to him by Mr. Nesbitt, as backed up by yourself and Mr. McFadden, was?

A. Yes, I did.

380 Q. And Mr. McFadden -- sorry, Mr. Towey didn't, at the end of the meeting, express any doubts or concerns that while he indicated he wanted it "In writing", he didn't say: Well, I am still not sure and I am still not happy and I still don't understand. That wasn't the position. Mr. Towey, on the contrary, appeared content with the advice that he had been given and satisfied --

A. So it appeared to me.

381 Q. Yes. Now, when it came to Mr. Nesbitt, I think you know that Mr. Nesbitt was a highly experienced counsel and was a Senior Counsel of some years standing at that stage?

A. That's true.

382 Q. Had you briefed Mr. Nesbitt before?

A. Yes, I remember the first time being involved with him was in relation to a case, I think it would be about 1986, it was called the Grannagh case. It was a European case. And I worked with him in that, and he did rather a very impressive job insofar as he drafted -- there were two sets of proceedings. There were Article 177 proceedings and there were Article -- it was called 168 then. And I remember his submissions on the, his draft submissions were shown to the Commission at the time and the Commission withdrew, on the basis of this, withdrew their --

383 Q. Their objection?

A. -- their proceedings against us and acted on behalf of Ireland in this case. It's to do with the language.

384 Q. So you regarded Mr. Nesbitt as a highly persuasive legal advisor, particularly in areas of European law, that was your experience of him?

A. Yes.

385 Q. And you were aware of him as a commercial counsel?

A. Yes, I was.

386 Q. I can't remember whether he was a Senior Counsel at the time, but he certainly had been at the Bar since 1975, and I think he may have taken silk shortly before this, I don't know whether you recall this?

A. I think he was a Junior Counsel when I -- at the Grannagh case. It was a Senior Counsel this time.

387 Q. I think he was a Senior Counsel by the time he was giving this -- I think he was a Senior Counsel by the time he was called to advise on this, in or about, it may have been October '95?

A. And I also knew him at the Bar in my time.

388 Q. And you would have known him at the Bar?

A. Yes.

389 Q. And could I suggest to you, firstly, that you had considerable faith in his ability to advise you?

A. Oh, yes.

390 Q. And if Mr. Nesbitt had felt, irrespective of what documents he had been provided with, that he wanted more documents, he was the kind of person who would not hesitate to come back to you and say "I can't advise on this unless I have more"? Is that the kind of person Mr. Nesbitt was and still is?

A. Yes.

391 Q. And therefore, and likewise, can I suggest to you that because you knew Mr. Nesbitt, if for some reason you felt that there was a lack of clarity in a response given by him, either orally or written, because of your long knowledge of Mr. Nesbitt, would you feel that you would be able to write or ring Mr. Nesbitt and say: "Sorry, I need more clarity on this, I need more clarification on this issue because I am not happy with the response"?

A. Yes, I would have no difficulty in doing that.

392 Q. You would have no difficulty in doing that?

A. No.

393 Q. And of course, that didn't happen in this situation. When you got the opinion, you recall reading the opinion yourself, the opinion we are now talking about of May 1996?

A. That's right.

394 Q. And I think your evidence was -- sorry, your Witness

Statement makes it clear that on reading the opinion, you were satisfied that it dealt with the question related by Mr. Towey concerning the restructuring of the consortium.

And you say you recall thinking that what he said in his opinion was applicable to both the pre-licence situation and the draft licence itself, and you felt the opinion was echoing or reconfirming the advice begin by Mr. Nesbitt at the meeting of the 23rd?

A. That's right.

395 Q. Is that still your view?

A. That's right.

396 Q. Mr. Towey then received the opinion, isn't that right?

A. Yes.

397 Q. The opinion was sent to Mr. Towey. And Mr. Towey has said in evidence that he can confirm that he had no questions in his mind as to what the position was after considering the opinion. And he said that -- he has also said that he did not feel there was any need for further instructions. If Mr. Towey had contacted you -- it's his Witness Statement. If Mr. Towey had contacted you, which he gave under oath on Day 360 here; if Mr. Towey had contacted you, Mr. Gormley, and had asked you for further clarification or further advices, would you have been willing to go after Mr. Nesbitt to try and get them?

A. Certainly.

398 Q. But Mr. Towey didn't do so?

A. Didn't do that.

399 Q. So, as far as you were aware, you understood what the opinion meant, Mr. McFadden -- I assume you and Mr. McFadden were of one mind on this?

A. Yes.

400 Q. He suggested that your evidence and his should be read as such. And Mr. Towey understood what the opinion meant?

A. Yeah.

401 Q. So far as you were aware, he never came back with further queries?

A. So far as I am aware.

402 Q. And I think it is also the position that you prepared a written submission to the Attorney General?

A. That's right.

403 Q. Now, the Attorney General was furnished with various documents, including the documents that are on the Departmental file, isn't that right?

A. That's right.

404 Q. They would appear to include the letter of the 24th April of 1996. Is there any reason why you would have not included that?

A. No reason why not.

405 Q. And they also included the opinion of Mr. Nesbitt of the 9th May of 1996?

A. Correct.

406 Q. And the then Attorney General, Mr. Dermot Gleeson, was satisfied -- well, I suppose, not just satisfied, but obliged and happy to rely on the work that you and Mr. McFadden and the late Mr. Bacon and Mr. Nesbitt had done?

A. Yes.

407 Q. Isn't that right?

A. Yes, that's right.

408 Q. So was there any doubt in your mind that Mr. Gleeson was able to understand what the opinion said?

A. No.

409 Q. And Mr. Gleeson, of course, hadn't been privy to the meeting of the 23rd April of 1996. He hadn't attended that meeting?

A. No.

410 Q. But he was, nonetheless, able, so far as you are aware, to understand and sanction the release of this opinion as dealing with the issues raised?

A. That's true.

411 Q. And isn't it also the position that while you -- I know you were away between 1996 and 2002. Were you aware that in

September of 2002 the opinion -- the issue arose, which had arisen previously in March, that the Tribunal had a view that the opinion didn't appear to deal with the matter?

Were you aware of that in September, or when do you recall first becoming aware of it?

A. I recall sometime around October before --

412 Q. Before the meeting?

A. Before the meeting.

413 Q. Well, at that stage -- so, in October of 2002 you were satisfied in your mind that you understood what it said.

You believed that you understood what Mr. McFadden knew what it said?

A. Yeah.

414 Q. And so far as you were aware the Attorney General knew what it said?

A. Yes.

415 Q. And you had no reason to think that Mr. Towey didn't know and agree with what it said?

A. That's true.

416 Q. But here was the Tribunal saying: Well, we don't think it says what you think it says. And then you had the meeting of the 18th October, 2002?

A. That's right.

417 Q. And as you have said, whatever understanding the Tribunal



may have had or misunderstanding the Tribunal may have had before that meeting, you believe that as a result of that meeting, any misunderstanding they may have had in relation to the opinion should have been clarified, and basically the -- they should have -- they appeared to be, to you, satisfied to accept your explanation?

A. That's true.

418 Q. I think you are aware that the minute of Mr. McFadden records the fact that there was no indication that the Tribunal required any further assistance from the Office of the Attorney General?

A. That's right.

419 Q. And I think you never expected to be involved again in relation to this issue?

A. That's true.

420 Q. And is it also the position that you were not in a position, and you are not in any sense withholding evidence from the Tribunal?

A. No, never.

421 Q. Let's be clear about this. In case there is a suggestion out there in the ether, I am not suggesting it's been directly put, but it may be implicit in some of the questions that are raised, that in some way you withheld or concealed the fact that you had received oral advices,

insofar as -- sir, insofar as this is implicit, are you happy to confirm on oath to the Tribunal that at no stage did you conceal or hide, in any way, the fact that oral advices had been given?

A. I am very happy to say that.

422 Q. And that you would have been willing, if anybody had asked you the question as to whether or not oral advices had been given and what the content of those was, to disclose those immediately?

A. Sure.

423 Q. And you remain of the view that the opinion deals with the issue that was raised by Fintan Towey in his letter of the 24th April, 1996?

A. Yes.

424 Q. And outside of the Tribunal, am I right in thinking that nobody has ever suggested otherwise?

A. I haven't heard.

MR. O'DONNELL: Thank you.

CHAIRMAN: I understand Ms. Carol Talbot has been retained by Mr. Kelly on behalf of Mr. Lowry. Is it the case, Ms. Talbot, you would like to --

MS. TALBOT: That's correct, Chair. I don't have any questions for Mr. Gormley. I should point out I have a very short application to make when the Tribunal has heard

Mr. Gormley's evidence.

CHAIRMAN: You have no questions.

MS. TALBOT: No questions for Mr. Gormley.

CHAIRMAN: In conclusion Ms. O'Brien.

MS. O'BRIEN: Nothing, sir, in conclusion.

CHAIRMAN: Thank you very much, Mr. Gormley, for your evidence.

THE WITNESS THEN WITHDREW

CHAIRMAN: Ms. Talbot.

MS. TALBOT: Thank you. I am instructed by Mr. Lowry to have him recalled as a witness in circumstances where since his giving evidence in December 2005 there have been seven witnesses, five of whom were recalled and two new witnesses who have given evidence, and he wishes to be recalled by the Tribunal to give response to certain evidence that has been provided to the Tribunal in the meantime.

CHAIRMAN: Well, I understand there has already been some correspondence between the Tribunal solicitor and Mr. Kelly in which it was requested what further evidence he proposes to offer in relation to that. And I understand it may have been pointed out that your former leader, now a member of the Supreme Court, when Mr. O'Donnell had not cross-examined the substantive previous witnesses.

MS. TALBOT: That's correct, Chairman. I should say that

Mr. Lowry has instructed that he wishes to give evidence to the Tribunal in response to that evidence. That is correct, there has been correspondence.

CHAIRMAN: I will reflect on that matter, Ms. Talbot, as I will, as a matter of urgency, address some of the other matters that arose earlier today, and revert at the very earliest opportunity. Mr. Shipsey.

MR. SHIPSEY: Chairman, could I just have 30 seconds of your time, Mr. Chairman, just to say in relation to the evidence that you have heard over the last few days, Chairman, we are confident that on consideration of the evidence of Mr. McFadden and Mr. Gormley, that you will decide to withdraw or rescind the provisional findings that you made earlier in relation to the change of ownership issue. But in the, hopefully, unlikely event that that confidence is unfounded, we would expect to be told, sir, in writing so that we can make written submissions in relation to the evidence that's been heard over the last two days. We hope that won't be necessary, but in fairness to IIU and Mr. Desmond, we would wish to have that opportunity in the event that the provisional findings are not to be revoked.

CHAIRMAN: Well, in the first instance, Mr. Shipsey, I can assure you I will be addressing everything that's

transpired in recent days as a matter of urgency.

Primarily perhaps in the context of preparing what is an obviously important chapter, and I'll obviously ensure that fair procedures are complied with in the course of what takes place.

MR. O'DONNELL: Are there going to be fresh provisional findings in respect of which we'll be allowed to make submissions? Because otherwise the situation will be that you will go into the writing of your report without having heard the submissions of the parties, including my client, on the evidence that has been given today and over the previous three days, and so I am asking you now to give us an opportunity -- firstly, I think it is appropriate that you would make new provisional findings to replace the previous ones. Secondly, I think you should hear us -- I accept that that can be done in writing rather than orally, by way of submission on what should be -- on what those findings might be. And thirdly, that we be given an opportunity to respond to any provisional findings that you might make prior to the final report. Because otherwise we'll be in a situation, as I say, where we'll not have been in a position to make submissions on this evidence and the next thing we'll hear is a report. That doesn't seem to me to be the way in which you have wanted to treat it to

date.

CHAIRMAN: Well, I am not short on submissions. As you know, Mr. O'Donnell, between, indeed your co Senior, Mr. Fanning, and Mr. Lehane, with some additions, I have through the better part of 2,000 pages over the past several weeks, and I'll reflect on these matters. I have indicated my anxiety to ensure that procedures remain fair, and I'll see that communication is made with the relevant legal personnel as to how matters should best proceed.

Very good.

THE TRIBUNAL ADJOURNED UNTIL FURTHER NOTICE