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IN THE COMPETITION

Case Nos. 1277/1/12/17

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

20 July 2017

Before:

THE HONOURABLE MRS JUSTICE ROSE
(Chairman)
DR CATHERINE BELL CB
MARGOT DALY

(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) BALMORAL TANKS LIMITED
(2) BALMORAL GROUP HOLDINGS LIMITED

Appellants

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

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HEARING

APPEARANCES

Robert O'Donoghue QC and Zac Sammour (instructed by K&L Gates) appeared on behalf of the Appellants (Balmoral).

Rob Williams and James Bourke (instructed by CMA Legal) appeared on behalf of the Respondent (Competition & Markets Authority).

1 Closing submissions by MR. O'DONOGHUE

2 THE CHAIRMAN: Good morning.

3 MR. O'DONOGHUE: Morning.

4 Madam, if I can begin by reminding ourselves of a few basic organising principles for the
5 review of the decision. I just handed up an extract from the *Lundbeck* case, just to remind
6 ourselves of a few of these points.

7 *Lundbeck*, as you know, Madam, is an unbelievably long judgment, so what I have done is
8 given you the cover page and just the passage I want to go to, because it is something
9 distinct; but obviously, if the Tribunal would like a copy of the entire thing, we are
10 obviously happy to provide that.

11 It is the bit over the page at the hole punch, 105. This is obviously in the context of appeals
12 against Commission decisions but, subject to a few minor wrinkles, in my submission, the
13 principles are essentially the same.

14 So starting at 105, obviously the burden of proof is on the CMA, first. Second, the benefit
15 of any doubt must go to Balmoral. The question of reasonable doubt and a fair trial
16 obviously engages article 6 of the Convention of Human Rights and the corresponding
17 article 48 of the charter, that is at paragraph 107.

18 At 108, an important point:

19 "Account must be taken of the non-negligible stigma attached to a finding of
20 involvement in infringement of competition rules for a natural or legal person."

21 109, precise and consistent evidence, albeit the evidence must be looked at as a whole,
22 rather than being atomised.

23 Now, when I opened this case, I made the point that the appeal is a point of principle for
24 Balmoral and, of course, every company that comes before this Tribunal says their case is
25 important, otherwise they would not bring it; but my client has asked me to reiterate that
26 there is obviously a legal person in the form of the company that is an addressee of the
27 decision and there is an individual, Mr. Joyce, who has been through a certain amount and a
28 degree of finger-pointing has been directed in his direction.

29 So, this appeal is brought on the basis of a very genuine and deeply held feeling that they
30 certainly tried to do the right thing. They think they did the right thing. Bits of it may, with
31 the gilt edge of hindsight, have been done a bit better, but we are where we are, but they
32 certainly feel that they effectively brought an end to the cartel because without their entry,
33 and with their refusal at the meeting, subject to the question of the dawn raids, the cartel

1 may well either have continued or may have continued uncovered, depending what CST or
2 somebody else would have done.

3 I mean, in a sense, it is neither here nor there, but, of course, the ringleader, CST, gets off
4 scot-free, no civil exposure, their director is not subject to criminal prosecution, and the one
5 person or company that feels like it was trying to do the right thing ends up with a share of
6 grief. There we are.

7 Now, as a starting point, we say that the CMA's case is, we say, putting it kindly, a very odd
8 case. They start from the very difficult position that this is an infringement that took place
9 in part of a single meeting and, apart from *T-Mobile*, which we say is quite different, there
10 is no other case that I am aware of in which an infringement of this kind and duration has
11 been committed. We say that is one striking feature.

12 The second and in some ways far more important striking or odd feature is that the meeting
13 was organised by a seven-year cartel with the express, agreed -- and we say only -- purpose
14 of recruiting the only competitive undertaking, Balmoral, to the cartel. It is common ground
15 that the cartel failed to achieve that purpose and that Balmoral rebuffed its efforts, at least
16 in that regard, and made clear it would continue to compete.

17 So, what we have is a very odd juxtaposition, which is in the same meeting with the same
18 players in the same market with the same products, the company is not involved in a
19 restriction of competition to do with customer allocation and price-fixing, but in the same
20 breath, is involved in a concerted practice also to do with pricing. We say that, as a starting
21 point, is a bit odd.

22 I said in opening that there really are only a handful of cases in this area and that I think is
23 true, at least in terms of the information exchange, but what is strikingly different about
24 those cases is that in each and every one of them -- with the exception, actually, of *T-*
25 *Mobile* -- there were multi-year meetings, discussions; it was iterative.

26 So, it is manifest in all of these cases that everyone at those meetings on a repeated basis
27 went to the meeting with the clear purpose of doing something that was anti-competitive.
28 Most of these cases essentially turn on sort of defensive arguments that, "Well, we went
29 with this purpose, but it is not as bad as you think"; whereas in our case, as the evidence has
30 emerged, there was only one purpose: joining a cartel on the cartel side, refusing to join the
31 cartel on our side. So there is a difference.

32 The third feature which is striking and odd is that there was a build-up to the July meeting
33 in which more than half a dozen meetings and many more other discrete communications
34 were made with Balmoral and Mr. Joyce to entice them to get them on board. That, of

1 course, in some of these instances, included disclosure of some pricing information by the
2 cartel to Balmoral and Mr. Joyce, to show them how rosy life could be in the cartel, and
3 none of that earlier contact forms part of the objections in this case. In fact, the CMA
4 expressly decided that it would not make findings of infringement for those periods.

5 Now, the fourth feature which is very odd and, in our submission, unjustifiable is that one
6 of the cartelists, CST, is not an addressee of the second decision.

7 Now, we do not understand that. First of all, it cannot be the case that non-attendance at the
8 meeting makes all the difference because Galglass is an addressee and they did not attend
9 the meeting; but the critical point is that there is ample evidence in the second decision that
10 is CST was part of the recruitment effort for Balmoral as well. Just to give you the
11 references, this is 3.6, 3.9 and 3.12.

12 Very importantly, I wanted to take this up because we have not seen this before, there is
13 very clear evidence that Mr. Lange of CST was told by Clive Dean about the meeting and
14 the discussions and the results. That is in supplemental bundle, tab 13.

15 This is an interview of 7 August 2012 between the OFT and Mr. Lange of CST. It is page
16 26, Madam, I would ask you to turn up. It is really the top half. Does the Tribunal have
17 that?

18 THE CHAIRMAN: Yes.

19 MR. O'DONOGHUE: So Mr. Cope says:

20 "And this is from who?"

21 Lange says:

22 "Clive. Nearly all my information -- 95% of what I know" --

23 THE CHAIRMAN: Oh, no I do not have --

24 MR. O'DONOGHUE: It is the old problem, there are two 26s. It is at the front end, it is the first
25 26, and it is marked "CIV/1039". Do you have that?

26 THE CHAIRMAN: Yes.

27 MR. O'DONOGHUE: It says:

28 "JC: And this is from who?"

29 "NBL: Clive. Nearly all of my information [at the top of the page] -- 95% of all I
30 know of what happens in that marketplace comes back to me from Clive and a little
31 bit from Nick Stringer. I have no contact with Franklin [Hodge] or Balmoral.

32 "JWC: Has Clive discussed with you anything else that came out of that meeting?

33 "No. No, he didn't. I think it was a bit of a damp squib meeting, frankly, without
34 Nick Stringer ..."

1 Mr. Dean clearly informed Mr. Lange of CST of the content and result of the meeting of 11
2 July. Now, given that we are told again and again these are separate infringements with
3 separate identity, we simply do not understand on what basis CST was excluded from the
4 second decision. In all material respects, they were identical to all the other addressees.
5 Now, it is the case that on 2 May 2012 they submitted an immunity allegation, but of course
6 that was in relation to the cartel, and it is the case they did not attend the meeting but, as I
7 said, neither did Mr. Stringer.

8 If one is thinking in terms of participation and infringement and getting on board or being
9 part of a common objective, their role before the meeting in recruiting Balmoral and their
10 receipt of information after that meeting and being interested in receiving that information
11 is important, in our submission.

12 So, it is very, very odd that they have been artificially excluded from the second decision.
13 We do not understand that.

14 Now, the fifth oddity, the point I have briefly touched on, is the cartel had two components:
15 it had a customer allocation component and a price-fixing component and, for reasons that
16 are unclear to us, the price-fixing side of things seems to have become rather forgotten in
17 this case and a bit of a poor relation.

18 The price-fixing in the cartel case involved prices for the same products as Balmoral was
19 supplying: same products, same market, same players. In fact, in this case, there was a
20 single statement of objections, which is a small but we say somewhat revealing point.

21 At paragraph 4.10 of the cartel decision, of course, the CMA ran this case both as a
22 concerted practice and/or an agreement.

23 THE CHAIRMAN: The statement of objections: you say there was a single statement of
24 objection; who were the addressees of that?

25 MR. O'DONOGHUE: Well, it was essentially a composite document. To be fair to the CMA, it
26 was a single document presented as two infringements. It is not a big point, but they were
27 in one --

28 THE CHAIRMAN: No, but I would be -- I do not have in my head the earlier stages. So, it was a
29 single statement of objections covering the two alleged infringements, so the same
30 document went to everybody but it was clear in the statement of objections against whom
31 the allegations were made.

32 MR. O'DONOGHUE: Yes, I entirely accept that.

33 THE CHAIRMAN: It was clear from the SO that Balmoral was considered on the hook for the
34 second one but not on the first one and --

1 MR. O'DONOGHUE: Yes.

2 THE CHAIRMAN: -- also that CST was for the first one and not the second one, for whatever
3 reason, you say.

4 MR. O'DONOGHUE: Yes, I really making a sort of minor optical point, which --

5 THE CHAIRMAN: I understand that but I just want to understand what the point is, minor
6 optical or not.

7 MR. O'DONOGHUE: I understand.

8 THE CHAIRMAN: Right.

9 MR. O'DONOGHUE: No, it does not go any deeper than that.

10 THE CHAIRMAN: I do not know whether you are coming on to this, but there was then a
11 settlement agreement.

12 MR. O'DONOGHUE: Yes.

13 THE CHAIRMAN: I also do not quite have my head round who was the party to that and who
14 was settled, but you or Mr. Williams may come to that.

15 MR. O'DONOGHUE: Well, on the settlements -- I mean, I will say one or two things about
16 leniency, but on the settlements I have no specific point to make; but you are quite right,
17 there were settlement agreements. They are actually in the bundle.

18 THE CHAIRMAN: I do not want to put you off your stride.

19 MR. O'DONOGHUE: Essentially, as I understand it, the --

20 MR WILLIAMS: Madam, if it helps, I can take instructions on that over the lunchtime
21 adjournment and make sure I give you the position because, without wanting to deprive Mr.
22 O'Donoghue of the chance to tell you about it, it might be easier for the CMA to do that.

23 MR. O'DONOGHUE: I am more likely to get it wrong.

24 MR WILLIAMS: Yes, well, it will allow Mr. O'Donoghue to carry on with his flow.

25 MR. O'DONOGHUE: Thank you.

26 Another oddity or feature of the cartel decision of course is that the cartel itself included
27 information sharing. Just, Madam, for your record, the paragraphs I have extracted in terms
28 of information sharing for the cartel, it is 3.83, 3.8 and 3.14.

29 So, standing back and looking at the two decisions, we say it is fundamentally illogical to
30 say on the one hand there was a cartel before, during and after the meeting at which there
31 was an agreement and/or concerted practice to fix prices not involving Balmoral; there was
32 also, in the same meeting with the same people in the same market, a restriction of price
33 competition by a concerted practice.

1 THE CHAIRMAN: You say it is clear from the cartel decision that the information sharing
2 allegation includes what went on at the 11 July meeting?

3 MR. O'DONOGHUE: No, no, let me clarify. I am not saying that.

4 THE CHAIRMAN: Right.

5 MR. O'DONOGHUE: I am making a more basic point, which is that the cartel, which obviously
6 continued during the meeting, that had an information sharing aspect, but not in the context
7 of the 11 July meeting.

8 THE CHAIRMAN: Right.

9 MR. O'DONOGHUE: So, in the generality of the cartel from 2005 to 2012, from time to time,
10 information sharing was a feature of how that cartel worked, as you would expect.

11 Again, not a major point, but --

12 THE CHAIRMAN: Well, we will come on shortly to what the point is. Now we are up to the
13 sixth oddity. You say that although the main cartel decision does not attempt to incorporate
14 what happened at this meeting as part of that infringement for the other cartelists,
15 nonetheless the cartel had an information sharing element and this is information sharing
16 and you say it is illogical and odd to try to carve this out of the wider cartel?

17 MR. O'DONOGHUE: Well, that is part of the point I wish to make, but it goes a bit further.

18 THE CHAIRMAN: Yes.

19 MR O'DONOGHUE: Let me wrap up on my shopping list of oddities and then I will make the
20 point.

21 THE CHAIRMAN: Yes.

22 MR. O'DONOGHUE: There is a legal point, which is that it is not as if the distinction between an
23 agreement and a concerted practice is something rigid and mutually exclusive. It is
24 essentially a different manifestation of the same thing; it is a question of intensity.

25 Fundamentally what we are dealing with is a concurrence of wills.

26 Just to wrap up this point, when it came to penalty Mr. Williams was very quick to
27 emphasise that the reason the cartelists were not fined for information sharing was because
28 they were in the cartel. We say that is a rather odd situation, in the sense that we had
29 understood these were distinct infringements; saying that you were fined for another
30 infringement does not seem to me a complete answer to why you were not fined for a
31 supposedly separate infringement. So, it is part of the cartel when it suits them and it is not
32 part of the cartel when it does not.

33 The final point, of course, which is one I have touched on or attempted to touch on in cross-
34 examination, is that Franklin Hodge's own leniency application not only makes no

1 distinction between a cartel agreement and information sharing, but it does not mention
2 information sharing separately at all.

3 Equally, although CST made its immunity application before the meeting, given that they
4 were aware of the meeting, it would have been perfectly open to them to supplement their
5 immunity application with this further information.

6 This rather sort of meandering lead-up, I mean, it comes to quite a simple point which is we
7 are told there is a price-fixing cartel which straddles the meeting, and we are not in that, and
8 then we are told in the meeting there is a concerted practice over pricing with all of the
9 same people apart from CST, who in my submission should be in there. Where does one
10 end and the other one begin? I mean, it is fundamentally unclear.

11 Now, one thing which has emerged really clearly in evidence, and I am going to come back
12 to this in more detail, is that from everyone's perspective who attended the meeting, the
13 meeting was only ever about the cartel, in terms of its purpose. The cartelists were trying to
14 get us into the cartel; we went to the meeting with the purpose of not getting into the cartel.
15 If the meeting's purpose -- and this I think is common ground at least among the witnesses -
16 - was all about the cartel, it seems to us even more bizarre that in the midst of all that, a
17 concerted practice also to do with restrictions of pricing competition emerged on the basis
18 that no one had foreseen as a matter of purpose or as a matter of intention. That seems to us
19 quite odd.

20 One of the fundamental problems now, of course, is that if the entirety of the meeting was
21 about a recruitment effort to join the cartel and attempts to rebuff that, in my submission,
22 one then has to disentangle where do the disclosures to do with pricing in terms of cartel
23 enticement start, and where do the disclosures which go to the separate concerted practice
24 end? There is a fundamental lack of clarity in how one is supposed to disentangle what is a
25 restriction of pricing competition with apparently two distinct components in the same
26 meeting with the same people.

27 Now, of course, the decision does not attempt to do this, because they have misunderstood
28 the purpose of the meeting and they have misread the transcript, I will come on to that.

29 Now, a minor footnote on that, of course, is the criminal proceedings. Now, I don't want to
30 over-egg this pudding but Mr. Joyce gave evidence in the criminal case and he was
31 presented as the good guy who broke up a price-fixing restriction of competition. Then it
32 emerges some time later that he and his company are actually a bit of a bad guy because
33 they were involved in a bit of a restriction of pricing competition themselves. This was

1 presented to the criminal judge and the criminal jury as, "Well, here is the good guy and he
2 will tell you all about the bad guys".

3 One way to test this is: suppose the two defendants in the criminal case had been convicted,
4 and suppose they had appealed, and suppose it had emerged on appeal that Balmoral was
5 involved in a bit of price restriction itself. That, in my submission, would have been a
6 pretty compelling appeal.

7 It is back to this --

8 THE CHAIRMAN: Yes, well, I mean, there is that oddity, is there not, another oddity, that
9 generally a co-defendant's evidence is not admissible against the other defendants in
10 criminal proceedings. So presumably the defendants in the criminal proceedings could not
11 give evidence against each other; the judge would have had to direct the jury that their
12 evidence is not relevant as against the others.

13 MR. O'DONOGHUE: That is clearly right, but Mr. Joyce was --

14 THE CHAIRMAN: Yes, but because Mr. Joyce --

15 MR. O'DONOGHUE: -- a prosecution witness.

16 THE CHAIRMAN: -- was not a defendant then his evidence was admissible.

17 MR. O'DONOGHUE: Yes.

18 THE CHAIRMAN: Do you say that it would have affected the -- I do not see that then the civil
19 case against Balmoral affects the admissibility of Mr. Joyce's evidence in the criminal
20 proceedings, but perhaps you are not going as far as that.

21 MR. O'DONOGHUE: Well, he certainly could not have been a defendant because the
22 information sharing on its own is not a cartel offence.

23 THE CHAIRMAN: Yes.

24 MR. O'DONOGHUE: I am making a more basic point which is that if you are putting forward
25 someone with admissible evidence as the good guy who broke up the price-fixing, if, in the
26 midst of all that, he himself and/or his company were involved in a concerted practice to do
27 with price-fixing in the same meeting, that might be something the defendants in that case,
28 if they were convicted, would wish to know about.

29 It is not a big point, but there is a saying that a stroll will show you which way the wind is
30 blowing, and it is another slightly odd feature of this case looked at as a whole.

31 Now, turning to the meat of this appeal --

32 THE CHAIRMAN: Well, before we move off your list of oddities, I just want to be clear that I
33 understand where these go to.

1 I understand your point about the discrimination point as to the penalty, that the CMA says
2 these are two separate infringements, so why then do they not fine the other people for this
3 infringement. There has been a difference of treatment because it is illogical to take into
4 account the fact that they have been fined for the main cartel when you are considering
5 whether to fine them for this separate cartel. It does not make any difference that they were
6 up to the statutory cap; they can be up to the statutory cap again for this cartel infringement.
7 Then, presumably, you will go on to say the Tribunal cannot impose a fine on the others for
8 the second infringement, so the only remedy we can give is to remove the fine for --

9 MR. O'DONOGHUE: Yes, we will at least be saying that.

10 THE CHAIRMAN: Yes.

11 Then I think you say there is also an oddity in the factual assessment, where I think where
12 you are going is: well, there were all these other meetings, these earlier meetings, and the
13 CMA does not say that those were a cartel. Really, the only difference with this meeting is
14 that they filmed it, so why is this regarded as a cartel when the other earlier meetings in
15 January and March are not regarded as a cartel.

16 That is a factual point: was there actually some separate factual CP here, concerted practice
17 here, separate from the cartel.

18 What I am not clear about is whether you have a further point of some kind as regards the
19 impact on our decision of these odd features of the case, or is that --

20 MR. O'DONOGHUE: No, it does go deeper than that.

21 THE CHAIRMAN: Right.

22 MR. O'DONOGHUE: There is a whole series of points. I mean, the first point I made is that, you
23 know, single meeting, we are not *T-Mobile*, all these other cases.

24 THE CHAIRMAN: Yes, that is to do with a definition of a concerted practice, yes.

25 MR. O'DONOGHUE: That is all slightly different.

26 I think, on the point you are really driving at, there is something important in this and I
27 think maybe the best way to express it is as follows: we understood now very clearly from
28 the live evidence we have had that the meeting had a single purpose to do with the cartel. I
29 will be making the submission that everyone who went to that meeting, they went with the
30 purpose of pressurising someone to join the cartel or resisting such pressure. That was the
31 context and purpose or objective in which the discussions took place.

32 Now, in the midst of that, information was disclosed by both sides. Again, we will see this
33 in more detail, but the information was in the context of enticements to come on board with
34 the cartel.

1 We have a decision saying we successfully resisted those overtures and those enticements,
2 that is the cartel decision, but then we have a decision saying that -- well, it is unclear. Is it
3 the same stuff, different stuff, that gives rise to a concerted practice?

4 The way it is has come out is that it was all one thing, and these disclosures were in the
5 context of a meeting from start to finish that was about the cartel. Maybe it is the
6 disentanglement point. I mean, which buckets are we meant to put these disclosures into,
7 because there seems to be an acceptance that the disclosures that were part of an enticement
8 to join a cartel that we successfully resisted joining, that at least without more should not be
9 an issue, because that is essentially the cartel decision.

10 THE CHAIRMAN: Yes, well, that was a point you made in opening, that it has to be possible for
11 you to resist joining the cartel and not to be tarred with the brush of being a cartelist just
12 because you happen to be in the room when somebody makes a disclosure of price.

13 MR. O'DONOGHUE: Indeed, because otherwise you are --

14 THE CHAIRMAN: There has to be some meeting of minds.

15 MR. O'DONOGHUE: Otherwise you are innocent of the cartel but, by definition, guilty of
16 concerted practice.

17 THE CHAIRMAN: Yes.

18 MR. O'DONOGHUE: That cannot be right. That is unfair, apart from anything.

19 So, there is that point, but in my submission it goes deeper than that, which is that once one
20 understands the context and purpose and objective, the object of the meeting, there is a
21 fundamental lack of clarity as to which bits of enticement or disclosure go to which offence.
22 We understand some of them. I mean, one way to look at this is that by the time we get to
23 page 21 of the transcript at which it is clear we are not involved with customer allocation --
24 I mean, I am going to make this point, that it is the bits after that that are more of a problem.
25 There is a fundamental question as to which disclosures go to which purpose and how on
26 the one hand can they absolve us of liability for certain disclosures, but say that we are the
27 worst thing in the world for other disclosures that, in our submission, arise in exactly the
28 same context?

29 The problem is that because they have misanalysed the meeting, they essentially stopped
30 reading about cartels at page 21 and they ignore the rest. They have not done this mental
31 exercise. They have misanalysed the meeting as a fundamental matter.

32 That problem, if you are with me on that, may be reason in itself to allow the appeal.

33 I will come back to this in various other sort of guises but that is probably as well as I can
34 put the point at this stage.

1 THE CHAIRMAN: Yes; when you say they misanalysed the meeting, that is partly because of
2 your what was everyone's purpose going to the meeting point, and because you say it is
3 artificial to regard the page 21 quote as some kind of cut-off point in the meeting, after
4 which they moved on to something different. It is all part and parcel of --

5 MR. O'DONOGHUE: The same thing.

6 THE CHAIRMAN: -- them trying to persuade Mr. Joyce to join the cartel, which he did not.

7 MR. O'DONOGHUE: Well, it is not merely artificial; we say it is dead wrong as a matter of fact.

8 THE CHAIRMAN: Right.

9 MR. O'DONOGHUE: The live evidence on that point is unambiguous, in my submission.

10 I will take you to that because, in a way, I think that is the key error in this case: they have
11 simply misunderstood what was going on. They have been banging on about objective
12 intent and subjective purpose and things that sound slightly metaphysical, but it is a very
13 simple point: what was going on at this meeting? What was the purpose in coming into it
14 and, at different points, was it the same purpose or was there more than one purpose? We
15 say the evidence has come out extremely clearly that there was only ever one purpose and
16 that was always the cartel.

17 In our submission, once you understand that, the whole thing starts to unravel. They have
18 simply misunderstood, on a basic level, what was going on. I will come back to that because
19 it is a central point.

20 Moving on, I am going to divide the CMA's case essentially into two parts, or maybe two
21 and a half. I will explain.

22 We say they are running a primary case, I will explain what that is. They are then running
23 what I would call a minimalist case, I will explain what that is. The two and a half, there
24 may even be a minimalist, minimalist case within the second category, I will explain what
25 that means.

26 The primary case, or ambitious case, is that Balmoral went to the meeting with the purpose
27 of stabilising prices, and that Mr. Joyce exchanged information with the cartelists to further
28 that anti-competitive goal. They say that the exchange of information consisted of price
29 bands which served as targets for the parties, we had an understanding on a price floor, and
30 that they would price within the bands, and this was all to avoid a price war.

31 You can label this in a number of ways: you can call it disclosure plus; I call it their primary
32 case; you can call it their ambitious case, but it is something more than mere disclosure.

1 In my submission, it is clear that that primary case is at the heart of the decision. If we can
2 turn up the decision from the core bundle. Tab 8. I want to start paragraph 4.17, please. It
3 is the last sentence. Does the Tribunal have that?

4 THE CHAIRMAN: Mm-hm.

5 MR. O'DONOGHUE: 4.17. We have seen this before. It says:

6 "In these circumstances, the exchange of information about the prices that the Parties
7 were charging their customers and the price bands within which the Parties would
8 seek to charge going forward, was clearly capable of reducing uncertainty about their
9 future pricing."

10 A few pages on at 4.56, I will take these pretty quickly, the first sentence:

11 "In particular, the price bands served as targets for the parties to stick within."

12 Then a couple of pages on, 4.65:

13 "Balmoral has suggested that to the extent that there were references to future prices,
14 these were quoted as 'broad' bands and therefore too vague ..."

15 It is the last part:

16 "Moreover, as noted above, the price bands were useful because they provided a target
17 for the Parties to stick within, with the lower end of the range effectively indicating a
18 price floor."

19 The last sentence of 4.66:

20 "... the price bands discussed during the meeting reflected target prices, with the
21 bottom end of the band effectively indicating a price floor."

22 Which is the same point as the previous paragraph.

23 In a way this is unsurprising because of course Mr. Williams effectively spent the guts of a
24 day cross-examining on stabilisation and price floors and targets, so it was not primarily -- I
25 mean, I appreciate he has a secondary or even tertiary case, but the primary basis on which
26 it was approached consistent with the decision is that it was not merely disclosure; it was
27 disclosure around stabilisation, targets, price bands, price floors, price war, and so on.
28 So there is more fabric to that case than saying, "The second I utter anything about price, I
29 lose." There is more fabric to that case.

30 Now, that case, we say, is dead in the water following the live evidence. This is primarily
31 the evidence of Mr. Snee, but also Mr. Joyce.

32 I do not know if the Tribunal has the transcript to hand? I want to quickly go through a
33 number of points, and it is Day 3 for Mr. Snee.

1 At the risk of providing a pointless running commentary, in my submission Mr. Snee was a
2 very straightforward witness, and everything he said in his live evidence should be
3 accepted.

4 Just to run through the points, there are a number and I will give you the references as I go
5 along.

6 The starting point we have touched on, which is he was extremely clear that the purpose --
7 and I emphasise "the" purpose -- of the meeting was to recruit Balmoral to join the cartel.

8 For your reference, that is Day 3, page 30, lines 8-9, and lines 30-31 on the same page.

9 The second point we have already touched on to some extent: his evidence was that the
10 entire meeting was about the cartel and that Balmoral would have understood his consistent
11 references to market share, 25 per cent, raising prices, as being an invitation to join the
12 cartel and not simply to discuss some broad price bands; that is Day 3, page 38, lines 27 and
13 following.

14 He makes the subsidiary point, which is that all of the pricing information he gave was by
15 way of enticing Balmoral to join the cartel. That is Day 3, page 39, lines 24-30.

16 The third point, which is a very important point, is that the reason that from his perspective,
17 Mr. Dean's perspective, he was fixated on the cartel for the entirety of the meeting is that he
18 had seen, from a decade of long experience, through essentially three failed cartel attempts -
19 - one in the early nineties, another in the late nineties and a third one in the early phase of
20 the cartel where there were pre-determined discounts as opposed to rigid price lists -- and
21 he had seen from long and, I suspect, bitter experience that certain things would not work.
22 So, it was not an accident that he came to the meeting with the cartel, and only the cartel,
23 uppermost in his mind. To turn this around, he would have instinctively and clearly
24 understood that something even weaker than these failed cartel attempts, this sort of chatting
25 about prices, was doomed to failure. That is why, in terms of the cartelists' purpose,
26 information sharing was never on their radar. They knew from long and bitter experience it
27 was hopeless. So it was the cartel and only the cartel, and that was the only game in town
28 for them.

29 Just to give you the references for that again, it is Day 3, page 39, lines 3-4. Day 3, page
30 46, lines 18-25, and page 50, lines 10-17.

31 In what effectively became a mantra, he said, again and again and again -- I have not
32 counted them, there are probably 10 or 12 -- that the whole thing was inconclusive. I will
33 give you one reference, but there are a lot of references to them being inconclusive. One is
34 Day 3, page 45, lines 1-3.

1 He expressed this in different ways. At one stage he said "inconclusive in terms of
2 achieving the price stabilisation you wanted". He said it was conditional, hypothetical,
3 wishful thinking. That is Day 3, page 50, line 12.

4 He put it in slightly different ways. He said that it was a hope, or a feeling that
5 communications would continue "and that there might be a move to stabilise prices". That
6 is Day 3, page 46, lines 13-16.

7 Now, one thing I do want to turn up, because it is quite important, is Day 3, page 52. It is at
8 lines 15-21. At line 15, I put to him part of the transcript of the meeting, and it says:

9 "... it all boils down to market share, price will follow once we agree what the market
10 share is because Allan ... is not interested, in fact Allan said [at the end] he and Jim ...
11 had spoken and he was on the point of saying don't go to any meeting [at all] because
12 it's pointless."

13 I said to him:

14 "Question: From the transcript there we understand very clearly that in respect of
15 stabilisation prices upwards Allan was not on board."

16 He says:

17 "Answer: That is correct."

18 So I was very careful to put to him that it was not just stabilisation in a sort of abstract
19 sense, or it was not that you could achieve some stabilisation but it would not be as
20 effective as you would hope; the critical point is that Balmoral was not on board with
21 stabilisation at all.

22 We will come back to this because one of the points the CMA has made in opening on the
23 case law is: well, in cartels, sometimes people cheat. That is true, but our case is very
24 different. We are saying there was no meeting of minds to begin with, Balmoral was not on
25 board. We are not saying that there was some stabilisation but not as much as you would
26 think. We say that the case fails to get off the tarmac. So it is not a cheating point; it is a
27 more fundamental one.

28 Now, one of the points I put to him again and again was that with the half dozen meetings
29 before the July meeting, it was the same old story. He agreed with that and he essentially
30 said, subject to one or two points of detail, that the July meeting was a bit of the same old
31 story again. One reference for that is Day 3, page 53, lines 12-17.

32 I am almost done with some of these points, but there is a further important point which I
33 would like us to look at if that is possible. It is on page 59 of Day 3. It is around lines 5-9.

1 So, again, to avoid any criticism by the CMA, I was very, very careful to put to him in
2 cross-examination not only that it was stabilisation that Allan Joyce was not on board with,
3 but that stabilisation effectively included the price bands. That was all part of the same
4 discussion.

5 So we see at line 5, I put it to him:

6 "Question: It was completely unremarkable to you and to Mr. Joyce to observe during
7 the meeting, for example that the price brackets for school tanks were something
8 between 9 and a half and 10 and a half. That was again a statement of the bleeding
9 obvious. Everybody knew that."

10 Then he says:

11 "Answer: That is correct."

12 Then on the 135s, he says:

13 "Answer: Certainly those were the prices that the cartelists were operating to, that is
14 correct."

15 I did specifically put to him the price bands in the context of stabilisation and he said it was
16 completely obvious and that everybody knew that.

17 In the same vein, just to complete that point, the question of price war, cutting each other's
18 throats, came up, and I put that to him as well. This is on Day 3, page 67, lines 2-4. Let us
19 have a look at that while we are here.

20 It is at the top of page 67. Madam Chairman, you put to him the very good point that it was
21 not very intelligent of him to tell Mr. Joyce that everything he wanted to know related to
22 how he would compete with Compco and that he would have been better off keeping his
23 cards close to his chest. You said to him:

24 "THE CHAIRMAN: ... Would it not be better for him [Mr. Joyce] not to know that,
25 and to think that you were still going to be charging the cartel prices to Compco so he
26 bid higher than he might otherwise ..."

27 He said:

28 "Answer: In retrospect, Madam, you are correct. I question myself on that."

29 Over the page at 67, you said:

30 "[THE CHAIRMAN]: Fine, then we would just descend into this throat-cutting
31 exercise then."

32 I say to him:

33 "MR O'DONOGHUE: Is that not exactly what happened?"

34 He said:

1 "Answer: In the fullness of time that is correct, yes."

2 Madam, it is not entirely clear, but there is a suggestion as to whether he was the one
3 saying, "Fine, then we could descend into the throat-cutting exercise". That is not clear from
4 the transcript, but I am not sure it particularly matters. The point was put to him and he
5 agreed with it. It looks like it comes from you, Madam Chairman, but it says --

6 THE CHAIRMAN: No, it is a little A just next to 30 on 66.

7 MR. O'DONOGHUE: That does not appear in my version for some strange reason.

8 THE CHAIRMAN: On page 66, just opposite line 30:

9 "Answer: In retrospect, Madam" --

10 MR. O'DONOGHUE: Oh, yes, sorry, you are quite right, he continues, so, yes, I was wrong.

11 THE CHAIRMAN: It is him.

12 MR. O'DONOGHUE: It is him.

13 THE CHAIRMAN: Yes.

14 MR. O'DONOGHUE: I wanted to make sure that was correct, but anyway, he agreed with the
15 point, which is the bit I am interested in.

16 The other thing I put to him was a paragraph I mentioned a couple of times, which is
17 paragraph 3.102, the cartel decision. That is on page 72 of the transcript. If we can start at
18 the bottom of 71.

19 So, what I did was I put the quote from the cartel decision to him at 3.102, where it says:

20 "If the contractor was on their gold list and if competing against Balmoral, [they]
21 would drop their prices to whatever level they thought would realistic to win the
22 contract..."

23 Over the page:

24 "This arrangement meant that only one of our number competed against Balmoral for
25 any one contract. If more than one of our number were approached, then the other
26 would effectively provide a high quote and remain on the sidelines."

27 What I said to him:

28 "Question: What we get from that, I would suggest, very, very clearly, is that after the
29 meeting it was understood that there was a fundamental distinction between
30 aggressive competition between Balmoral and the cartel, and a continued lack of
31 competition within the cartel, because you say that whenever you faced Balmoral you
32 had to compete as normal. That is what we get from this, is it not?"

33 He said:

34 "Answer: Yes, that is correct. Yes."

1 I say:

2 "Question: Is that not completely at odds with any suggestion that the discussions in
3 the meeting led to a reduction in price competition from Balmoral?"

4 He repeats the point about it being inconclusive.

5 Now, just to wrap this up, we heard about the last bite of the cherry, in some detail, maybe a
6 bit more detail than we expected. For your reference, Madam, it is at Day 3, page 55, lines
7 7-13; more generally on pages 54 and 55 of the transcript.

8 So the sequence of points that I put to him was that the price of a tank is not simply the first
9 quote; there is an iterative process of negotiation to be played out. Therefore, the price was
10 driven by the customer and one of the consequences of the last bite of the cherry is that
11 there would be a degree of preference for someone who was established, and then someone
12 else, one or more people who were bidding, were essentially sticks to beat down the price so
13 that the preferred supplier would effectively be disciplined.

14 In my submission, what we get from that is that you cannot control the price in this market
15 unless you can control the customer in some way. The only way they had successful done
16 that was to divvy up the customers in the cartel and to have a rigid agreement on prices
17 achieved through a price list.

18 Madam, in our submission, any way you look at this, based on his live evidence and based
19 on the features of the market, the discussion at the meeting was simply incapable of
20 producing price stabilisation or any understanding on price, on stable prices, based around
21 informal price bands.

22 Just to wrap up Mr. Snee's evidence, he accepted that he never called Mr. Joyce to complain
23 about breaching the bands, not stabilising, engaging in a price war and so on; that is Day 3,
24 page 72, lines 6-20. In fact, he accepted he never, subsequent to the meeting, had any
25 competitive interaction with Mr. Joyce whatsoever, which we say is striking.

26 One of the things I have not done, because it is slightly painful, of course, I went through
27 his previous statements to the OFT in quite some detail, and I was certainly left with the
28 strong impression that it is very hard to square those statements, which he stood by, with the
29 statement he has provided in these proceedings. I would invite you to strongly prefer, based
30 on his live evidence, the detailed information that I put to him based on his previous
31 statements and which he confirmed.

32 Just to take one example, there are a number, if we can look at his statement of these
33 proceedings, which is in core 5.

34 THE CHAIRMAN: When you talk about hard to square his earlier statements --

1 MR. O'DONOGHUE: The other way round.

2 THE CHAIRMAN: -- with the statements he made in these proceedings.

3 MR. O'DONOGHUE: Yes, he made one statement in this appeal, which is at core 5.

4 THE CHAIRMAN: Oh, sorry, I thought when you referred to his earlier statements you were
5 referring to his statements in the interviews and in the criminal --

6 MR. O'DONOGHUE: Yes, that is what I mean.

7 THE CHAIRMAN: Oh.

8 MR. O'DONOGHUE: I put all of those to him in some detail. For example, if we look at
9 paragraph 26 of his most recent statement --

10 THE CHAIRMAN: His witness statement?

11 MR. O'DONOGHUE: Yes. In tab 5. So he says in the last sentence:
12 "I left the Meeting with a sense that we were all on board with the price bands as
13 target price levels in order to pull up market pricing."
14 I have shown you in the transcript where he said exactly the opposite.

15 MS DALY: Sorry, which paragraph were you referring to in his witness statement?

16 MR. O'DONOGHUE: Paragraph 26, the last sentence. He says there, "We were all on board",
17 and I took you to the part in cross-examination where he says, "Not even Allan was on
18 board". So it is hard to square this.
19 I did put his previous statements to him in considerable detail, and I would suggest that the
20 combination of those and his live evidence paints a clear and very different picture to, for
21 example, paragraph 26.
22 Just to wrap up the evidential side, obviously there is another side of the equation which is
23 Mr. Joyce. Again, in cross-examination and re-examination, in my submission, he was
24 extremely clear that the purpose -- and I emphasise "the" purpose -- of the meeting from
25 Balmoral's perspective was to end any suggestion of participation in the cartel, and his
26 evidence is that he succeeded in that goal.
27 Again, for your reference, it is Day 3, page 23, lines 2-13, and Day 2, page 92, lines 6-8.
28 Now, on the bands specifically -- and again, Mr. Williams no doubt will have things to say -
29 - his evidence was that nobody at the meeting was really interested in the bands as bands
30 because those bands were incapable in themselves of stabilising prices. From his
31 perspective, he effectively presented the discussion around the bands as a sort of ploy to
32 deflect criticism about Balmoral's pricing, which was rampant.that is why they did not get
33 into detail on things like accessories and more detailed prices.
34 Again, for your note, Day 2, page 96, lines 11-14.

1 A third and final point: in my submission, he also made clear in evidence that the bands
2 were not targets in the sense of something to be aimed for, to increase or gravitate towards
3 as prices. He says they were simply market prices. They were things that were widely
4 observed and known in the market and, according to his evidence, not new to anyone. I will
5 come back to that --

6 THE CHAIRMAN: You say that is what he meant by referring to prices as market prices, that
7 they were widely observed and known? To me, a market price is like the price for brent
8 crude or pork bellies or aluminium. It is a price which is set by an exchange market
9 platform --

10 MR O'DONOGHUE: Yes --

11 THE CHAIRMAN: -- but that is not this.

12 MR. O'DONOGHUE: No, clearly not.

13 THE CHAIRMAN: Clearly not. So when he was referring to market prices, what you say he
14 means is that these were prices that everybody knew was what tanks were being sold for?

15 MR. O'DONOGHUE: Yes, it was something quite basic, which is, "In the period we have been in
16 the market, we have observed this sort of spectrum of pricing". We say it was essentially a
17 retrospective of things he had seen and identified from the variety of sources, primarily
18 customers, we say.

19 We say that on any reasonable assessment of the evidence as it has emerged, this ambitious
20 case is dead in the water.

21 I am about to move on to something separate. I am in your hands as to whether now is a
22 convenient --

23 THE CHAIRMAN: Yes, let us take a five-minute break.

24 (11.32 am) (A short break)

25 (11.44 am)

26 MR. O'DONOGHUE: Before the short break you asked a question about market prices. Just to
27 complete the evidence on that front: in his live evidence, Mr. Snee agreed with Mr. Joyce
28 that the price bands were reflective of the market price. For your reference, that is Day 3,
29 page 59, lines 5-14. So in our submission, there is actually no conflict of evidence on this
30 issue at all.

31 THE CHAIRMAN: No, no, I just wanted to be sure I understood what they were meaning by
32 that.

1 MR. O'DONOGHUE: Coming back, a bit more briefly, to the question of the fundamental
2 misanalysis of what the meeting was about, can I ask you to turn up the decision, first of all.
3 Again, tab 8 of the core bundle. This time it is 4.15, page 70.

4 Now, I think we saw some of this a few days ago but it is important so I want to be very
5 precise as to where we pick this up. It is towards the bottom of the page. It says, last full
6 sentence:

7 "Balmoral Tanks was made aware early on during the meeting that its competitors
8 were involved in customer allocation. Despite this and its intention to end the contact,
9 Balmoral Tanks remained at the meeting and continued to exchange information on
10 recent past bids, current pricing and future pricing intentions."

11 We can pick up the same point back a few pages at 3.36 on page 51. The same point:
12 refused to take part in any allocation of customers, but exchanged information regarding
13 current and future pricing intentions with the other attendees, including after the existence
14 of the customer allocation arrangements were confirmed to him during the meeting.

15 A couple of pages on at 3.45:

16 "After these arrangements are confirmed to him, Mr. Joyce remains in the room for
17 over an hour, continuing to discuss the size of the market, market share ..."

18 Mr. Williams asked Mr. Joyce on at least one occasion: "Well, why did you not get up and
19 leave sooner?"

20 Now, in my submission, it is entirely clear from Mr. Snee's evidence that at all material
21 times -- just to put this in context, page 21 of the transcript is the sort of cut-off point. That
22 is when he remained in the room after, by implication, he should have left.

23 I took Mr. Snee through eight or ten references after page 21, to the (inaudible) of equal
24 market share allocation, 25 per cent, pushing up prices, price as a function and market share
25 and so on. In my submission, he was as clear as daylight that each and every one of those
26 discussions was to do with the cartel.

27 What seems to have been forgotten on the other side of the room is that the cartel had two
28 components: it had the sort of naked customer allocation and it had a price-fixing. For
29 reasons that are unclear to us, they seem to have stopped at customer allocation at page 21
30 and forgotten about the second component of the cartel.

31 So, in my submission, it is dead clear that that was what the discussion by the participants
32 on both sides, or three sides, were concerned with.

33 Now, the reason this fundamental misanalysis of what happened at the meeting, what was
34 being discussed, matters, we have touched on some of the points but we can put this in a

1 number of ways. In my submission, the fundamental point is that if people go to a meeting
2 with one and only one purpose, albeit opposing purposes, it is impossible to find, as a
3 matter of logic and evidence, that there was a distinct and unintended and common purpose
4 which arose at that meeting.

5 In terms of a meeting of minds, or in this case a non-meeting of minds, they were
6 addressing themselves mentally to the cartel, wanting Balmoral to come on board, not
7 wanting to come on board. I have taken you to the very clear evidence that the disclosures
8 were in the context of enticements.

9 You can see this very clearly from even the earlier part of the transcript. So we can pick
10 this up at page 14.

11 THE CHAIRMAN: Of the meeting transcript?

12 MR. O'DONOGHUE: Of the meeting, yes.

13 The way you get the ball rolling on the cartel, you see it at page 14 in the middle:

14 "How are things with your prices?"

15 That is the sort of entree into trying to gee Balmoral up to get on board with the cartel,
16 because it would be pretty foolish in a meeting like this, where there is essentially a non-
17 disclosed agenda, to say, "Please join our cartel". This is the sort of round-about, normal,
18 human way --

19 THE CHAIRMAN: Why do you say there is an undisclosed agenda?

20 MR. O'DONOGHUE: Well, it became clear at some point that -- at page 21 Mr. Snee spills the
21 beans in a very express way that, "We are in a cartel". But starting with "How are your
22 prices?", at this stage this is trying to orient the discussion towards joining the cartel. That
23 is how it evolved.

24 It goes on, and we see the upshot of it at page 21 where Mr. Snee says:

25 "Obviously, it's going to be difficult to arrange that customer allocation with you guys
26 now."

27 That follows a whole series of interactions to do with, "That is not the way we work", and
28 so on.

29 So the problem for the CMA is that the pricing discussions in terms of the purpose of the
30 meeting are part of enticements to join a cartel. That is the context and that is the purpose.
31 We say once you understand that, it is then logically and forensically impossible to turn
32 around and say, "Well, there was a common purpose, but something else", which no one in
33 that room realised or understood at the time.

1 Or, at the very least, my disentanglement point: you have to disentangle which bit is cartel
2 and therefore acceptable as a means of rebuffing, and which bit is not. Because they have
3 completely misanalysed the meeting, what happened, they have not even addressed their
4 minds to that basic question. We say on that basis alone, the appeal should be allowed.

5 I have made the point, but let me reiterate it. On the cartel side it was not simply an
6 accident that they did not have in mind information sharing as a distinct purpose. As I
7 indicated, because of the successive failed cartel attempts, because they understood very
8 clearly from the functioning cartel that customer allocation and rigid price list sharing was
9 required, after 10 years of iterative experience, there was no universe in which information
10 sharing would have been a purpose, because that was an even weaker form of failure than
11 these failed cartel attempts. So it simply made no sense.

12 You will remember the build-up to the meeting where we set the stage, where there was a
13 need for an emergency meeting, Mr. Snee was losing £600,000 of business with Compcoc,
14 he was getting a bit desperate. By this stage the cartel was on life support and the idea that
15 at that stage, given the losses they had suffered at Balmoral, that they would have come
16 along and said, "Well, let us have a bit of information sharing and see how we go", I mean,
17 it was last-chance saloon for them and it was the cartel or nothing. That is why information
18 sharing was never on anyone's radar at any time as a purpose or objective.

19 So we say that the primary case -- I mean, the case that is set out in the decision is not mere
20 disclosure; it is disclosure plus. I have taken you to the paragraphs, and Mr. Williams
21 cross-examined at length on stabilisation bands, price war, price floor, price ceiling, you
22 name it. In our submission, it is not open to them at this stage to run away from their case.
23 That is the case set out in the decision; that is the case they have put to Mr. Joyce and they
24 should be stuck with it.

25 Now, there is a hint of a suggestion of a minimalist case and, of course, that in itself is
26 revealing, because it is an implicit but clear acknowledgment that the primary case, or we
27 say effectively the only case, has got some problems, because if the minimalist case was so
28 wonderful, they could stand up and do this in 15 minutes and say, "Well, there you go."
29 Now, the minimalist case, which is ambitious in its own way, is that it does not matter why
30 Mr. Joyce or anybody else was at the meeting. It does not matter what their purpose was, or
31 common purpose. It does not matter why they said what they did. All that matters is that
32 they said the magic words, those being references to current and future pricing, and having
33 uttered the magic words, so the CMA says, the parties to the meeting reduced uncertainty in

1 the market. That is what I call the minimalist case, which is a bare disclosure or, in
2 pejorative terms, a "magic words" case.

3 Now, we say that case is bad for two reasons. One, it is bad in law; two, it is bad on the
4 facts.

5 Now, before we get into the legal side, which is obviously important, I want to take a step
6 back and think about this minimalist case for more than 10 seconds, because as a matter of
7 common sense, it cannot possibly be correct that the second that two people in the same
8 room or same environment utter anything to do with current or possible future pricing, that
9 that act in and of itself amounts to a concerted practice. The minimalist case is essentially
10 that that is, per se, illegal. We say that if that were correct, it would have pretty profound
11 implications and it raises fundamental questions.

12 Now, the simple version of the case is essentially something which has come up here, which
13 is: suppose there is a one-way disclosure and I am told something about a price. I cannot
14 unlearn what I have been told. Am I condemned by the fact that somebody else has opened
15 their mouth? It seems to me pretty surprising if it is true.

16 We accept that a one-way exchange of information may amount to an infringement, but to
17 say that the mere fact or the mere circumstance that someone opens their mouth and utters
18 something to do with pricing, with a competitor that you condemn, that seems to us wrong.

19 Now, there is number of ways you can think about this. One of the cottage industries that
20 has emerged on television is all these business people going on these shows and talking
21 about market prices and saying, "Well, what is the price going to do in the market?" and all
22 this sort of discussion. This goes on ad nauseam in CNBC and Bloomberg and so on. Is
23 that per se signalling? If two competitors go on one of these shows in succession and they
24 mention prices, are they signalling to each other? It would be surprising if that were true.

25 Slightly closer to home, one of the running jokes among barristers is that the CMA has
26 obviously got its panel and it has certain rates for the panels; it has off-panel barristers who
27 are on different, lower rates; then there is the private bar who are on different rates again.

28 One of the running jokes among barristers is complaining or boasting about how terrible or
29 wonderful your rates are. Is that a pricing disclosure?

30 The implications of what is being suggested in the real world are pretty fundamental, and if
31 this per se version of events -- which we say is bad in law and bad in fact -- is correct, it
32 raises something very, very fundamental.

1 Now, turning first to the law, there are a few cases which were raised in opening which I
2 need to deal with. The first case is the *Philips* case, which was an appeal against the
3 smartcard chips decision. That is in authorities bundle 2, tab 24.

4 What I want to do, if I may, I think it is important that we first look at the Commission
5 decision in that case, because that was the context in which the appeal arose. (Handed)
6 Like most cartel decisions, it is rather a large tome. If I can invite the Tribunal to go to
7 paragraph 69 of the decision and read until paragraph 74.

8 Just to set the stage, this is an overview of what the cartel comprised. I think it is important
9 we first understand that before moving to the judgment itself.

10 (Pause).

11 THE CHAIRMAN: Yes.

12 MR. O'DONOGHUE: A number of points. It was suggested in opening by Mr. Williams that
13 this case was the closest on the facts to this appeal. I would suggest that it is the case that
14 on the facts is in many ways the furthest away from this appeal.

15 It was a global cartel involving all the major producers of smart card chips. It involved
16 contacts and pricing, production capacity, capacity utilisation, future market conduct,
17 contract negotiations, minimum price levels, major customers, customers' target prices and
18 so on. Many, many meetings over a period of more than two years.

19 I am involved in a £150 million follow-on damages claim from this decision. With respect,
20 to suggest that this is the same as the galvanised steel tanks information sharing decision
21 really is not credible. For one thing, it is called a cartel.

22 Now, that is really to set the stage for the *Philips* judgment, which is the appeal from this
23 decision. If we can now go to the judgment itself, I think in many ways the *Philips*
24 judgment is the high watermark of their minimalist case. Mr. Williams I think suggests that
25 this is where his per se rule comes from.

26 So, authorities bundle 2, tab 24. Again, there is a bit of reading. If I can invite the Tribunal
27 to read paragraphs 124, 128, 129 and, in particular, 130.

28 THE CHAIRMAN: Can you say those again?

29 MR. O'DONOGHUE: 124, 128, 129, and 130.

30 THE CHAIRMAN: Thank you.

31 MR. O'DONOGHUE: 130 is the important one. (Pause)

32 It is a bit condensed but --

33 THE CHAIRMAN: I have not quite finished.

34 MR. O'DONOGHUE: Sorry, forgive me.

1 THE CHAIRMAN: Yes.

2 MR. O'DONOGHUE: Just to fill in some of the blanks, I think there were five meetings at issue
3 in that appeal. Mr. Williams in his opening suggested: well, this shows that one meeting or
4 one contact is enough.

5 In my submission, based on paragraph 130 alone, where the court says:

6 "... the exchange of information corroborates the finding that the applicants
7 participated in lawful information exchanges on prices and capacities, but that that
8 exchange is on its own insufficient to establish the existence of a restriction of
9 competition by object."

10 In our submission, that really puts to bed the idea that it is --

11 THE CHAIRMAN: Is that not because of what is said in the last sentence of 129, that it was only
12 information on that occasion of:

13 "... an exclusively general nature ... without however indicating the specific prices and
14 volumes envisaged."

15 Is that not why they then hold that that would not of itself establish the existence of a
16 restriction of competition by object?

17 MR. O'DONOGHUE: Well, it is not entirely clear. I agree there may well be that qualification,
18 but on their interpretation of the per se rule, you would have thought that if it was
19 information, albeit of a general nature to do with price, that ought to be enough. That, as I
20 understand it, is their case.

21 In any event, we pick up -- well, there are a couple of points. One has to do with the Dole
22 case, which we say confirms the similar principle, but even within this judgment I think we
23 see quite a bit more caveating of what is said than Mr. Williams suggested.

24 If we can go back to paragraph 63, which was one of the paragraphs Mr. Williams took you
25 to, in our submission he rather glided over some of the important parts of this, because it is
26 caveated. It says, three line down:

27 "... inasmuch as the independence of the undertakings concerned ... is modified as a
28 result."

29 Then at the end, an important part:

30 "... if they are capable in an individual case, having regard to the specific legal and
31 economic context, of resulting in ..."

32 A restriction of competition.

33 So it is not put in the bald terms Mr. Williams suggested, that there is a qualification.

1 Madam, picking up partially on a point you mentioned in relation to paragraph 129, I note
2 that in paragraph 128 there is a reference, about four lines from the end, to future price
3 estimates.

4 If we can turn now to the one of the *Bananas* cases, this in the same bundle, at tab 12, and it
5 is paragraph 373, which is something we looked at before.

6 In the middle it says -- well, let me read the whole thing:

7 "In so far as the Commission might have meant thereby that, on the assumption that
8 its findings related to the frequency of the communications and its conclusion that
9 there was a consistent 'pattern' of communications are not upheld, the existence of a
10 single pre-pricing communication between *Dole* and its competitors for each year
11 from 2000 to 2002 would be sufficient to establish collusive conduct, that claim
12 would have to be rejected in the light of the specific object of the co-ordination
13 complained of and of the nature of the market which was organised in weekly
14 cycles."

15 Now, it is a slightly different point, but in my submission the corollary of this is that one
16 meeting, one exchange, depending on the context, may not be enough. In my submission,
17 the combination of paragraph 130 of Philips, and 373 of this case, which has not been
18 answered by the CMA, really puts to bed the idea of the existence of a per se rule.

19 A couple of final authorities, very quickly. You were taken to Advocate General Kokott's
20 opinion in one of the *Bananas* cases, and this is authorities bundle 6, tab 59. Mr. Williams
21 took you to paragraph 113, particularly the last sentence, where the Advocate General says
22 it is in fact:

23 "... sufficient for a finding of anti-competitive object that information is exchanged
24 between competitors about factors relevant to their respective pricing policy or - more
25 generally - to their conduct on the market."

26 Then there is footnote 97.

27 Now, Madam, you picked up on the point: well, what is in 97? Again, it was rather skirted
28 over. 97 refers to the sugar cartel case, *T-Mobile* and the John Deere case. In my
29 submission, it is perfectly clear from those references that this last sentence is making a
30 rather general and quite banal point, and it is simply not authority for the proposition that
31 any disclosure on pricing --

32 THE CHAIRMAN: Not extending the law beyond those three --

33 MR. O'DONOGHUE: No, it is a sort of tail-end Charlie to a paragraph that is dealing with
34 something a bit different.

1 So I think that is all I want to say at this stage on the legal principles. We say, if that is a
2 minimalist case, it is wrong. If it were right, it would raise pretty fundamental issues.
3 Moving -- this, I hope, is my last point -- to the factual side of the equation. This is slightly
4 more bitty, but I hope I can finish it before lunch, to make sure Mr. Williams has time to
5 respond.

6 In our submission, the essential factual question is what did the parties know before the
7 meeting, what did they know after the meeting, and what is the difference between those
8 two positions?

9 We say, as a matter of evidence or a forensic matter, you can deal with this in one of two
10 ways, at least in this case. The first way, which is a bit easier, is to say that if the discussion
11 centred around the question of pricing bands, then one can reject the CMA's case as a
12 matter of fact simply on the basis that, as a general matter, the pricing bands told no one at
13 the meeting anything material that they did not already know. In our submission, there is
14 strong evidence to support that factual conclusion.

15 Now, we get this from Mr. Snee, and it is Day 3 of the transcript on page 59, and it starts at
16 line 5, page 59. It starts -- so I put the question to him:

17 "Question: Because of these various sources, whether it is Compco, Mr. Dean, Hall &
18 Kay, telephone conversations, other market intelligence, it was completely
19 unremarkable to you and to Mr. Joyce to observe during the meeting, for example that
20 the price brackets for schools tanks were something between 9 and a half and 10 and a
21 half. That was again a statement of the bleeding obvious. Everybody knew that."

22 "Answer: That is correct."

23 "Question: Equally on the 135s, given that the sources of the information were the
24 same essentially, again banding the prices between 15 and 17, everybody knew that.
25 Those were the prices on the market.

26 "Answer: Certainly those were the prices that the cartelists were operating to, that is
27 correct."

28 So one way to deal with this is that if the essential question is gravitation around bands, this
29 tells you that it did not tell you anything. So that is the perhaps more general way to deal
30 with this. But we are perfectly content to disaggregate this and to deal with some specific
31 points. Let me now come to those. They are a bit more bitty, but again, it is a pretty
32 straightforward picture.

33 Now, I want to reiterate a point I made in opening which was picked up with Mr. Williams:
34 it is not good enough for the CMA to come along in cross-examination and say to Mr.

1 Joyce: "Well, what about that bit of information? What about that bit of information?" In
2 terms of the infringement, they are stuck with the decision.

3 Now, of course he can put contextual matters to Mr. Joyce, and he did, but it is very, very
4 important to be precise as to what is specifically objected to in the decision, and how did the
5 evidence come out on those issues?

6 Now, if we can look briefly at the decision, again, core bundle 10, paragraph 8, and it is
7 4.16 this time on page 71. The CMA says:

8 "The information shared at the meeting ... was sufficient to reduce uncertainties as to
9 the participants' price intentions in respect of CGSTs for schools and 135 [cubic
10 metres] CGSTs generally and in respect of dealings with Compco, Tyco and Hall &
11 Kay specifically."

12 So at the very least, there are three categories of customers who are put in issue. There is
13 also some other stuff, but I have to deal with at least these three.

14 So on Tyco, the essential issue there was the £14,650 price for the 135 tank.

15 Now, in our submission, the way the evidence has emerged, it is pretty clear that that was an
16 infamous price on the market, it was something which was done in error. There was a
17 suggestion it may even have been a loss-making price. Everybody knew about it, and there
18 was a strong suggestion it was not a price, at least at that stage, that anyone would wish to
19 have repeated. So it was something of an aberration.

20 Just to give you a reference, Mr. Snee in our submission effectively said this in so many
21 words; Day 3, page 60, line 5.

22 Then in relation to Hall & Kay, there was a specific reference to a price of £16,800. On the
23 cartel side, they obviously knew that price because they were fixing prices, but the critical
24 point which emerged in cross-examination of Mr. Joyce is that Balmoral knew it too. Hall
25 & Kay, Mr. Dixon, had told to them. For your reference, that is Day 2, page 87, line 5.

26 Although this was a different period in time, you may recall, Madam, that Hall & Kay was
27 the customer who sent Mr. Snee a spreadsheet of everybody's prices, which he then filled in
28 and sent back to them. Now, it is a different period of time, but I think it is fair to say that
29 they seemed to be in the habit of sending out quite a lot of information to their suppliers.

30 Now, in some ways, of course, it is very curious that customers would do this, but of course,
31 these were essentially intermediaries. The end customers were the supermarkets and the
32 schools. These were, in a sense, aggregators of bids from the suppliers, and what was
33 foolish in the context of the cartel may actually be an intelligent thing to do in a competitive
34 market. That may explain why these intermediaries were in the habit, it seems, of

1 disseminating quite a lot of information on pricing that in a direct business-to-business
2 supply relationship you would be surprised to see circulated to the same extent. So that
3 may be an explanation. I do not want to give evidence, but it seems logical to me.
4 There obviously was a lot of evidence on transparency generally. Mr. Snee's evidence in
5 his statement that it was something like 75 per cent, and of course, the elephant in the room
6 on transparency was that, at the time, the cartel had 95 per cent of the market and they all
7 knew each other's prices, so it was fixed. So there was 100 per cent transparency in relation
8 to, at that stage, 90 per cent of the market participants.

9 THE CHAIRMAN: As long as they do not cheat.

10 MR. O'DONOGHUE: There may have been some cheating, there may have been some cheating,
11 but it does seem the price list was a more rigid phase than pre-determined discounts.
12 So the transparency as a general matter does seem to be pretty exceptional, at least at this
13 time.

14 Then of course there was Compco, which in many ways is at the core of the CMA's case in
15 terms of Balmoral. There are a number of points to be made in relation to that.

16 First of all, you obviously have the point that at least as a general matter, Mr. Joyce was not
17 the point person for Balmoral pricing; that was Mr. Ross.

18 I want to return to this again, because it is quite important. Mr. Ross gave a statement,
19 which I put to Mr. Snee, and let us have a quick look at that again. It is defence bundle, tab
20 13. At paragraph 39, he says:

21 "All quotations to be sent to customers and negotiations on price are undertaken by
22 myself and my team. Mr. Joyce and other staff at Balmoral are not involved in this
23 process."

24 Then at 45, the very important point:

25 "... I can honestly say that I have not been influenced by anyone outside my team at
26 Balmoral in terms of how I sell, or get my sales staff to sell in terms of sales margin or
27 mark up."

28 Now, Mr. Joyce obviously gave realistic evidence that as a managing director he was not in
29 an ivory tower completely disconnected from pricing, but the reporting lines and the
30 delegated authority are pretty clear, in our submission.

31 You may remember the exchange with Mr. Snee, where he had, at an early stage, tried to
32 contact Mr. Ross directly, rather than going through Mr. Joyce. I put to him that the reason
33 he did that was because Mr. Ross was the man to talk to; he would get the information he
34 needed from the horse's mouth.

1 Now, of course, he never met Mr. Ross because Mr. Joyce put Mr. Snee in his place and
2 said he should not be approaching his salespeople.

3 Now, that is a general point which applies to Compco and to, essentially, all pricing on the
4 Balmoral side.

5 Their business model for these tanks is not complicated. They have an estimator which is
6 essentially based on cost. That is the primary input. You add a margin to that, and there is
7 then a process of negotiation.

8 So it is primarily cost driven, rather than being driven by price list --

9 THE CHAIRMAN: I think Mr. Joyce's evidence was that he was involved in the cost stack, but
10 not in the --

11 MR. O'DONOGHUE: Yes.

12 THE CHAIRMAN: -- price.

13 MR. O'DONOGHUE: I think he was very keen on costs. He was pretty strict on those.

14 So, that was the way the business functioned with a cost plus approach, an estimated to, and
15 most of the things that were detailed/delegated to Norman Ross and his team.

16 I did make the point in opening that there is a locus question, because Mr. Joyce is in
17 Aberdeen and they are all down in Croydon. So it is not a case where there is sort of --
18 well, subject to picking up the phone or e-mailing, there is no sort of office chit-chat on
19 pricing because they are at two different ends of the country. Anyway, not a big point.

20 A very important point on Compco: this came out of Mr. Snee's evidence and it is at Day 3,
21 page 67, lines 12-18. It starts at line 11. What I was putting to him at this stage was the
22 telephone calls he had after the meeting with various people. He says:

23 "Yeah, ok, I will send you that warranty document and I'll have a word with Mike
24 [Greaves of Franklin Hodge]. What's your feel, your gut feel on pricing with
25 Compco? By the sounds of it, I don't know how far out we are on these prices, it's a
26 difficult one to call."

27 Then I say to him:

28 "Question: The fact that you are using language like 'gut feel', 'I do not know',
29 'difficult to call', does that not clearly suggest the discussion of stabilisation or bands
30 or not cutting each other's throats in the meeting, did not tell you anything of any
31 significance in pricing this bid."

32 Again, he repeats his inconclusive point and he says:

33 "Answer: ... there was still a hope that we could continue the conversation."

34 So it is all a bit weak, frankly.

1 Now, there is, of course, the unavoidable fact that as it turned out, Franklin Hodge's bid was
2 completely off beam. They were at £16,000 and Balmoral was at something like £14,800 or
3 £14,900, so a pretty big difference.

4 You will recall the point I put to him, which is common sense, that in circumstances where
5 he had been in the cartel where, on average, the cartel prices were higher than competitive
6 price, there was a real risk of a loss of face, essentially a Tyco situation, if all of a sudden he
7 went in with this barn-storming price, because he would have been held to that price by
8 Compco on all subsequent occasions.

9 So, his instinct, because of the predicament he was in, was that he could not go in too low;
10 he was sort of between the devil and the deep blue sea. He wanted to win, but there was a
11 limit to how far he could go because then he was stuck with it.

12 Now, you may think that serves him right for being in a cartel, but there we are.

13 A couple of final points. There is unchallenged evidence that Compco itself in February
14 2012 disclosed information on both school tanks and supermarket tanks to Balmoral, so that
15 is also relevant. We saw on a couple of occasions that Clive Dean in January 2012 also
16 gave very specific school tanks and supermarket tanks pricing information to Mr. Joyce
17 around the same period. So all that goes into the mix.

18 Now, it is perfectly right to accept that Mr. Snee did say that he used the information he
19 received at the meeting; that is a concession I am very, very happy to make.

20 The legal test is not merely "use". It is something which has to reduce uncertainty in the
21 market, and in my submission, for the reasons I have outlined and given my submissions on
22 what is the legal test, it is very, very difficult to conclude that that is something which is on
23 the wrong side of the line.

24 Now, there is one issue at page 49 of the transcript where -- this was covered in some detail
25 by Mr. Williams, where Mr. Joyce was asked by Mr. Dean, "What would you quote for a
26 135 now?" Again, we accept that on this single occasion, Mr. Joyce does not just repeat the
27 bands that everybody knew already, but he does say, when pushed, "I would be surprised if
28 it is less than 16". In our submission, that is hardly something to build a case on.

29 The first point we would note is that it was essentially an instinctive reaction of going down
30 the middle of the bands, rather than a considered or thoughtful position. He sort of split the
31 difference and gave a number.

32 If one looks at the transcript, he actually says a number of things which qualify that
33 significantly. He says, for example, "I would not always say it is 16, we have taken some at
34 15".

1 He then goes on to caveat this by saying, "Well, it would depend on whether it was a
2 multiple order or a single order".

3 Of course, he said on a number of occasions he was not responsible for pricing.

4 So, what was said was said. It needs to be seen in context but, in our submission, if that is
5 the high watermark of their case, it falls on the wrong side of the line in terms of showing
6 an infringement.

7 A couple more points on these specific pricing issues --

8 THE CHAIRMAN: How much longer are you going to be?

9 MR. O'DONOGHUE: I think five or ten minutes.

10 THE CHAIRMAN: Okay.

11 MR. O'DONOGHUE: There was also a discussion of a price of £8,600 for school tanks. It was
12 put to Mr. Joyce by Mr. Williams that, again, this was something new and material. But, as
13 Mr. Joyce explained on Day 2 of the transcript, page 79, lines 30 and following, "This price
14 was common knowledge in the market very quickly at that time."

15 Indeed, we see from page 23 of the transcript that Mr. Snee knew by the time of the meeting
16 that Balmoral prices had actually gone up to £9,500 for the same product.

17 The same price applies for the references to £9,200 and £9,300 being low; the cartel knew
18 that the price was £9,500, so this did not really amount to anything.

19 A couple of final points. There was also a discussion of a price of £10,100 for school tanks.
20 Again, the cartel obviously knew their price because it was a fixed price. Again, critically,
21 Balmoral was aware of this price before the meeting and the reference for that is Day 3,
22 page 55, lines 15-17, and lines 23-26.

23 Now, the final point, very quickly, is we have seen what I say is their primary or only case,
24 we have been through the minimalist case, and there is a hint of a suggestion of a sort of
25 minimalist, minimalist case, which runs as follows.

26 The suggestion, as I understand it, is Mr. Joyce wanted to avoid a price war and he told his
27 competitors that he wanted to see prices stabilised and increase. As I understand it, it was
28 effectively a sort of signalling case that you would give a broad feeling on price, even if you
29 did not necessarily divulge something which was new and material and specific. We have
30 been through the evidence on that point and as a matter of fact, it simply does not get off the
31 ground.

32 Two final points. One we have touched on already, of course: the last bite of the cherry
33 cuts across essentially all of this. That should not be forgotten.

1 A critical point, which is recognised in countless places in the transcript, is that the
2 suggestion that this form of stabilisation was something that was achievable, or capable of
3 being concretised, in part of a single meeting really is pie in the sky.

4 This was something that, by its very nature, if it was to have any chance of ever getting off
5 the tarmac, would have required a very, very large number of complex iterations over an
6 extended period of time, and it is common knowledge that the meeting was the beginning
7 and end of any communications as respects Balmoral.

8 If I can just check with those behind me --

9 THE CHAIRMAN: Well, could you check whether you have made any headway on what we
10 asked about the number of sales?

11 MR. O'DONOGHUE: Ah. A letter was sent to the CMA overnight and I think there may be an
12 agreed ... (Pause)

13 Sorry, I misspoke. We have something which on our side is ready. We are in the course of
14 having it agreed by the CMA. I hope that is done today and we can get on with that as soon
15 as we can.

16 I will just check.

17 THE CHAIRMAN: Yes.

18 MR. O'DONOGHUE: Those are our submissions.

19 THE CHAIRMAN: As far as penalty is concerned, you rely on the points you made in your
20 opening and in the skeleton.

21 MR. O'DONOGHUE: Well, thank you for reminding me. Well, yes, essentially. In a way, the
22 way the point has emerged in terms of the inconsistency, in my submission, has become --

23 THE CHAIRMAN: Yes, I think we did --

24 MR. O'DONOGHUE: -- more acute, not less.

25 THE CHAIRMAN: We did traverse that ground --

26 MR. O'DONOGHUE: There is one further point on penalty. Mr. Williams is right, there are two
27 components to a fine: you have to deter the infringer and you have to at least consider
28 deterring other people.

29 In our submission, at least in this case, it does not quite work in the same way because as
30 regards Balmoral, we have taken the case on a point of principle. We hope we are right. If
31 we are wrong, we will take it on the chin. This is probably the last company on earth who
32 at this stage needs to be deterred itself. It is a pretty unusual situation.

33 Of course, that raises the question: well, okay, maybe you get it, what about all the others?

34 The circumstances of this case really are so exceptional that it could be explained in very

1 clear terms that a finding of no need to deter others in this context was driven by the truly
2 exceptional circumstances of this case.

3 So, I do not think there would be a lacuna enforcement policy if this case was looked at in a
4 slightly different way, because it has, in my submission, an unprecedented context.

5 THE CHAIRMAN: No, I think what you are saying is that even if we were to cancel the fine, no
6 one, looking at the history of this, would think: well, what a good idea it was for Balmoral
7 to have gone to this meeting.

8 MR. O'DONOGHUE: Well, if they had their time back, they would have -- hindsight is gilt-
9 edged.

10 THE CHAIRMAN: Yes. All right, thank you very much.

11 Yes, Mr. Williams.

12 Closing submissions by MR. WILLIAMS

13 MR. WILLIAMS: I assume I should get started, Madam, rather than --

14 THE CHAIRMAN: Yes, please.

15 MR. WILLIAMS: Madam, I said in opening that the best evidence available to the Tribunal in
16 this case is the recording of the meeting and the transcript. The Tribunal has now heard
17 from two witnesses since the parties' openings and in our submission it remains the case that
18 the recording and the transcript are the best evidence of what happened at the meeting.
19 They provide a complete, objective and contemporaneous record of what was said and also
20 what was meant and they also provide evidence of the impact which the meeting was likely
21 to have and did in fact have on competition.

22 I also said in opening that Balmoral's case involved a reinterpretation of the objective
23 evidence, and that remains our case. The difference now is that Balmoral's interpretation of
24 the evidence has been tested in the cross-examination of Mr. Joyce, and in our submission,
25 and with respect to Mr. Joyce, it has not withstood the scrutiny of cross-examination and it
26 has been demonstrated to have weaknesses, both in terms of its basic starting point, which is
27 Balmoral's purpose at the meeting, and also in terms of the explanation given for the detail
28 of the exchanges.

29 My plan in closing is to start with a few observations on the oral evidence and then to go
30 back to section 4 in the decision to explain why, following the oral evidence, the CMA's
31 case in the decision stands and is indeed reinforced by the evidence the Tribunal has heard.
32 We thought that would be a useful way to show the Tribunal why the decision should be
33 upheld on appeal.

1 Having done that, I will deal with some of the other arguments that have arisen during the
2 course of the hearing, including the point about the interaction of the information exchange
3 with the main cartel.

4 Before I get going, can I hand up a note, which is not a note with content, but it is a note of
5 references. We thought it might save note-taking today. (Handed).

6 Obviously, the Tribunal will have the transcript, but this is the note. You will see it is not a
7 comprehensive treatment of the case, but we have descriptors of what the issues are,
8 references to the meeting transcript, to the trial transcript and, where relevant, some other
9 references. We just thought that, rather have me read out long lists of references, that might
10 be useful so that we can get through the material today.

11 I should say, in the time available -- we have been doing it under some time pressure so we
12 have not had a chance to check everything in it, so if anything does not make sense, we are
13 very happy to clarify that.

14 Starting, then, with the witness evidence, the Tribunal has heard from two witnesses who
15 are in quite different positions as far as the issues before the Tribunal are concerned.

16 Starting with Mr. Joyce, one can fully understand his perspective in relation to the decision,
17 for reasons I touched on in my opening submissions, but Mr. Joyce's evidence, we would
18 suggest, to a large extent involved a defence of the position Balmoral has taken on this
19 appeal. There were a number of occasions on which Mr. Joyce did not directly answer the
20 questions put to him or moved the discussion on to another topic.

21 Now, it is really for the Tribunal to form a view of the evidence and I will not say any more
22 about that, but we say this is an important point where the question for the Tribunal is how
23 the witness evidence should be reconciled with the objective and contemporaneous
24 evidence. We say that the tenor of the evidence is an important consideration.

25 Notwithstanding those general points, Mr. Joyce did accept a significant number of key
26 points put to him which are of significant importance in deciding the appeal and I will come
27 back to some of those.

28 In contrast to Mr. Joyce, I think there is consensus between the parties that Mr. Snee's
29 evidence was completely straightforward and we would invite the Tribunal to accept his
30 evidence in full, although it is necessary in some respects to clarify what his evidence was
31 and what it went to, and I will come to some of those issues.

32 We make two general observations about the cross-examination of Mr. Snee. Mr. Snee was
33 cross-examined at a general level with almost no reference to the transcript of the

1 discussions with Mr. Joyce, other than to suggest that his purpose in having those
2 discussions was linked to the cartel and nothing else.

3 I will come back to that point but the result, in my submission, is that the meaning and
4 effect of the exchanges between Mr. Snee, Mr. Dean and Mr. Joyce were not really tested in
5 cross-examination, other than in the context of that point about the relationship back to the
6 cartel.

7 So, for example, Mr. Snee was cross-examined, as Mr. O'Donoghue said this morning, on
8 the fact that the bands were based on market prices, which is not in dispute up to a point;
9 but he was not cross-examined on the important question of whether they represented
10 targets and the significance of that discussion at the meeting. We say that is important and
11 obviously Balmoral needs to engage with those issues, because those issues go to the heart
12 of the CMA's case.

13 The second general point, which I will come back to, is that a main theme, if not the main
14 theme, of the cross-examination of Mr. Snee was to argue that the meeting was a failure for
15 him, but measured with the yardstick of whether he had achieved the stabilisation of market
16 prices. That idea of stabilisation was, for a significant part of the cross-examination, put to
17 him with reference to the main cartel arrangements.

18 Now, the main cartel had been carefully designed over many years to create complete
19 stability in pricing in this market using a range of interlocking mechanisms. It is obviously
20 right that the meeting did not create and was never going to create that kind of stability.
21 That, of course, is not the CMA's case; that is not the theory of harm underpinning the
22 decision.

23 What Balmoral has sought to do is to link that part of the discussion about the stability
24 created by the main cartel with the use of the word "stabilise" -- well, Mr. Joyce's use of the
25 word "stabilise" in fact -- at the meeting, and Mr. Snee's reactions to that language.

26 Now, of course, the word is obviously being used in a different way because no one is
27 suggesting that Mr. Joyce had the aim of cartelising the market. When Mr. Joyce talked
28 about stabilisation, in my submission, as I will come back to, he was talking about
29 something very different, which was alleviating the downward pressure on the low prices,
30 avoiding a price war.

31 In our submission, really, what this part of Balmoral's argument is doing is mixing and
32 matching different theories of harm, linking them together with the word "stabilise" and, in
33 our submission, it does not do anything to undermine the CMA's findings in the decision,

1 which are based on a theory of harm relating to reduction in uncertainty, not the
2 stabilisation of market prices, whether by the cartel standard or any other standard.

3 So we come back to the point: Mr. Snee's evidence, that the exchanges reduced uncertainty
4 by establishing target price bands and he obtained a useful insight into Balmoral's pricing
5 from the meeting, in my submission was not undermined by his cross-examination. Nor
6 was his evidence that he in fact used the information in pricing the Compco bids, as Mr.
7 O'Donoghue has realistically had to accept.

8 I will come back to explain the significance of that in a while, but that is a key issue. In our
9 submission, it came through the oral evidence very strongly.

10 Mr. O'Donoghue asks you to accept Mr. Snee's oral testimony, but not his witness
11 statement. In my submission, Mr. Snee is a credible witness. His witness evidence should
12 be accepted and there is not an inconsistency between his witness evidence and his oral
13 evidence when the two are properly understood together. As I said, the stabilisation point is
14 key to that and I will come back to that when we look at the transcript.

15 As a footnote to that discussion about Mr. Snee's position, it was suggested to him yesterday
16 that his evidence in the previous statements never made any reference to a reduction in
17 uncertainty, arising as a result of the meeting. The reason for that is of course that that
18 evidence was prepared in connection with the criminal proceedings which was dealing with
19 the cartel offence and was therefore directed to the elements of the cartel offence and the
20 legal test for cartel offence.

21 So, it is not surprising that it was not expressed with reference to and in the context of
22 Competition Act infringement. Indeed, it would have been very strange if it was. So it is an
23 unfair criticism.

24 Nevertheless, even in that context Mr. Snee had expressed the view in interview that he
25 discussed confidential information with Mr. Joyce. That is the reason why he found himself
26 in the position where he is asked to provide a witness statement in support of this appeal,
27 because the substance of his evidence in relation to the criminal proceedings supported the
28 CMA's findings in the decision, even if it had not been prepared in that context.

29 With that introduction, I will turn back to section 4 of the decision. It is at core bundle, tab
30 8, as the Tribunal will know only too well by now.

31 I just want take a preliminary observation about the structure of the decision, which I meant
32 to make in opening, so please forgive me for that.

1 Section 4. It is not rocket science, I should say. Section 4 has to be read in connection with
2 section 3, which sets out the relevant factual background, and that point operates at two
3 levels.

4 First of all, you can see in paragraph 4.1, that is the way section 4 starts. You will see in
5 due course when you get into the footnotes in section 4 that it is replete with footnote
6 references back to section 3, I am sorry to say.

7 Having said that, really -- it might be helpful to show you this. If you just turn over three
8 pages for the minute, to page 72, you will see paragraph 4.20. This might seem a bit
9 cumbersome but I hope it will be worth it in a minute.

10 At 4.20, there is a point made at the end there, which says:

11 "All attendees took an active role in sharing and soliciting information."

12 Footnote 315 contains a general cross-reference back to paragraphs 3.40 to 3.60. I do not
13 need to take you to those now, but what the Tribunal will see when you go back to that
14 discussion is that is really the meat of the discussion; that is the factual summary of the
15 meat of the discussion in relation to the issues which then formed the basis of the
16 infringement as found in section 4.

17 Obviously, there are other aspects of that factual story; there is the facts before the meeting,
18 there is the run-up to the meeting, there then is the post-meeting conduct; but that section,
19 those 20 paragraphs, is of core interest. In fact, quite a lot of the detail in those paragraphs
20 is then picked up again in section 4, almost all of it. I will show you one or two things that
21 you will not see in section 4, just so you have the full picture. As I say, I hope that was
22 helpful in terms of explaining how the jigsaw fits together.

23 As I showed the Tribunal in opening, there are two legal issues really challenged by
24 Balmoral in section 4: the finding of a concerted practice, and the finding that the concerted
25 practice had the object of restricting competition.

26 What you can see from paragraph 4.13 is that those issues are not really distinct from one
27 another because, for example, 4.13 says that:

28 "As a result of the exchange of information about their current pricing and future
29 pricing intentions, the parties reduced uncertainty regarding their intended conduct on
30 the market and substituted ..."

31 Et cetera. The finding that there is a substitution of practical cooperation for the risks of
32 competition is obviously bound up to a degree with the assessment of the impact of the
33 exchanges on competition, so these two sections also need to be read together.

34 THE CHAIRMAN: But that is the definition of a concerted practice --

1 MR. WILLIAMS: Yes.

2 THE CHAIRMAN: -- which is one element of the infringement. The restriction or distortion of
3 competition is a separate element.

4 MR. WILLIAMS: The object is a separate element --

5 THE CHAIRMAN: Yes.

6 MR. WILLIAMS: -- but the substitution of -- I mean, I fully accept, Madam, your point on the
7 structure of it, but when one gets into the analysis of whether the parties are in fact
8 substituting cooperation for the risks of competition, to some extent you get into the
9 question of what sort of information have they exchanged, what is the effect of that on
10 competition? So I am only really making the point that they are not completely discrete
11 discussions. The material that focuses on whether the discussions related to current, future,
12 or historic pricing, you see that predominantly in the object section here, although obviously
13 it is highly relevant to the CP point too.

14 So, really, when the Tribunal thinks about the concerted practice question, it will need to
15 think about some of the issues that are dealt with in more detail in the object section. I will
16 pick up some of those points in the object section, because that is the way the decision
17 works.

18 Paragraph 4.14. I hope it is helpful. This is the decision that is under appeal. I did show it
19 to you in opening but what I am going to do is weave in the evidence the Tribunal has
20 heard.

21 4.14 makes the point that there was direct contact at the meeting between the competitors.
22 It also deals with the position of Galglass. There is no separate issue in relation to that on
23 this appeal and there is obviously no issue that there was direct contact; the issues arise
24 further down the road.

25 Paragraph 4.15 deals with really two points that are dealt with in more detail in the object
26 section, which are, firstly, the purpose of the meeting, and secondly, as I say at the end
27 there, whether the information related to past bids, current pricing and future pricing
28 intention. So I will come back to those points before very long.

29 4.16, Mr. O'Donoghue took you to, and as he picked up there, the reduction in uncertainty
30 arises firstly generally, and secondly in respect of dealings with Compco, Tyco and Hall &
31 Kay specifically. We will work our way through those and I am going to deal with the
32 Compco and Tyco situation in detail.

33 Just in relation to Hall & Kay, to pick the point up while we are here, Mr. O'Donoghue
34 identified that in particular as the issue around the 16,800 price, which Mr. Joyce said that

1 he had already picked up on the grapevine. He was cross-examined about that yesterday
2 morning and there were two aspects to that point. You will see the reference here is back --
3 in footnote 311, there is a reference back to paragraph 3.53.

4 What paragraph 3.53 says is not so much the price, but the fact that Mr. Snee and Franklin
5 Hodge had taken the position that they were not going to budge off that price for credibility
6 reasons. So it is not merely the fact that that price had been charged; it was the fact that they
7 had taken that strategic position in relation to Hall & Kay for credibility reasons.

8 Mr. Joyce accepted in cross-examination -- it is covered in the table -- that he did not know
9 that that was Franklin Hodge's strategic position, and indeed he could not have known that
10 because it was an internal strategic matter.

11 As I say, we will come back to Compco and Tyco in due course but I thought it was worth
12 picking that point up.

13 I will just pick up one more point before the lunch adjournment, Madam.

14 4.17 deals with the position at a single meeting. The Tribunal has our submission about that.
15 The principles are in *T-Mobile*. The question is: in the context of this market, is the
16 exchange capable of having an effect on competition if there is only a single meeting on the
17 facts? Our answer to it is, firstly, yes, in principle, because of the regular nature of the
18 tenders, and secondly, that is demonstrated by the fact that there was in fact an impact on
19 the market. So I was not going to go back over those submissions beyond that summary.

20 Madam, I do not know if that is a convenient point?

21 THE CHAIRMAN: Yes, thank you very much. We will break now and come back at two
22 o'clock.

23 (1.00 pm) (The short adjournment)

24 (2.00 pm)

25 MR. WILLIAMS: Madam, Members of the Tribunal, we were at paragraph 4.17 and I was just
26 going to make a few follow-up observations to address some of the points Mr. O'Donoghue
27 has made.

28 The point I was making before the short adjournment is that the assessment of whether in
29 the present case there is an infringement of competition law has taken into account the
30 particular context of the market and the particular conditions of competition in assessing
31 whether the meeting was sufficient to give rise to a distortion of competition. It follows
32 from that that the approach the CMA has taken is not a per se approach in which some
33 magic words have been issued, giving rise to an infringement. The assessment has been
34 made in the market context.

1 What one also sees in 4.17 is that in concluding that the infringement was constituted as a
2 single meeting, the CMA draw the distinction that I was drawing before the short
3 adjournment in relation to, on the one hand, an information exchange reducing uncertainty,
4 and on the other hand, a price-fixing agreement which would introduce that kind of long-
5 term stability into the market.

6 So the CMA very clearly and fully had those considerations in mind and it is completely
7 wrong to equate the two. The theory of harm is as set out in the decision.

8 Just to respond to the various characterisations of the CMA's case, the maximalist,
9 minimalist or super-minimalist, or whatever the three categories were, we obviously do run
10 what Mr. O'Donoghue described as the primary case, which is the infringement as found
11 supported by the market context, and Mr. Joyce's purpose, which is a subject I will come
12 back to.

13 We also make the case that the infringement has to be assessed objectively and not
14 subjectively. So to the extent that that is the second version of the case, we say that what
15 matters is the nature of the information that is exchanged, not the subject of purpose of
16 entering or avoiding a price war. That is a factor which we say reinforces the infringement
17 which has been found, but it is not a necessary element of that.

18 We do not run a third case which is simply based on price signalling. That has never been
19 our position.

20 As I have just explained, Mr. Joyce was cross-examined about those matters because they
21 are part of the context for understanding the behaviour that occurred, but we are not saying
22 that there is an infringement by virtue of signalling alone. That is not our case.

23 I can take the next few paragraphs very quickly because they are dealing with public
24 distancing and the Tribunal appreciates our position in relation to that is very
25 straightforward. We say that if there was a separate information exchange infringement,
26 there was no public distancing and, in our submission, really, the evidence on this appeal
27 has not put a different complexion on that question.

28 THE CHAIRMAN: I do not think there has been a public distancing case argued on either side.

29 MR. WILLIAMS: No, that is fine, so we can skip over paragraphs 4.18 and 4.19.

30 The point I picked up in 4.20 is the last sentence, and this talks about the transcript of the
31 meeting showing all attendees taking an active role in sharing and soliciting information. I
32 am going to develop that point, not specifically --

33 THE CHAIRMAN: When are you going to develop it?

1 MR. WILLIAMS: Now. I am going to develop it now. Not specifically for the purposes of
2 public distancing, but because obviously it is a key issue on the appeal, Madam: was
3 Balmoral a passive participant in the meeting.

4 THE CHAIRMAN: Yes.

5 MR. WILLIAMS: That issue obviously is not just relevant to the public distancing issue; it is
6 relevant to understanding the meeting more generally.

7 We say there are nine factors which show Balmoral's active participation in the meeting.

8 Those factors are -- the reference is in the note so I will just give you the headlines.

9 The first is initiating the conversation about the need to stabilise prices and avoiding rock
10 bottom. That was an active step on Mr. Joyce's part; the evidence clearly shows that.

11 Secondly, specifically identifying the prices which Mr. Joyce regarded as too low; 14,650
12 and below, 8.6, 9.2, 9.3.

13 Thirdly, formulating the two price bands. We have seen from the evidence that it was Mr.
14 Joyce who actually brought those figures together to formulate the band and to say: on
15 schools it should be this; on the 135s it should be that.

16 Fourthly, actually characterising those prices as bands, which was an important step,
17 because it was that which then led to the fifth step, which is using the bands as a tool to
18 keep track of prices.

19 So, step four: describing them as bands. Step five: proposing to use the bands to monitor
20 prices. Six, calling the bands "targets". Mr. Joyce not only formulated the bands and called
21 them bands, he was the first person to call them targets.

22 Seventhly, after identifying the target bands, continuing to refer to monitoring of prices
23 against the bands -- and we have given two examples: "Got to have the bands to work with
24 as a market price", and, "If you are falling outside the bands, that is a concern". We have
25 given the references both to the transcript and to the cross-examination on that evidence.

26 The eighth point is then going one step further and targeting the top end of the band. Again,
27 that was Mr. Joyce's proposal. We have given two examples there. We do draw attention to
28 the revision 7 point because, as it emerged in cross-examination, that clearly related to
29 future prices because the revision 7 had not been implemented at the time of the meeting.

30 Then the ninth step is asking questions as the meeting progressed to find out additional
31 information. We have given at least two examples of that there.

32 So we say for all of those reasons that the characterisation of Mr. Joyce as a passive
33 participant in the meeting really is not consistent with the evidence. One can see that on the
34 transcript and the oral evidence does not make any difference to that.

1 So, skipping over the next few paragraphs about public distancing, paragraph 4.28 deals
2 with really an argument which has become a mainstay on the appeal, which is whether the
3 correct way to understand the meeting is that it was one long attempt to persuade Balmoral
4 to join the cartel. I am going to deal with that point once I have dealt with the CMA's
5 positive position in relation to the elements of the infringement.

6 4.29 and following are important points because this deals with conduct on the market.
7 This is dealt with at two levels, both firstly in terms of the presumption of conduct by the
8 parties, and we do stress in 4.29 it is all parties.

9 On this appeal the Tribunal has heard evidence from Balmoral and from Mr. Snee, who
10 represented Franklin Hodge. We say that there is absolutely no rebutting the presumption
11 of conduct by Mr. Snee because there is evidence of actual conduct; but leaving that point
12 to one side, Kondea are presumed to have used the information, Mr. Dean was at the
13 meeting; Galglass is presumed to have used the information, and there is no challenge to the
14 fact that that was disseminated to Galglass.

15 So, to the extent that information was passed by Mr. Joyce to those parties, we say that the
16 infringement is constituted by the receipt of information and the presumption of use.

17 I am not going to take you to it, 4.30 deals with the use by Mr. Snee -- the Tribunal heard
18 his evidence yesterday. You have seen the transcript, you have seen what he said in his
19 witness statement. In our submission, the position was really very much reinforced by what
20 Mr. Snee said yesterday about his use of the material.

21 It was suggested in cross-examination that his use of the material was pro-competitive
22 because he reduced his price. That is a bad point for reasons I am going to explain in just a
23 minute.

24 The significance, though, of that episode is not limited to conduct on the market. We say
25 that it is extremely illuminating. In terms of the way in which this kind of information
26 could influence competition, it is relevant in understanding the theory of harm as well, and
27 not just the conduct on the market element.

28 Paragraphs 4.32 to 4.34 deal with the other side of the coin, the use of the material by
29 Balmoral. Balmoral argues that the presumption is rebutted as far as it is concerned. The
30 point that is made at 4.33 is that conduct by Balmoral is not specifically necessary as long
31 as Balmoral passed information to the other parties and, as I have said, I have just dealt with
32 that point.

33 4.34 deals with Balmoral's case as regards rebuttal. The points that are made here are,
34 firstly, the mere fact that Balmoral bid below the band is not in itself evidence of rebuttal.

1 There are reasons why a party might choose, following its own agenda, to, using the phrase,
2 "cheat on the cartel". Obviously, this was not a cartel, but it is the same principle.

3 I referred to the *Tokai Carbon* case in opening, about how a party with an aggressive
4 strategy can pursue its own agenda whilst simultaneously participating in an infringement.
5 So, just as Mr. Snee snuck under the 16,000, one can say by analogy that Mr. Joyce snuck
6 under the band -- I should say Balmoral snuck under the band.

7 What is also noted in 4.34 is that over the subsequent period Balmoral did, in significant
8 part, bid within the bands, so that is another reason why it is difficult to show that the
9 presumption of conduct is rebutted.

10 So, how does Balmoral seek to rebut the presumption? The key to the argument is that
11 pricing was for the sales team, and not for Mr. Joyce who obtained the information; but that
12 argument depends on, effectively, Mr. Joyce being able to maintain a wall between him and
13 Mr. Ross on this information. He says in paragraph 36 of his second witness statement that
14 he did not tell Mr. Ross what the information was.

15 In our submission, that wall pretty much came down in cross-examination. We have given
16 you the note in our hand-up. He said that he probably told Mr. Ross the outcome in generic
17 terms, and we say that that must mean in reality that he talked to him about the bands. We
18 say that is bound to be the case given all of the evidence of Mr. Joyce talking to Mr. Ross
19 about the previous meetings, the culture of gathering intelligence within Balmoral and all
20 the rest of it.

21 On the balance of probabilities, he probably told Mr. Ross what he learned at the meeting.
22 If the Tribunal accepts that that information was fed back to Mr. Ross, who was in charge of
23 the sales team, then Balmoral cannot rebut the presumption of conduct, because if that
24 information came to Mr. Ross's attention, then there is no way in which one can say it did
25 not influence Balmoral's conduct on the market. Mr. Ross would then be in the position
26 where he couldn't un-know what he knows.

27 Balmoral's rebuttal also has a second aspect, which is that Mr. Joyce himself was insulated
28 to some extent from the pricing process. I am going to make five quick points about that,
29 four general points and one specific point.

30 First point: Mr. Joyce is the managing director and Mr. Ross and the sales team answer to
31 him. In our submission, the general principle that he is not able to influence prices where
32 he chooses to do so is not realistic. You heard the evidence of Mr. Snee yesterday about
33 how these businesses work. The managing director is in charge and if they make a decision
34 about a strategic matter such as pricing, then that goes.

1 Second general point: Mr. Joyce accepted in cross-examination, and I think it is actually
2 consistent with his witness statement, that he sets the framework for pricing and he has to
3 approve certain prices. He might have to approve specific bids and he could ultimately
4 change the pricing framework if he wanted to. That is another reason why Balmoral cannot
5 rebut the presumption, because it is ultimately Mr. Joyce's decision.

6 Thirdly, and we do not have dozens of references for this, but Mr. Joyce accepted that the
7 many references in the transcript to him having conversations with his guys relate to
8 dialogue between him and his sales team, regular dialogue about pricing decisions,
9 judgment calls on pricing, how to approach particular bids, how to handle customers.
10 We do not say that is surprising; we say it is exactly what you would expect. Mr. Joyce is
11 clearly an attentive managing director, managing a business, working in a new sector,
12 paying attention to what is going on, learning about the business. It is exactly what you
13 would expect. You would expect him to be involved and we say that is what the evidence
14 shows.

15 The Tribunal also saw the stealth e-mail. It may be that that was an unusual case, but again
16 it showed a degree of involvement in the detail of working out prices, albeit in that instance
17 through the underlying costs, but it certainly does not show someone who is remote from
18 the detail of making those sorts of judgments.

19 The fourth general point, and one did see this in the transcript and it was dealt with in cross-
20 examination, the reference is in the note, Mr. Joyce explained that his sales team were
21 looking for support from him for low prices, and it may be that that was part of the formal
22 approval process which the Tribunal has heard about. We say that is exactly the sort of
23 situation that we are dealing with here: pressure on prices, judgment calls having to be made
24 as to whether to go down low with a bid in order to try to win the job, and Mr. Joyce
25 potentially being asked to give his approval to a bid at a particular price. If that is the sort
26 of particular situation we are worried about, then those are the sorts of situations where Mr.
27 Joyce may be called upon to give his approval, so that is another reason why the
28 presumption of conduct cannot be rebutted.

29 Those are the four general points.

30 The specific point relates to the pricing of the 14,900 bid specifically just after the meeting.
31 The Tribunal may recall that I showed Mr. Joyce an e-mail, which is exhibited to his second
32 witness statement, in cross-examination, which deals with that and shows the internal
33 communications within Balmoral in relation to that bid.

34 I was really putting the content of those communications to Mr. Joyce, and I put to him:

1 "Question: You see this breakdown before the client does, is the point I am making.
2 You see that figure of 14.9 before the client sees it."

3 Mr. Joyce said:

4 "Answer: I have no idea. I do not know."

5 So he does not -- and this is not a criticism, but he does not have a recollection of what
6 happened in relation to that process, so the Tribunal only has the objective e-mail evidence
7 to go on.

8 What that e-mail shows, in our submission, is that Mr. Joyce saw the figure of 14.9 before
9 the client saw it. There was a note on the e-mail saying, "If any of these stick out like a sore
10 thumb, then please shout", or something to that effect. So the client had not seen the figure,
11 so he was still in a position to express concern or to make an adjustment to that or to make a
12 recommendation or to raise questions.

13 I stress we are in the territory here of rebutting the presumption of conduct and we say,
14 really, when you put it into this factual mix and you see Mr. Joyce seeing the figure before
15 it goes out, he cannot rebut the presumption of conduct. He is copied into the figure before
16 the client sees it, before the order goes out, you can see the chronology in the e-mail.

17 We invite the Tribunal really to use that e-mail as the clearest guide to what actually
18 happened in Balmoral at the time.

19 So we say, to the extent necessary, Balmoral cannot rebut the presumption of conduct,
20 either at the level of Mr. Ross or at the level of Mr. Joyce, but in fact, actually, we would
21 only need to win on one of those in order to establish conduct by Balmoral.

22 So moving, then, on to object. I dealt with the legal framework in opening; I was not going
23 to go back to any of that.

24 Just to summarise in a few sentences what I took from the authorities in opening: from *Dole*
25 in particular -- sorry, they are all the general principles in relation to concerted practices and
26 information exchange, but just focusing on *Dole* and *Philips* in relation to price information.
27 From *Dole* we took the point that one does not actually need a hard-edged exchange of
28 specific future prices to establish an objective infringement; it will suffice to show an
29 exchange of information relating to pricing policy, future price ideas, market signals and
30 trends, market conduct generally.

31 In relation to the point Mr. O'Donoghue showed you this morning in the Advocate General's
32 opinion, you might remember, Madam, we went to footnote 97 and we saw, "Oh, it is *T-*
33 *Mobile*", and I said, "Oh, I showed you that point in *T-Mobile*".

34 So the same point is in *T-Mobile*; it is not a point we did not cover in other authorities.

1 The point we make really is, taking the evidence in the round, target prices are a long way
2 up that spectrum. You know, we are not talking about amorphous price ideas; we are
3 talking about an exchange of target prices between direct competitors.

4 The reason I took you to *Philips* was not to suggest that the entirety of *Philips* resembles
5 our case on the facts, obviously it does not, but you will remember I took you to specific
6 elements of the infringement which were identified in themselves as sufficiently
7 constituting an object infringement, even at a single meeting.

8 So, obviously, we take the point that the infringement went wider and longer and all the rest
9 of it, but one can see from that analysis forms of conduct that suffice in themselves to
10 establish an object infringement, which we say do bear strong similarities to this case on the
11 facts.

12 You will have the general framework in 4.45 and 4.46. The point I wanted to pick up is in
13 4.46. It says the exchange reduced uncertainty in relation to the parties' conduct and
14 highlighted to Franklin Hodge, Kondea and Galglass that there might be less downward
15 pressure on their prices than they would otherwise have expected.

16 What I wanted to do was really flesh that out with some of the other evidence the Tribunal
17 has heard to get a full picture of what competition on this market was like at the time of this
18 meeting, which is obviously the most important question for the Tribunal.

19 The Tribunal heard from Mr. Snee yesterday and he explained that at this point in time, he
20 wanted to compete hard with Balmoral for Compco. Compco had been his customer, he
21 had lost business to them and the volume of business -- I think the Tribunal saw that it had
22 gone down two-thirds or three-quarters, something like that. A very, very significant
23 percentage.

24 So Mr. Snee -- Franklin Hodge's incentives to compete very hard for Compco at this point
25 in time were obviously very high and, all other things being equal, you would have
26 expected Mr. Snee's position to be, "This is an opportunity for us to show we mean
27 business. I am going to offer Compco my very best price for this job. What is that price?"

28 What the Tribunal has seen is that what became Mr. Snee's very best price was conditioned
29 by what Mr. Joyce told him at the meeting. He decided to bid what he bid because he
30 thought it was just enough to beat what he thought Balmoral was going to bid.

31 That, in our submission, is an absolutely crystal clear distortion of competition. It is a
32 distortion of competition in itself, but if one puts it into this context where Mr. Snee is
33 saying himself that he is going to go in hard for the Compco job, it is all the more clear that
34 what has happened here is the prices -- as paragraph 4.46 says, there's less downward

1 pressure on prices, less downward pressure on Mr. Snee's price than there would otherwise
2 have been. The Tribunal has seen and heard that.

3 I pause to note that in his second witness statement Mr. Joyce denied ever having said the
4 16,000 figure at the meeting. He was cross-examined about that and I think the point is
5 now effectively conceded. It was, in our submission, a completely unsustainable position
6 for Mr. Joyce to take, but in any event, the position is now that it is no longer an issue; it has
7 been accepted by Mr. O'Donoghue in closing.

8 The point I really make about the Compco bid is that we know from the Tyco episode what
9 the most competitive price for the 135 was. It was not 15,800; it started with a 14. Not
10 only did it start with a 14, we see Mr. Joyce talking at the meeting about how it might be
11 driven down to 14.5, 14.4.

12 The point I made to Mr. Joyce in cross-examination was that actually the winning Galglass
13 price on that Tyco job was 14.3, it was not 14.6. It was not simply that Galglass had gone
14 in with the same bid as Mr. Joyce and they had gone with the preferred supplier in the last
15 bite of the cherry; they had actually outbid them by a margin.

16 So, the lowest price we are aware of in this market at this stage is 14.3. I can show you the
17 14.3 in the documents if that is helpful. It is supplementary 2 bundle, 16. I do not think this
18 is something the Tribunal has seen.

19 I'm afraid this is another one of these eyesight-testing spreadsheets, but you do not need
20 very much from it.

21 If you go to the bottom on the left-hand side and go up until you see four Swanseas in a
22 row, it is about an inch from the bottom. Perhaps I should say 2.5 centimetres.

23 You can see it says, "Swansea":

24 "Morrison's Leamington Spa, Morrison's Wells, Morrison's Sheldon" --

25 No?

26 THE CHAIRMAN: Tab 16? Oh, Swansea. Oh, I see, yes. Swansea Morrison's Leamington Spa -

27 -

28 MR. WILLIAMS: That's right, yes. There are three Morrison's jobs. Those are the three
29 Morrison's jobs and if you go along those three jobs you can see there are three figures
30 about 14.3. One of them is ever so slightly above.

31 THE CHAIRMAN: What is this spreadsheet?

32 MR. WILLIAMS: Sorry, I should have said. This is a Tyco document which is on the CMA's
33 file. It is information provided by Tyco about contracts it had awarded under bids it
34 received for those contracts.

1 So you can also see, a bit further along --

2 THE CHAIRMAN: From Galglass?

3 MR. WILLIAMS: The 14.3 is the winning Galglass bid. A bit further over to the right, you can
4 see Balmoral is the last supplier on the right and you can see there 14,650.

5 I am sorry it is so small.

6 THE CHAIRMAN: Right.

7 MR. WILLIAMS: I just wanted to make good that fact. The point is that in this market at this
8 time, 14,300 is a real price. 14,650 is definitely a real price because that was Balmoral's
9 price.

10 The position in relation to the Tyco Morrison's job has also been covered in some detail.

11 This is another aspect of competition around the 135 tank at this stage, and what the
12 evidence shows, what the transcript shows, is that Mr. Joyce had two explicit concerns
13 about that price, the 14,650 price and Tyco: first of all, that it was already too low in itself,
14 and he was clearly conveying that at the meeting, and we say that conveying his view that
15 that price is too low is in itself an object infringement, on the principles I have already
16 explained.

17 Secondly, he was not just concerned about the 14,650, he was concerned about the
18 downward spiral spinning out of control, so, as I have said, the 14.5, the 14.4.

19 When he was cross-examined in relation to his words, "We don't want everyone down at
20 14.5, 14.4", he was driven to say, "I do say some things in here I wish I had not". That is
21 understandable.

22 So Balmoral did not actually know, maybe until yesterday, that at that time the lowest price
23 in the market was 14.3.

24 Now, Mr. O'Donoghue has raised the question as to whether that was a mistake, and there
25 are number of important points to make about that.

26 First of all, if there was a mistake, the mistake was Galglass's price, which is the 14.3 figure
27 rather than the 14,650. It cannot be suggested that 14,650 was a mistake because that was
28 Balmoral's price and no one is suggesting that was a mistaken price. That was a price that
29 was driven by competition. So on any view, 14,650 was a real price, it was not some sort of
30 slip, and the discussion of 14.5 and 14.4 tends to suggest that, even for Mr. Joyce, 14,650
31 was not the last word.

32 As to whether the Galglass price was in fact a mistake, obviously there is mixed evidence.
33 There is the contemporaneous explanation of Mr. Dean, who presents it as a mistake. You
34 saw Mr. Snee's statement in the criminal proceedings, where he described it as an error. It

1 does look as though Mr. Snee's evidence in the criminal proceedings may simply have been
2 picking up on what is said in the transcript where Mr. Dean described it as an error, because
3 what Mr. Snee said is, "Well, to the best of my recollection, that was a real price because
4 Galglass was signalling".

5 Obviously, Mr. Dean is not here. You have heard from Mr. Snee and you will form your
6 own view in relation to his evidence, but in our submission there is no reason to treat his
7 evidence in relation to that as any less reliable than the rest of his evidence.

8 Mr. Snee did give important evidence about how, in this type of situation, suppliers might
9 even bid below cost to establish a particular market position.

10 So, I go back to the point that both as between Balmoral and Galglass on the one hand, and
11 as between Franklin Hodge and Balmoral on the other hand, you are clearly right in the
12 crucible of hot competition between these two companies for these two particular
13 customers, Tyco and Compco. Really, this is an example of where you would expect to see
14 the very best market prices driven by the most fierce competition, for all the reasons you
15 have seen.

16 So, really, on the Compco job, what one would have expected is, you know, a price down in
17 those 14,000s. But what you instead see is consensus breaking out at the meeting between
18 Kondea, Franklin Hodge and Balmoral, that 14,650 is silly, unsustainable, it is bonkers and
19 all the rest of it, and following on from that target bands being established above that price.
20 We do reiterate, Mr. Joyce is not a passive beneficiary of that discussion. He objects to the
21 14,650. He identifies the bands starting with the 15. So the outcome in relation to the bands
22 is not just a coincidence, as far as Mr. Joyce is concerned, he is really at the heart of that.

23 So, going back to where I started, it is really in that context that one needs to see the episode
24 with Mr. Snee and Franklin Hodge, and the bid to Compco, and one can see that the bid
25 around 15,850, or whatever it is, just snicking in below the 16, it is a serious distortion of
26 competition in this particular market at this particular time.

27 That was a long way of really, I think, trying to bring to life the finding in paragraph 4.46,
28 that the effect of this infringement is to put less downward pressure on the prices of
29 Franklin Hodge and the other participants in the meeting than there would otherwise have
30 been, given the competitive threat from Balmoral.

31 So I will not go back through 4.47 and 4.48, which are points I made in opening about the
32 context of the infringement being the existing cartel and competition being particularly
33 fragile. I do want to pick it up again at paragraph 4.49 through to 4.51, which deals with the
34 question of purpose where the Tribunal has heard, obviously, quite a lot of evidence. 4.

1 49 deals with the primary purpose of Franklin Hodge, Kondea and Galglass, but what it also
2 records is that that purpose having failed, Mr. Snee also had the purpose of finding out more
3 about Balmoral's pricing, and he makes the same point in his witness statement in these
4 proceedings in paragraph 18, where he actually refers to the position of himself and Mr.
5 Dean, I think.

6 Now, in our submission this is not an exotic claim. It is perfectly obvious from the
7 discussion at the meeting that Mr. Snee and Mr. Dean are interested in Balmoral's pricing,
8 because notwithstanding whether they have actually managed to recruit them to the cartel or
9 not, or share markets or anything else, they do in fact have a sustained conversation with
10 Mr. Joyce about the pricing on these two tanks in particular. So to suggest that they have no
11 purpose at all in discussing that information, other than for the purposes of the cartel, in my
12 submission it is just not really what happened. They had the conversation, and it was
13 something in which they were interested.

14 Now, our position is that one does not need to identify a discrete secondary purpose,
15 subjective purpose, of pursuing pricing information independently of the cartel. That is
16 going down the subjective road rather than the objective road. We say, just on a common
17 sense view of the evidence, they did have that purpose because they had the conversation,
18 they were interested in it; but the suggestion that the case falls down because there was not
19 some purpose separate from the cartel, the talking about price with Mr. Joyce, it is a
20 completely unreal interpretation of what happened at the meeting where there was
21 discussion of price, irrespective of whether Mr. Joyce had been recruited to the cartel.

22 I will come back to the disentangling point, Madam. I am going to deal with that.

23 So, Mr. Joyce's purpose. The case has been closed this morning by Mr. O'Donoghue on the
24 basis of Balmoral's original position that its only purpose in attending the meeting, or
25 certainly its only purpose, if I could put it that way, rather than linking it to a particular
26 point in time, was to kill the contact. But the Tribunal has seen the interview evidence with
27 the OFT. Mr. Joyce was cross-examined about it, and he accepted that he did have the
28 purpose of avoiding a price war, and that that did form the subject matter of discussions at
29 the meeting.

30 With respect, Mr. Joyce was bound to accept that. He was in court when the case was
31 opened and he saw the evidence on the case file, and he realistically accepted that he did
32 have that purpose, and that he did convey it at the meeting.

33 What Mr. Joyce did not accept is that a price war is really just intense competition on price.
34 He did not say what he thought a price war was, but in my submission that is what it is. The

1 reason why Mr. Joyce would not accept that that is what a price war is, is because the
2 purpose of avoiding a price war is of course flatly contrary to the case Balmoral has
3 advanced on this appeal, which is that it only wanted to go to the meeting to indicate that it
4 wanted to compete strongly.

5 Mr. Joyce's position in relation to the price war point really seemed to be that he had said it
6 many times before. I mean, that was a surprising position to take -- surprising to us, I
7 should say, because the case had been opened by Balmoral's legal team the day before on
8 the basis that it defied common sense for Mr. Joyce to go to the meeting with the purpose of
9 avoiding a price war. But even if it were true that he had said it many times before, it does
10 not absolve Balmoral of responsibility for making statements which softened competition,
11 and the only difference, as far as the meeting of July is concerned, is that the CMA has
12 evidence of it. So it is not that continued communication to that effect would not be a
13 problem; it is just that that is what the CMA were aware of until Mr. Joyce gave his
14 evidence.

15 So the necessary effect of the price war point is that the signals Mr. Joyce was sending out
16 at the meeting were really not the signals that he claims in his witness statement that he
17 wanted to send at the meeting. It is not part of our case to say that he formed a particular
18 intention at a particular point in time. Our point is simply that, at the meeting, he has
19 accepted that he had that purpose and that he conveyed it to the other participants.

20 This is now where we get to the signalling point. Mr. Joyce, having accepted the price war
21 point, he did not accept what we say is the plain interpretation of related parts of the
22 transcript, which are clearly bound up with that issue, at pages 15 and 16 of the transcript
23 where he talks about not being the cheapest, everyone has got to make some money, prices
24 creeping up, and so on. Those are really all aspects of the price war point but Mr. Joyce did
25 not accept the natural reading of those passages.

26 Really, the point is just that once that position in relation to purpose is established, the
27 interpretation of the remainder of the discussion of the meeting makes sense in a way that it
28 does not make sense on Balmoral's case.

29 So moving, then, through the decision, paragraph 4.53 deals with the specific tanks, and it
30 has been part of Balmoral's case on the appeal that there could not really be a distortion of
31 competition in relation to these tanks and these tanks alone. In fact, the fact that the
32 discussion focuses on two sizes of tank is in my submission very important when we come
33 to the disentangling point, because just to foreshadow the submission, no one in the meeting

1 could have thought that they could arrive at a market-sharing arrangement by having a
2 discussion in relation to two sizes of tank.

3 So if one is trying to work out what was the objective purpose of that discussion, the
4 objective purpose of talking about only two sizes of tank cannot be to arrive at a market-
5 sharing arrangement; it has to be something to do with those tanks. The tribunal has heard
6 the evidence and has seen that the reason for talking about -- or the reasons for talking about
7 those two sizes of tank are that they were the tanks that were of particular concern to those
8 involved in the discussion.

9 The 14,650 tank, that came to form part of the discussion because Mr. Joyce raised it, his
10 particular concerns about that tank. Then Mr. Dean subsequently linked that tank to the
11 schools tank because he said, "These are the two sizes that we as a cartel have struggled to
12 move the price on."

13 So the objective reasons for talking about those two sizes of tank were that they were the
14 two particular sizes that were bothering all of the parties most at this point in the market at
15 that time.

16 I will come back to the point that actually that conversation could never have led to a
17 market-sharing agreement, for reasons I will explain.

18 So that is part of the reason for talking about these two sizes of tank. Related to that, there
19 is the evidence that the tanks do constitute a significant proportion of the market. When I
20 asked Mr. Joyce about the importance of these two sizes, he would not really go any further
21 than to say that all tanks are important. But the Tribunal has his interviews with the OFT
22 and his evidence in the criminal proceedings, which described them variously as "popular
23 sizes" and "the highest in demand".

24 What one also sees in the footnotes in particular to 4.53, are some figures, some data in
25 relation to sales and quotes. Balmoral emphasises the low proportion of quotes which these
26 tanks formed for it, but what you can see in the footnote -- I think it is 371 -- that for the
27 schools tank in particular it was a small proportion of quotes but it was a much bigger
28 proportion of sales. So I do not think there can be any disputing Balmoral's interest in the
29 135 tank, given the sustained discussion of that tank at the meeting. What one sees from
30 that footnote is that, objectively, the schools tank was at that time 20 per cent of its sales,
31 which on any view is a significant proportion of its business.

32 So that is the products. The point we make, really, about this, is that quite apart from
33 anything else, this is an object infringement. There is no de minimis threshold, so it is not
34 completely clear to us where the point about the proportion of the market goes. The points I

1 have just made to you are really just important in understanding the significance of the
2 discussion, its relevance to the parties, its importance and the potential impact on
3 competition.

4 I am just going to skip over 4.54 briefly. 4.55 deals with the bands as a means of catering
5 for variations in price and cost. What the CMA says here is that such variations made the
6 bands more useful than discussion of a single price point. Notwithstanding that point, the
7 Tribunal has heard or seen Mr. Joyce's evidence and heard cross-examination about the
8 question of ancillaries, accessories, variations on the orders, and all the rest of it.

9 There are a number of detailed points dealt with in the cross-examination. We have given
10 the references in the table. I think our overarching submission about them is that the extent
11 to which those different factors made the price information exchanged at the meeting sort of
12 meaningless and useless was seriously exaggerated.

13 The Tribunal heard that installation was a standard process for this tanks. The dimensions
14 were either fairly standard, or that there was limited variation in relation to them. For
15 example on the schools tank Mr. Joyce said that it was difficult to change the dimensions,
16 which was more or less opposite to what he said in his statement.

17 You heard about the standards applicable and how there is really one predominant standard.
18 Most accessories followed the standard. Various items that Mr. Joyce referred to would be
19 the exception rather than the rule, and so on.

20 The point about the liner we came back to in cross-examination yesterday morning. It
21 turned out that the liner was not such a big factor, and in fact it turned out Balmoral did not
22 even offer it at the time. So that was not relevant. It was never relevant, but it is in Mr.
23 Joyce's witness statement. Things like transport, although that would vary, it would vary
24 for everyone. If everyone was shipping a tank to Scotland, everyone would know the tank
25 was going further.

26 THE CHAIRMAN: It depends where the tank starts out.

27 MR. WILLIAMS: That is true, and the reality is you had two suppliers in the south, two suppliers
28 in the Midlands going north and so on. But of course the reality is everyone knows where
29 everyone is. It is not impossible to cater for that kind of factor, and the parties had the
30 bands to work with. So that is the detailed answer to that part of the case.

31 There is a more common sense answer, which is that the parties did discuss the information
32 at the meeting. Either it was meaningless gobbledegook or it was not. In my submission, it
33 obviously was not gobbledegook. It was meaningful information between businessmen
34 who understood the information and knew whether it was useful to them or not, and they

1 talked about it in that form because it was useful to them, and when they needed to ask
2 questions they did, and when they needed to clarify things they did. That, in my
3 submission, is a much more plausible interpretation than the idea that they had the
4 discussion but it did not mean anything to anybody.

5 There is of course the point that if, really, all that the discussion was about was about
6 pushing prices up from too low a level to something that is more acceptable, you do not
7 need to know absolutely exactly what components you are talking about; you are talking
8 about pushing the price up a bit.

9 So 4.54 and 4.56 deal with target price bands. The way the point has really been developed
10 on appeal is to say well, these are just market prices. Everyone knows what things are
11 selling for. In our submission, really that argument sort of misses the point of this part of
12 the case. The particular reason why the CMA has dealt with the price bands in the way they
13 have is because they were identified as targets, and there is obviously a difference between
14 parties gathering intelligence about the range of prices in the market and three direct
15 competitors sitting in a room and saying, "What are our target prices for these particular
16 sizes of tank where we are struggling to push the price up?"

17 I mean, one cannot move from "these tanks were sold at these prices in the market" to: "In
18 that case it is all right for us to set a target price." It simply does not follow at all.

19 Of course, the point is that they were not the only prices in the market. They were certain
20 prices in the market, but they were above certain other lower prices that the parties did not
21 want to offer. So it might be that they were market prices, but they were the preferred
22 market prices.

23 That is the point about it. That is the answer to the "bleeding obvious" point that was put to
24 Mr. Snee. It was put to him in relation to the bands as an indication of market prices and not
25 in the context of the CMA's finding that they were targets.

26 The Tribunal has the *Tate & Lyle* point. I will not labour it, but again, there is a difference
27 between picking up intelligence and competitors sitting in a room together assembling a
28 body of information and sharing it between them to give them all a much clearer picture
29 than they could get from simply participating in the market.

30 So you then move on to 4.57, 4.58. This is a point in the case where I just need to deal with
31 a little bit of detail, because now we are talking about specific evidence in relation to
32 current prices, future prices and past prices in forming future prices.

33 I have just talked about the bands as current prices and explained that the -- I mean, first of
34 all, competitors discussing current pricing information is sensitive, but it is obviously of

1 particular sensitivity when the discussion was framed in the way that it was here. There is
2 further discussion, and I will just give you the references for now.

3 At 3.48 of the discussion of current prices -- this is one of the few instances where one
4 needs to dip back into section 3 for some of the relevant information -- there was a current
5 Franklin Hodge target price in Scotland which the Tribunal heard about. I put to Mr. Joyce
6 that Franklin Hodge's target price was something he could not know about without talking
7 to Mr. Snee, and I think Mr. Joyce would not acknowledge that it was a target price, even
8 though that is what Mr. Snee described it as.

9 The tribunal also saw the information provided by Mr. Dean in relation to his current prices
10 on the 10.1 tank in the handwritten notes. The significance of that is that Mr. Joyce asked
11 for it. To say that it is information he had no interest in, he actually asked for it and then he
12 wrote it down. So to say that this information is of no interest or utility to him is really in
13 defiance of common sense, in our submission.

14 Paragraph 4.59 deals with future pricing intentions. I will just make a number of quick
15 points about this. You have my submission in relation to targets as forward-looking
16 information. There is then the exchange with Mr. Dean about a hypothetical new tender for
17 a 135, which the Tribunal heard about. I think, again, Mr. O'Donoghue has accepted that
18 that discussion happened, and that it resulted in the figure of -- surprised if it is less than 16,
19 and you have seen the way in which that unfolded from there.

20 There is also reference here to Mr. Snee's discussions with Mr. Joyce about the upcoming
21 Compco bid where he said -- the Tribunal has seen this, and in fact, Madam, you challenged
22 Mr. Snee about this. Whether it was well advised or not for him to raise that with Mr. Joyce,
23 he did talk to him about an upcoming tender. He said he wanted to position himself just
24 under Mr. Joyce, and Mr. Joyce freely answered him and said "Anything under 15 grand is
25 stupid."

26 That is really a conversation that should not have happened.

27 There was then a reverse conversation later on between Mr. Snee and Mr. Joyce in relation
28 to the schools tank where Mr. Snee volunteered that consistently with his desire to win work
29 back from Compco, he would bid closer to the 9.5 than the 10.5.

30 I have also given you the example of the revision 7 point which, as I have said, was
31 forward-looking information.

32 So one can see, then, from 4.60 that there is the third category, past information, which
33 gives a flavour of future information, and this is really the "These prices are too low, this is

1 there we want the prices to be." You have the examples of the 8.6, the 9.2, the 9.3 on the
2 schools tank, and you have heard more than enough, I think, about the 14,650.
3 If I can just add one more example. At 4.62, here we see discussion of the 16.8. Now, Mr.
4 Joyce says he knew that price, and I have already made the point that what he did not know
5 was that it was a price that Franklin Hodge were not going to budge off; but there is another
6 feature of this price which is that Mr. Dean and Mr. Snee both said to Mr. Joyce they
7 thought it was a reasonable price. That very much chimes with what we see Mr. Joyce
8 saying later on, which is that he wanted to push prices up towards the top of the band. 16,8
9 is clearly at the top of the band, so one can see the sensitivity in that kind of conversation.
10 Although Balmoral's case has majored on the argument that the information is historic in
11 nature, we say that is not right. But it is also important to see the point in 4.63, which is that
12 Mr. Joyce said in his interview in the criminal proceedings that he would not supply
13 competitors with Balmoral historic pricing information, because it could be used by them in
14 forming their strategy. That was put to him in cross-examination and he took the same
15 position at that stage. So even on Mr. Joyce's own view, historical information can create a
16 distortion of competition. This is back to *Tate & Lyle*, really. Feeding information to
17 competitors can create a distortion of competition which would not otherwise arise.
18 4.65 deals with the question of whether the bands were too broad to be of use. We have
19 covered this to some extent. I just wanted to pick up the point that in cross-examination --
20 and this is in the note again -- Mr. Joyce accepted that the bands were workable to give him
21 a guideline, and we say that is an important concession in the context of the objection that
22 these bands were basically of no utility.

23 There have been undercurrents in the evidence at times where it has been suggested, I think,
24 that the information Mr. Joyce provided could not have been useful because he did not
25 know enough about the market, did not know enough about his business. In the evidence he
26 kept referring back to whether he had sold one tank of a particular size, or whether it was
27 one or two exactly. The Tribunal has heard from Mr. Joyce. One thing I think we can all
28 agree on is that he knows his own business and that would not bandy around information he
29 did not understand, did not know about, and really it is not realistic to think that that is what
30 was happening at the meeting.

31 So the rest of the points I think we have covered. Really, at this point the discussion comes
32 back to the single meeting issue: transparency. I have already made my submissions about
33 those.

1 I will just give you one or two other references from section 3. I will not take you back to
2 them. 3.41 of the decision -- I am happy to take you back to them if it will be helpful, but I
3 am happy just to give you a quick rundown. There are only two points. 3.41 has the quote
4 including the words "I can be frank with you; we can put our cards on the table." The
5 submission we make about that is that Mr. Joyce went out of his way on a number of
6 occasions to create a sort of constructive atmosphere at the meeting. We say it is not right to
7 say that his attendance at this meeting was really under duress, and that whatever mixed
8 feelings he may have had going into it, he really conducted himself at the meeting in a way
9 that meant that it was a useful, productive discussion.

10 That is a good example because it is right at the outset of the discussion; it is really setting
11 the tone for what follows.

12 In relation to 3.43, the Tribunal will recall that Balmoral argued that its refusal to get
13 involved in contacts was sanctioned at the highest level. It was effectively agreed with Mr.
14 Milne, and it was said to be absurd to suggest that it would go to the meeting and then go
15 rogue and break ranks, and so on. But what you see in 3.43 is the bit of the transcript where
16 Mr. Joyce says that Mr. Milne was saying to him here, "I thought you were having chats."
17 The clear impression is that actually he has authority to have this kind of conversation, and
18 when he was cross-examined about that, he accepted that he was giving that impression.
19 So that, in our submission, puts a different complexion on the overarching point that
20 Balmoral had a corporate strategy, going into this meeting, that it was going there to cut the
21 contact off, and that was the position from the top down. In fact, Mr. Joyce gave the
22 opposite impression at the meeting. That is obviously important in understanding the
23 exchanges.

24 Those are the references I wanted to cover in the decisions. That is our primary case, and
25 we say that it is borne out by the objective evidence and it is supported by the witness
26 evidence the Tribunal has heard.

27 I just want to deal briefly with earlier meetings which Mr. O'Donoghue raised this morning.
28 There are a number of points to make about that, there are three points. The first point is
29 that the nature of the discussions as shown, for example, by the note of the January meeting
30 with Mr. Dean -- I mean, one cannot compare the provision of four indicative prices at that
31 point in time with a discussion of target price bands. There is no comparison. That is the
32 first point.

1 The second point is that Mr. Snee was asked about this, and the Tribunal may recall that
2 although he was cross-examined, he said actually the discussion in July was more specific,
3 with reference to his experience.

4 I do not have the reference for that, I am afraid, because that was a responsive point, but we
5 could give you that reference if you needed it.

6 The third point is that there was another qualitative difference, which is a point I actually
7 made to Mr. Joyce in cross-examination, which is that there is evidence from Norman Ross
8 in his witness statement, I think paragraph 58, that he thought that information was not of
9 any use because he thought the prices were too high. They were not the prices -- they were
10 not market prices, I think, is really what he thought. He said he put that information in the
11 bin, effectively, whereas later on in Mr. Ross's statement he says that the 15 to the 17
12 looked about right. So there is a clear difference, an important difference, between the
13 exchanges, and in terms of the utility to Balmoral on Balmoral's own evidence.

14 Coming back, then, to market sharing. I have already made some of my submissions about
15 this. This is the disentanglement point.

16 MR. O'DONOGHUE: I hesitate to rise, but on the Mr. Ross point 15 to 17, can we have a
17 reference for that, please?

18 MR. WILLIAMS: Yes we can. In fact, shall we take it out? It is D13, bottom of page 13. This is
19 Mr. Ross being shown the notebook. At the very bottom Mr. Ross says, "I do not recognise
20 these details but those prices ... would be about correct for the schools tanks at the time."
21 While you have it open, you can see on paragraph 58, that is where he said the pricing
22 information that he got in January 2012, "following the feedback, it did not match the
23 information, so I discarded it."

24 So you can see that one exchange he is capable of being useful to Balmoral in the way that
25 the other one, on Balmoral's evidence, was not.

26 MR. O'DONOGHUE: Madam, at the risk of being misled, what is happening here is that he is
27 being shown one of Mr. Joyce's notes sometime after the fact. He is looking at the notes
28 and saying: "Well, 15 to 17, looking back at that time, seems about correct." That is
29 obvious.

30 MR. WILLIAMS: I am not putting it any higher than that. I am just saying that in relation to
31 paragraph 58, Mr. Ross said the information was no use to him because the numbers looked
32 wrong in the market at the time, whereas in relation to the July meeting, the numbers looked
33 about right. That is all I am saying.

34 MR. O'DONOGHUE: [sotto voce].

1 MR. WILLIAMS: You can make that (inaudible).

2 Of course I have already addressed you on what is the likelihood that this information
3 filtered its way back to Mr. Ross. We covered that in --

4 THE CHAIRMAN: I am sorry?

5 MR. WILLIAMS: I addressed you in relation to the question of what is the likelihood that this
6 information filtered its way back to Mr. Ross? I addressed you on that earlier.

7 Mr. Bourke has helpfully given me a reference. The "more specific" reference for Mr. Snee
8 is Day 3, page 42, lines 6-15.

9 So, market sharing and disentanglement. I mean, the first point to make is that the way this
10 argument has been developed by Balmoral is to say that the CMA has fundamentally
11 misread the transcript because it has rejected the view -- sorry, it has taken the view that
12 nothing after page 21 had anything to do with the cartel. I addressed you in opening about
13 this. What the CMA found explicitly in the decision was that what happened at page 21
14 was that Mr. Joyce rejected the customer allocation arrangements because that is what was
15 discussed. It is a factual point. We just do not understand the criticism that is made when it
16 said that the rest of the transcript has been read incorrectly.

17 The only point that was made is that if Mr. Joyce had truly wanted to cut the contact off,
18 there is a watershed at page 21 of the transcript where he said to them, "I don' want to join
19 the customer allocation arrangements." One therefore needs an explanation for him staying
20 for the rest of the meeting. There is no clear explanation.

21 What Balmoral is saying is: well, the rest of the meeting was still an attempt to persuade
22 Balmoral to join the cartel, and we say that is not the point. The point is that if things have
23 come to a head at that point in the discussion, you have made your point, at least about
24 customer allocation, and there is absolutely no reason for you to continue to be there or
25 continue to talk about price if you do not want to, having brought the issue to a head.

26 THE CHAIRMAN: I think what you are missing is that you found that they did not ever become
27 a party to the cartel, including as a result of what went on at this meeting.

28 MR. WILLIAMS: Yes.

29 THE CHAIRMAN: That, as I understood it, is the point that is being made: that you are trying to
30 draw a clear line between this infringement and the main cartel infringement.

31 What Mr. O'Donoghue is saying is that you do that by saying well, as at page 21, Mr. Joyce
32 has made it clear that Balmoral are not prepared to join up the customer allocation. Then
33 how he interprets it is the rest of the meeting is trying to persuade Mr. Joyce to join other

1 aspects of what you have held is the main cartel, because it was not just customer
2 allocations. It was price-fixing; it was market sharing.

3 MR. WILLIAMS: Yes.

4 THE CHAIRMAN: But you have decided that those attempts were all unsuccessful because they
5 are not a party to the main cartel. So how is it, then, that you can pull out a little bit of this
6 meeting and suddenly identify it as some separate infringement when that does not seem,
7 for the reasons he has given, to be how the parties considered it? Or maybe even how one
8 would objectively consider it?

9 MR. WILLIAMS: That is the way you put it to me in opening, Madam, and that was the question
10 I was going to address.

11 The main cartel involved sharing the whole of the market for tanks of all sizes, fixing prices
12 across the whole of the market for tanks of all sizes, and allocating customers across the
13 whole of the market for tanks of all sizes.

14 It is right to say -- and I do not think we have ever suggested otherwise -- that after page 21
15 there are continued discussions in which Mr. Snee brings the discussion back to a wider
16 arrangement, to 25 per cent of the market and so on.

17 But in amongst those discussions, there is a concerted exchange of information in relation to
18 only two sizes of tank, the schools tank and the 135 tank. As I said a bit earlier on, there are
19 objective reasons why everyone at the meeting had an interest in discussing pricing on those
20 two sizes of tank. We have seen Mr. Joyce's repeated complaints about the 14,650, and you
21 have seen what Mr. Dean says about "We struggled to move the price on these two sizes in
22 particular."

23 Objectively, if it is helpful to use that word, but just on the facts, there are reasons for all of
24 the parties at this meeting to be discussing these sizes of tank separately from -- irrespective
25 of the progress that is made in relation to the main cartel.

26 The suggestion is made by Mr. O'Donoghue that this is all effectively the cartelists driving
27 the conversation; this is all a conversation that is about them enticing Mr. Joyce into the
28 cartel.

29 The Tribunal will have to form its own view of the evidence, but in my submission the
30 argument that is advanced by Balmoral completely depends on that characterisation of the
31 exchanges. It depends on the view that this is a one-way ambush where the information is
32 being thrown towards Balmoral to try to entice it into the cartel. I gave you our nine
33 reasons, earlier on, why that is not the correct way to understand this exchange.

1 There is an active information exchange, a two-way information exchange between these
2 parties that is driven by the concerns all of those parties have about that particular topic,
3 discrete from the main cartel.

4 In my submission, if you reject the submission that these are no more than enticements to
5 join the main cartel, and find that there is an active exchange of information, then the
6 argument falls away, because what you then have is an active information exchange
7 between these parties, which is driven by whatever is driving that exchange.

8 I do stress the point, if you accept that Mr. Joyce had his own reasons for wanting to have
9 this conversation, then that is also an end to this argument. In my submission, he
10 demonstrably had his own reasons, particularly on the 135, but he also identified problem
11 prices on the schools tank.

12 The picture is probably complicated because there are different mixed motives going on,
13 there are different scales of ambition. But in my submission it is completely realistic to
14 accept what Mr. Snee says in his witness statement, which is that we wanted to recruit them
15 to the cartel, but it is not right to say that this information exchange or this discussion was
16 useless, other than in connection with the cartel. It was not useless to Mr. Dean and Mr.
17 Snee unless it was connected to the cartel, and it certainly was not useless to Mr. Joyce,
18 other than for the purposes of the cartel.

19 That is our real key submission about that, but there is a related point, which is that that
20 discussion could never, on its own, be part of the cartel as found in the main cartel decision.
21 It could never mechanically lead to a 25 per cent sharing of the market because it is only a
22 discussion about two sizes of tank.

23 It is not the same scope of conversation. It is not the same conduct, it is not the same
24 market coverage, and objectively it could never lead to the outcome that is reflected in the
25 scope of the main cartel. It could never do that. That discussion about two sizes alone
26 could not do, and that was put to Mr. Joyce in cross-examination, and he accepted it.

27 I said: "Those two things have got nothing to do with one another, have they?"

28 He said, "No."

29 On Mr. Joyce's own evidence they are separate topics. They are separate discussions.

30 What you see, and what you have seen, Madam, is Mr. Snee trying, hope against hope, at
31 certain points in the conversation, to squeeze more juice out of the conversation. There is
32 the particular passage at the top of page 45 of the transcript. This is where I cross-examined
33 Mr. Joyce about this, where he says: "Well maybe what we will do is keep an eye on market
34 share, and if we see our volumes dropping off a bit, we can reduce our prices, and so on."

1 He creatively tries to see a way in which an exchange of pricing information could lead to a
2 market share agreement.

3 Mr. O'Donoghue has developed the point about it: that was never going to work, for all the
4 reasons you have seen. You need more than that to cartelise this market. That is Balmoral's
5 own case. But not only that; Mr. Dean says straight away, "That will never work." He says
6 straight away, "That will never work." Mr. Dean is one of the two people who is supposed
7 to be engaged in this recruitment exercise. So if Mr. Dean says, "We are never going to be
8 able to use that to get Balmoral into the cartel", even on its own terms, then I think one can
9 say pretty clearly that objectively, this information exchange, or an information exchange in
10 relation to price alone, cannot be used as a lever, as a bridge to the cartel.

11 Mr. Dean thinks that. I think that is not even having regard to the fact that they are only
12 talking about two sizes of tank. I think he is talking more generally. He is saying it would
13 never work --

14 THE CHAIRMAN: Yes, if you do not actually have customer allocation but you try and do it by
15 pitching your prices at a way that results in you only getting 25 per cent of the business,
16 then that is going to be much more difficult to do.

17 MR. WILLIAMS: It is going to be more difficult --

18 THE CHAIRMAN: -- That is besides your point about there is only two kinds of tank.

19 MR. WILLIAMS: Exactly, so the mechanism does not work, and it does not work with bells on
20 when you are only talking about two sizes of tank in the first place.

21 If you are looking for the -- we have our -- the submission I made in opening was actually
22 this whole argument is attaching too much weight to subjective purpose anyway, because
23 what the Tribunal should do is actually look at whether confidential information was
24 exchanged. If it was exchanged, would it have harmed the competition that is identified in
25 the decision? We say even if the exchange was motivated by Mr. Snee's desire, pipe dream,
26 whatever it was, to get back to the main cartel with Balmoral one way or another, even if it
27 was motivated in that way, and that was not reciprocated and it never happened, that does
28 not matter if, objectively, there is an exchange of the information found by the CMA and
29 that leads to the harm to competition. That was our primary point.

30 But our point now in closing, a more concrete point about the exchanges, is that actually
31 they were never going to lead to market sharing. They could not lead to market sharing.
32 Even Mr. Dean thought it was hopeless. They were only about two sizes, and in fact there
33 was good reason for the parties to be discussing those two sizes of tank anyway.

1 We say that objectively, and in fact subjectively -- but however you look at it -- there is a
2 freestanding infringement which does not depend on the main cartel, but actually cannot be
3 linked into the main cartel.

4 We have given you the references in our note for the disconnect point. We say actually, Mr.
5 Joyce's acceptance that those two things have nothing to do with one another -- I mean, that
6 is Balmoral's evidence and in our submission that is the end of it, really.

7 The other point I wanted to make about this: it is not surprising that after 7 years of
8 complete cartelisation, Mr. Snee did not give up straight away. But as I say, the mere fact
9 that 25 per cent pops up recurrently in the discussion does not mean that the discussions
10 have no meaning other than in the context of the 25 per cent.

11 I just want to show you two parts of the transcript, if I may. Pages 23 and 27 of the
12 transcript of the meeting. Mr. O'Donoghue has shown the Tribunal the bits where Mr. Snee
13 is returning to the theme, if I can put it that way.

14 On page 23, just halfway down the page, there is "AJ were selling at that price."

15 Then four lines up, do you see, "We do not have it all"?

16 THE CHAIRMAN: Yes.

17 MR. WILLIAMS: "We don't have it all [this is Mr. Joyce]. We have just got to make sure we are
18 taking our share at the right price."

19 You see the same point, similar point on page 27, the first reference Mr. Joyce makes where
20 he says:

21 "It's the same. We don't want everyone down at 14,5, 14,4. It is about accepting a
22 value of the market and the share you're aiming for."

23 So to the extent that Mr. Snee comes back to the point now and then, it is not completely
24 without some encouragement. You heard his evidence yesterday. He said the meeting was
25 inconclusive. What he meant by that was he maintained some hope that they might get
26 Balmoral into the cartel. Now that might have been hope against hope, it might have been a
27 pipe dream, but you know, when you put that in the context of these observations, it is not
28 completely mad, if I can put it that way.

29 THE CHAIRMAN: Well, what he was perhaps looking for was some indication from Balmoral
30 that they were not trying to push everyone else out of the market and would not be pricing
31 with that aim in mind. They would be pricing to get their fair share of the market.

32 MR. WILLIAMS: Anyway, I do not need to take that point any further. I am just saying that,
33 you know, it was not a pure picture of Mr. Snee banging his head against the wall, if I can

1 just put it that way. There are points where Mr. Joyce makes noises about taking his share
2 at the right price.

3 Of course, I am not alleging that anything came of that. I am not saying that amounted to a
4 customer allocation agreement. I am not saying that at all. I am just explaining what Mr.
5 Snee might have been reacting to.

6 THE CHAIRMAN: Is that a convenient point for us to --

7 MR. WILLIAMS: It is. I am nearly at the end.

8 THE CHAIRMAN: Yes. Oh well, we will wait a minute.

9 MR. WILLIAMS: Oh no, I am not that near the end. Sorry to disappoint you.

10 THE CHAIRMAN: We will take five minutes.

11 (3.17 pm) (A short break)

12 (3.28 pm)

13 MR. WILLIAMS: Madam, for your note, I think I am told the reference to the disconnect point in
14 the transcript may not be in our notes, so I will just give it to you. It is Day 3, page 7, lines
15 9-31.

16 Just to conclude that part of my submissions, the reality is that the different participants may
17 have entered the meeting with different starting points, but as the meeting developed, they
18 found common ground in a discussion about particular problems tanks, and the outcome
19 was an exchange of confidential information. The fact they started in different places did
20 not prevent them, both objectively and subjectively, from concerting together as they
21 actually did.

22 I summarised our position in relation to stabilisation argument earlier on. I can develop that
23 a bit more, if you want me to. If the point is clear, then I do not want to take up time on it.

24 THE CHAIRMAN: I think it is reasonably clear.

25 MR. WILLIAMS: The point is simply that:

26 "Did you achieve stabilisation in the cartel sense?"

27 "No.

28 "Mr. Snee, did you feel you have achieved stabilisation after the meeting?"

29 "No.

30 "Does that mean you did not go any way towards addressing Mr. Joyce's very
31 different concerns about stabilisation?"

32 It is just a separate question, and one cannot mix the evidence. Mr. Snee is cross-examined,
33 and you can see -- I will not take you to it. You clearly have the point.

34 THE CHAIRMAN: Yes.

1 MR. WILLIAMS: Stabilisation is being used in different ways at different times, and you cannot
2 treat them all as interchangeable. But if you have the point, I am happy to leave it there.

3 THE CHAIRMAN: Yes.

4 MR. WILLIAMS: I just wanted to give you a reference as well. I will not take you to it, but the
5 whole premise of the argument of the meeting was an utter failure for Mr. Snee. It is based
6 on reading those bits of the telephone calls after the meeting where Mr. Snee focuses on,
7 you know, the bit of the glass that is half empty. But if you look at page 59 of the transcript
8 -- you do not need to do it now, but just for your note -- there is a bit where Mr. Snee then
9 summarises where they have got to on the bands, and it is a very different story. I do not
10 want to descend into clichés, but it is a game of two halves, really.

11 Sorry, I just have descended into a cliché, I am sorry.

12 THE CHAIRMAN: We will forgive you this once.

13 MR. WILLIAMS: It has been a long week, Madam.

14 Okay, I can then just move on to deal with just a few other smaller matters, having dealt
15 with the main topics.

16 Leniency. Mr. O'Donoghue has come back to this point today. There was inconclusive
17 cross-examination of Mr. Snee about leniency position. He did not know anything about it.
18 I think the point that is being made is, is it not surprising that the information exchange
19 never came up in leniency?

20 This has two aspects. First of all there is CST, which came up, I think it is fair to say, for
21 the absolute first time this morning in closing submissions. I do not think the point has ever
22 been made about this supposed oddity in relation to CST.

23 There is a short point to make about CST, which is that it had approached the OFT in May
24 2012; it was cooperating with the investigation, and it obviously could not do anything to
25 jeopardise the investigation. So even if someone had approached CST and said, "Do you
26 want the rundown on the meeting?" it could not have reacted in anything other than in the
27 way it would react if it had wanted to participate in that discussion. It would not ring alarm
28 bells; it would give the impression that it was business as usual. That was one point, but --

29 THE CHAIRMAN: I notice in the main decision the duration of the infringement is shorter, as
30 regards CST --

31 MR. WILLIAMS: Exactly.

32 THE CHAIRMAN: -- and stops at the date of their mark-up.

33 MR. WILLIAMS: That is exactly the point. At that point --

1 THE CHAIRMAN: Is it the CMA's view that even if a cartel participant continues to attend
2 cartel meetings after having put down a marker, they will not be regarded as being parties to
3 the infringement thereafter?

4 MR. WILLIAMS: Yes, if it is part of an arrangement with the CMA that it will proceed in that
5 way so as not to jeopardise the investigation, then the answer is yes, and that was the
6 position.

7 That is leaving aside the fact that even if one looked at the bit of evidence that Mr.
8 O'Donoghue took you to, I do not think this actually took this point anywhere anyway. But
9 the principled answer is the one I have just given you.

10 As far as Franklin Hodge is concerned, the point does not work in that context, either, for
11 this reason: Franklin Hodge submitted its written leniency application in May 2013.

12 Franklin Hodge did not have the transcript of the meeting at that stage, and they did not in
13 fact have it until almost three years later in February 2016. There was no prospect of
14 competition lawyers reading the transcript and, you know, eyebrows raising, and all the rest
15 of it. They did not have the evidence.

16 Also, their leniency application shows that they decided not to interview any of their
17 employees when making the application because of the ongoing criminal investigation.

18 That is paragraph 7 and 33-34 of Franklin Hodge's leniency application, which is, we think,
19 at tab 33 of supplementary bundle 2.

20 If we are on this topic, what we can say is that Franklin Hodge settled the information
21 exchange infringement at the earliest opportunity. I am going to come to settlement in a
22 minute for you, Madam. If one is interested in what their reaction to the allegation is, it was
23 to accept it as soon as it was possible to accept it.

24 Is that a good moment for me to tell you a bit about the settlement process?

25 THE CHAIRMAN: Yes please.

26 MR. WILLIAMS: The way the process worked is that in October/November 2015 -- I should say
27 not all of these steps are directly connected to settlement, but these are the steps. The CMA
28 -- it was the CMA then -- before the SO was issued, it had what it called state of play
29 meetings with all of the parties who were implicated, ultimately, in both decisions. That
30 does not involve giving notice of any infringement; it simply explains the scope of the
31 investigation, which at that stage may or may not proceed.

32 Then, in December 2015, it wrote to the parties to explain that it was in fact pursuing both
33 cases. What happened at that stage is that the parties that were interested in settling the case
34 -- cases, I should say -- then approached the CMA in January 2016 and that was everyone

1 except Balmoral. As you know, CST was only the main cartel, the others were both --
2 Balmoral was only the information exchange. For that purpose, they were given what is
3 called a summary statement of facts.

4 Those settlements were concluded in or around March 2016, and for that purpose the parties
5 were presented with the proposed approach to penalty for both infringements, and the
6 CMA's position at that stage was the principled position it eventually took: that there would
7 only be -- for those parties involved in both infringements, there would only be one penalty.
8 I should say, that was a position which was not negotiable and not negotiated. That was the
9 CMA's position: that it would be appropriate to impose one penalty, for the reasons I gave
10 in opening.

11 Just to be clear, the decision was not a feature of the settlement process. It was a decision --
12 the CMA presented them with an approach to penalty. There were then representations on
13 the the approach to the penalty, and the level of the penalty, I think, may have been changed
14 in the light of the reps, but not the overall approach.

15 Just two more topics. One is to come back to your question on volume, Madam. You asked
16 me about the relationship between price and volume.

17 THE CHAIRMAN: As far as these choices that the CMA made about not imposing any fine on
18 people who were parties to both for the second one, can you just remind me of what the
19 Tribunal's task is in relation to those? Do we approach the whole fining exercise
20 completely afresh, or have to conclude that that was an unreasonable stance for CMA to
21 take before we interfere with it? Or what is the position?

22 MR. WILLIAMS: Yes, so the position in relation to the fines of the other parties is only before
23 this tribunal in the specific context of the discrimination argument.

24 THE CHAIRMAN: Yes.

25 MR. WILLIAMS: So the Tribunal is obviously not assessing those penalties using the discretion
26 it uses to assess penalties in the context of an appeal against penalty. Those penalties are
27 only in issue in these proceedings...

28 THE CHAIRMAN: Because of the discrimination.

29 MR. WILLIAMS: Because of the discrimination argument. So the only question the Tribunal
30 should ask itself, in my submission, is whether there has been discrimination. That is the
31 first question.

32 That involves asking the question: are these similar cases which have been treated
33 differently?

1 As I understand it, Balmoral's argument on that point is: well, they are similar cases because
2 it is the same infringement, and in our submission that is the flaw in the argument. The
3 question is not are we dealing with two parties who have been implicated with the same
4 infringement? What we are asking is: are they in the same position for the purposes of the
5 exercise of discretion in relation to penalty?

6 THE CHAIRMAN: It is also a question of is the difference on which the CMA relied a relevant
7 difference?

8 MR. WILLIAMS: Yes.

9 THE CHAIRMAN: I think what they are saying is: "You did not impose a fine on them because
10 you had imposed a fine on them in relation to some other infringement to which we are not
11 a party. So how can that be a reason?"

12 The fact that they have been fined for another infringement cannot rationally be a reason not
13 to fine them for this infringement.

14 MR. WILLIAMS: Exactly, and that is where we take the argument on, Madam, because the
15 decision as to whether to impose a penalty for any given infringement is a separate exercise
16 of discretion in any case. So there is a decision made in the context of the main cartel and
17 there is a decision made in this case. Although there is not a hierarchy between the two
18 decisions, one does not logically come first, in practice, because the main cartel was so
19 much further up the scale of seriousness, both in terms of the percentage multiplier applied
20 for seriousness, and in terms of the duration multiplier, you are always going to get the
21 bigger penalty in that context. You are using the same turnover because it is the same
22 product market in both.

23 It is not that the main cartel fine logically comes first, but that is always going to be the
24 bigger fine, if I can put it that way.

25 THE CHAIRMAN: It is not.

26 MR. WILLIAMS: For the main cartel? You mean it is not bigger for Balmoral, or -- for the
27 parties that participated in both infringements, they have only been fined for the main cartel.

28 THE CHAIRMAN: Yes.

29 MR. WILLIAMS: The point I am making, really, is that if you are thinking about what is the
30 purpose of imposing a fine, including, in particular, deterrence, obviously deterrence is
31 linked to the scale of the penalty. You impose a higher fine to apply more deterrence. So if
32 you are asking yourself the question "Have we imposed a big enough fine to deter these
33 parties from infringing competition law?", then the fine imposed in the context of the main
34 cartel was always going to be bigger.

1 The way it works is that the CMA calculated the fine for the main cartel, which was always
2 going to be the bigger fine of the two, and then it has to exercise its discretion as to whether
3 to impose a second fine or another fine.

4 The legal question the Tribunal is faced with is, has there been discrimination? Have
5 similar cases been treated differently? When one is approaching the question as to whether
6 to impose a fine in relation to the information exchange infringement, one therefore has to
7 ask the question in relation to those parties that are already going to be subject to a very big
8 fine in the context of the main cartel: is it necessary and proportionate to fine them further
9 for the statutory purposes in circumstances where they have already been subjected to this
10 fine?

11 The point I am making is that the focus of the question as to whether there is discrimination
12 is, are they in a similar position? Our submission is that they are not in a similar position in
13 relation to the exercise of discretion as to whether to impose a fine for the purposes of the
14 deterrence, because they have already been subject to a fine in relation to their turnover in
15 this market at the same time, much higher seriousness percentage, eight-year duration.

16 They just are not in the same position.

17 If you are deciding, "What do we need to do about this party in order to deter them from
18 infringing competition law?" they are in a different position from Balmoral, because you
19 start from a position where they have already had a fine imposed with reference to an
20 infringement which was always going to push the level of the fine higher.

21 To boil all that down, you have to ask yourself: "When we ask, are they in a similar
22 position, what do we mean?"

23 In our submission, it is wrong to say "You were both involved in this infringement." The
24 decision whether to impose a penalty in relation to either or both infringements involves an
25 exercise of discretion in the context of a statutory framework in the Competition Act which
26 requires the CMA, under section 36(7A) to consider, as a mandatory consideration, is it
27 necessary to impose a fine for the purposes of deterrence?

28 In relation to that question in particular, Balmoral is not in the same position as the other
29 parties, because they start from the position that they have already been fined on this
30 turnover in this market at this time to deter them from committing an infringement.

31 In our submission, there is not discrimination, and Balmoral does not get past the first stage
32 of the test because they are not in a similar position in relation to the relevant exercise of
33 discretion. There are different things in the scales for the different parties.

1 Even if, Madam, you did not accept that submission, the second stage is objective
2 justification. In my submission, it has to be right, when one comes to consider objective
3 justification, the CMA is entitled, and indeed not only entitled, it is required, under the
4 Competition Act, to ask itself the question under section 36(7A), which is "Do we need to
5 fine again for the statutory purposes, including deterrence?" It has to be satisfied that it is
6 reasonable and proportionate to impose another fine for the purposes of deterrence. I go
7 back to the same points: the same market, same turnover, the same time, except on the --
8 there has already been a 30 per cent multiplier, there has already been an eight-year duration
9 multiplier. Whether you view it through the discrimination prism and say there is no
10 discrimination, or whether you view it through the objective justification prism, in our
11 submission it is the same thing, which is that the CMA has to take into account the need for
12 additional deterrence, and it responsibly took that into account in accordance with the
13 statutory framework and cannot be criticised for that. It certainly is not wrong; it is
14 certainly an appropriate exercise of discretion.

15 If I can just develop the point one stage further; it is not unheard of for the CMA to have to
16 make a decision about how to approach a fine in a case where you have overlapping
17 infringements, overlapping whether it is on the law or the facts. So you might have a
18 situation where the same conduct gives rise to an abuse and an anti-competitive agreement,
19 for example, and the conduct might be more serious in the context of the abuse than in the
20 context of the 101 infringement, or vice versa.

21 You might have a situation where, depending on following the logic of the infringement, the
22 legal characterisation, one would merit a higher fine than the other, if that makes sense.

23 When faced with these sorts of situations, there are a range of ways the CMA can approach
24 the question of penalty. It can, in principle, impose a concurrent penalty. It could, in
25 principle, calculate a single sum on this single set of turnover and apportion it, and say that
26 relates to that and that relates to that, or it could carry out two separate calculations and say,
27 "We are going to impose the higher fine."

28 As a matter of form, all of those options would look different from this case, but in
29 substance they would not be different, really. What you would have is different ways of
30 presenting an overall judgment as to what is appropriate punishment in the context of a
31 particular set of facts, which has complicated legal consequences.

32 In my submission, if the CMA had, for example, done the calculation it did in the main
33 cartel for these parties and then presented that as a concurrent fine for both parties, and
34 said, "We have exercised our judgment, this is a fine on this turnover in this market times

1 30 per cent times 8" and all the rest of it, it would be much more difficult for Balmoral to
2 come forward and say, "This is discrimination", because the formal position would be that
3 the CMA had imposed a fine. In substance, the position would be absolutely the same.
4 Equally, if the CMA had gone through the steps of calculating two separate penalties and it
5 had said, "Well, we now have a fine of, for example, Franklin Hodge, £2 million, and we
6 now have a fine, divide it by eight [something like that], fine of a few hundred thousand
7 pounds, but in fact these fines relate to the same turnover in the same markets at the same
8 time, so we are only going to impose the higher of them." Again, much more difficult for
9 Balmoral to say there is discrimination.

10 We say that is really where we are. This is really just a matter of packaging. The CMA is
11 not just entitled, it is required to have regard to this overall question of proportionality and
12 the need for deterrence. In my submission, it is commonsensical to say that if Franklin
13 Hodge has been fined, for example, £2 million in relation to its activity in this market for
14 the last eight years on the basis of the highest seriousness percentage the CMA has, it is
15 really not difficult to see how the CMA would conclude that actually, that does the job.
16 In our submission, this really is a matter of form, not substance. The CMA has made a
17 decision in accordance with the statutory criteria, and it is not -- and I stress this -- Balmoral
18 has not even really challenged the actual reasoning in relation to the decision not to fine,
19 because it is not saying the CMA was wrong to conclude that they should not have been
20 subject to a separate fine. What it wants to do is bank them at zero and level the position
21 down.

22 In my submission, it is a slightly opportunistic appeal because it is not based on identifying
23 any error in the CMA's reasoning or its principled approach, it is just effectively saying,
24 "Well, you took that position and we are entitled to be treated in the same way." That is not,
25 in our submission, a principled basis for an appeal.

26 That is the position on the discrimination argument. But just standing back, there are
27 important reasons to register this infringement with some level of fine. I am just going to
28 make three points. The first is that Balmoral was placed in a position where it was offered
29 the opportunity to participate in a more serious infringement, and it did not participate in the
30 more serious infringement, but it nevertheless, on the CMA's findings, did participate in an
31 infringement.

32 It would be wrong, in my submission, to reach a position where a party that has to some
33 extent done the right thing, but to some extent done the wrong thing, ends up in a better
34 position on penalty, because they did not commit the worst infringement they could. Sorry,

1 when I say that, the CMA did take into account the fact that they had refused to anticipate in
2 the more serious infringement as a mitigating factor, but it is not a reason to go straight to
3 zero, is my point. It does not mean it is not appropriate to impose a penalty at all.

4 In fact, on the contrary. If you are thinking about general deterrence, it is important to make
5 the general point that a party that does the right thing in some respects simply will not get
6 off scot-free. So that is one point.

7 The second point is that Balmoral was a new entrant into the market. It was, as it turns out,
8 the only non-cartelised competitor, and obviously in some respects it deserved and received
9 some credit for its pro-competitive impact on the market. That has been taken into account
10 on the penalty. There is a flipside to that, which is the point I have already made about
11 remaining competition being fragile. It is important, in that situation, that a party really on
12 whom the remaining competition hinges, should not find itself in a position where it is
13 infringing and then not being subject to any penalty for that.

14 The third point to make is that Balmoral continues not to accept that it has done anything
15 wrong, and in fact does not accept it has done anything wrong today. If the tribunal
16 concludes that there was an infringement, then with respect to Mr. O'Donoghue's
17 submissions, there is a need for deterrence because it will have taken the outcome of an
18 appeal to reach the conclusion for Balmoral to accept it has done anything wrong.

19 That is all subject to an important point, which is that the fine that the CMA has imposed is
20 extremely modest, on the spectrum of fines, for an object infringement for an undertaking
21 with a turnover of £136 million.

22 As I showed you in opening, in any other case, this fine would be nowhere near what it is,
23 and orders of magnitude higher. The fine that has been imposed is there to, on the one
24 hand, register the need to penalise conduct of this nature in these circumstances, but on the
25 other hand, taking account of the distinguishing features of Balmoral's case.

26 In my submission, the penalty that has been imposed is in no way excessive; it is 0.1 per
27 cent of turnover, as we said in opening. Balmoral has been treated leniently, but the points
28 which it makes really do not support the view that it should not be fined at all for what it
29 did.

30 I am just going to take instructions, Madam.

31 THE CHAIRMAN: Yes.

32 No, those are my submissions, unless I can assist the Tribunal further.

33 THE CHAIRMAN: Thank you very much.

34 Yes, Mr. O'Donoghue?

1 Submissions in reply by MR. O'DONOGHUE

2 MR. O'DONOGHUE: I have a handful of points, I will be as quick as I can. There are
3 diminishing returns at this stage.

4 On the question of the disentanglement and the overlap in the transcript between the cartel
5 portion of an infringement and a separate infringement, the great difficulty with Mr.
6 Williams' submissions is that they actually make the position worse, not better; less clear,
7 rather than more; because for the first time he has now conceded that in fact the cartel
8 discussions continued beyond page 21, and we therefore have a further problem of
9 disentanglement.

10 What we now have to do is, in all pages subsequent to 21, disentangle the cartel parts from
11 the information sharing parts. That clearly makes it much worse, and not better.

12 Now, he gave a number of reasons for why there is a logical basis for distinguishing
13 Balmoral from this perspective and, with respect, they again do not get him anywhere. He
14 said for example, well, the information sharing involving Balmoral was just two tanks,
15 whereas the cartel was more than two tanks.

16 Frankly, one way to test this: suppose there was an agreement on the two tanks; is it being
17 suggested that that would be a separate cartel infringement to the one which was found? On
18 any rational understanding of a single continuous infringement, if you participate in an
19 agreement in relation to two products and there is a wider agreement with the others
20 involving more than two products, you are stuck with that. That is a single, continuous
21 infringement. So that really gets him nowhere, in my submission.

22 The fundamental problem which he has basically run away from is that there is
23 unchallenged evidence from Mr. Snee that the only purpose of the entire meeting, from the
24 cartel's perspective, was the cartel.

25 Now, Mr. Williams has tried to sort of pooh-pooh this and say, "Well, it may be that market
26 sharing 25 per cent comes up here and there", but that, with respect, misses the point.

27 Now, I want to be very clear on this because it is fundamental to this case. Can I go back to
28 the decision, because we need to understand what is the genesis of this market sharing
29 question.

30 The point is, it is not actually about market sharing at all; it is about price-fixing. The price-
31 fixing -- or the allocation of market shares is essentially the compensation for achieving
32 price stabilisation. So it is not about market share.

33 We can pick this up in the decision at 3.10. It is core A, tab 8. We have seen this before
34 but it is very important. It is the quotation at 3.10:

1 "The idea was to try and convince Allan that Balmoral should raise its prices to meet
2 ours in exchange for an equal share of the steel tank market."

3 So on Mr. Williams's versions of events, all you need to do is look for "market share 25 per
4 cent", and these are sort of random incidences in the transcript.

5 But in fact, it has to do with pricing. The market share and the pricing go hand-in-glove.
6 Therefore, the problem for him is that on each and every occasion we see pricing, the
7 question arises: can we disentangle that from something to do with the cartel, or is it in fact
8 separate to do with information sharing?

9 I am afraid that the efforts he has made -- which by the way are not made in the decision,
10 because they did not even see the point -- to excavate this problem, they actually make it
11 worse, not better.

12 It is not very satisfactory that in closings, this is essentially done on the hoof. There has
13 been a fundamental mistake made in relation to this meeting. It is not good enough to come
14 along now and say, "Well, I have got a bit of an explanation". That is not good enough.
15 This is a public decision by a public body with serious quasi-criminal consequences.
16 Now, just to complete the picture on purpose, because it was suggested by Mr. Williams
17 that Mr. Joyce at one point in his cross-examination agreed that he came to the meeting with
18 a purpose to do with stabilisation of prices. This is in the table, which I have not had much
19 of a chance to look at, but some of the references are misleading.

20 We can pick this up in the transcript. It is Day 2, page 55. It is above that page. So Mr.
21 Williams asked him, line 27:

22 "Question: ... but that you also put across the message that you wanted to stabilise
23 prices; in other words, avoid a price war. Do you agree that at the meeting you made
24 that clear to your competitors?

25 "Answer: I made lots of comments in the meeting, general comments. I did not go in
26 there with any preconceived thoughts about stabilisation or anything like that."

27 That is not a correct reference.

28 A bit of a criticism was made of my cross-examination in the sense that I put stabilisation in
29 some version to Mr. Snee, but there is another meaning of stabilisation that I did not put. I
30 would urge the tribunal to look very closely at the transcript of cross-examination. I put
31 each and every aspect of my case, very, very deliberately on stabilisation, bands, price war,
32 you name it. To suggest that one can come along after this and treat the meeting as sort of a
33 statute, and that I did not put that word to him -- I mean his mantra throughout his entire
34 cross-examination was that everything was inconclusive and he had about a dozen

1 opportunities to qualify that in any way he'd wanted and he did not. In fact, as the cross-
2 examination continued, the crescendo grew.

3 In a way -- he accepted this during cross-examination -- the best he could hope for was that
4 there might be a faint hope of a further meeting. So to suggest that, "Well, there was no
5 understanding on stabilisation but there was an understanding on target prices", well, why
6 on earth would he be seeking a further meeting if he had got either what he wanted or
7 something very close to it? It does not make any sense.

8 His evidence in my submission was emphatic on these points and as a factual matter, this
9 primary case is dead in the water.

10 A couple of final points, then I will sit down.

11 There was a suggestion in relation to Compco, Hall & Kay that an indication that the
12 cartelists may not find it credible to go over a certain level reveals something material to
13 Mr. Joyce. With respect, he was informed by page 21 of the transcript that there was a
14 customer allocation cartel involving these people. The second this was mentioned, he
15 understood they are hamstrung. They cannot go below these uncompetitive prices or will
16 face difficulty, because they will be getting a machine gun out of their foot because they
17 have been ripping off people for years and they cannot then turn round and say, "Well,
18 here's a two grand discount".

19 That was something that was revealed to him in the context of the infringement he was not
20 part of. He cannot then turn around and say, "Well, at page 70 he understood it would not
21 go below a certain price". He understood that from the very beginning.

22 In fact, the real benefit of this meeting for him is that he found out they were in a cartel. In
23 a sense, he was extremely happy because then he knew he would win even more business.
24 They were not as competitive as they could be, and this was a revelation to him.

25 One final point: it was suggested that the entirety of our penalty case turns on
26 discrimination. For the Tribunal's record, that is not correct. We do have to a rationality
27 ground. I will give you the references: it is NOA paragraph 85(1) and is covered in more
28 detail in our skeleton at 144 to 146.

29 I will just check behind me. I think that is all I have.

30 THE CHAIRMAN: Yes.

31 MR. O'DONOGHUE: Madam, those are our submissions.

32 THE CHAIRMAN: Thank you very much, Mr. O'Donoghue. Thank you very much, Mr.

33 Williams. We will go away and consider what to do, and let you know in due course.

34 Thank you.