IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1337/1/12/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Tuesday 6 October 2020

Before:
THE HONOURABLE MR JUSTIC MORGAN
(Chairman)
EAMONN DORAN
SIR IAIN MCMILLAN CBE FRSE DL
(Sitting as a Tribunal in England and Wales)

BETWEEN:

FP McCANN LIMITED

Appellant

v

COMPETITION AND MARKETS AUTHORITY

Respondent

and

(1) EOIN McCANN
(2) FRANCIS McCANN

Interveners

A P P E A R AN C E S

Mr Robert O'Donoghue QC and Mr Richard Howell (On behalf of FP McCann)
Mr Rob Williams QC and Mr Tristan Jones (On behalf of the CMA)

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Tuesday, 6 October 2020

(10.00 am)

MR JUSTICE MORGAN: Mr Doran, I have your icon but not your screen.

MR DORAN: I am here.

MR JUSTICE MORGAN: You are able to hear it?

MR DORAN: I am here, yes.

MR JUSTICE MORGAN: Okay, I can see you now, thank you. I can see Mr O'Donoghue and I can see Mr Williams, so unless there are matters of housekeeping which we can be told about, my understanding is we will hear from Mr Williams.

Mr Williams, can you open your response to the appeal, please.

Opening submissions by MR WILLIAMS

MR WILLIAMS: I will, Sir. Just a moment ago, everyone disappeared off my screen. I don't know if you can see and hear me okay.

MR JUSTICE MORGAN: Yes, I can. Very clear both seeing and hearing, thank you.

MR WILLIAMS: Good, I will carry on and you can let me know if there are any technical difficulties. I cannot see everyone, but I think for the moment that doesn't matter.

I will start by explaining what I plan to do in opening. The Tribunal has the material it needs to understand the background to this appeal from the CMA's perspective; that is to say the parties, the products that were affected by the cartel, the shape of the CMA's infringement decision, and the evidence which was available to the CMA. The Tribunal can take that background material

from the Decision and from the written pleadings.

My plan in opening had been to focus on the grounds on which the Tribunal is going to hear oral evidence, but we have looked again at that, given that Mr O'Donoghue focused on other things yesterday, and we thought it might be more helpful to cover more or less the same ground that Mr O'Donoghue did in opening.

So (break in transmission) about the appeal, then I am going to say a bit about two general aspects of the legal framework; that is burden of proof and the legal framework for penalties. Then I am going to deal with the grounds that Mr O'Donoghue dealt with yesterday, which is grounds 4, 5(d) and 6; and once I have done that, we will see what the time is and whether I have time to say a little bit more by way of introduction to the witness evidence, in particular on implementation and possibly delay.

There is a lot in issue across the appeal and across the seven grounds, but I want start with a few things that are not in issue because that is important as a starting point with the issues the Tribunal is going to have to resolve. The first point, and the Tribunal will have this (break in transmission) is to position its appeal as including a challenge to liability. It isn't actually in issue that FPM participated in the cartel found by the CMA for almost seven years with two of its direct competitors.

In reality, liability is not an issue. It is not an issue that the cartel involved an agreement in relation to three main forms of conduct; price fixing or price co-ordination (break in transmission) agreed price lists, customer allocation and bid rigging, and finally market sharing in the sense of an agreement to maintain market shares.

In my submission, and I do not think it is seriously (break in transmission) that these

three categories are at the top of range of serious competition law infringements.

SIR IAIN: Chairman, can I come in here. Mr Williams is breaking up and I am missing quite a lot of what he has to say.

MR WILLIAMS: Right. I don't know if other members of the Tribunal have the same problem.

MR JUSTICE MORGAN: Yes, I have. I wondered, I feared it might have been my signal but plainly my signal appears to be strong and obviously it is a general problem, not just --

MR O'DONOGHUE: Likewise, on my side I am having difficulties.

MR WILLIAMS: I don't know whether I ought to drop off and rejoin the meeting, whether that might help. Certainly your visuals or certain visuals are disappearing which does suggest I have a connectivity problem. I am in Central London, so it ought to be -- but it isn't.

MR JUSTICE MORGAN: It will only take a few minutes for you to leave us and rejoin, I suspect.

MR WILLIAMS: I will try and do that.

MR JUSTICE MORGAN: Do, please. I think it is worth trying and we will see what happens. The rest of us will remain and then we will welcome you back, we hope, soon. Thank you.

MR WILLIAMS: Thank you. (Pause).

MR JUSTICE MORGAN: Right, I can see you again, Mr Williams.

MR WILLIAMS: Well, I have rejoined on the same connection ...

MR JUSTICE MORGAN: Right, you have frozen straight away.

MR WILLIAMS: If I continue and there are further problems, perhaps we will need to look at it again. But I am now -- in fact, I am getting a signal telling me

I have a problem. I am going to leave the meeting again, I am very sorry about this. I do not understand the problem fully.

MR JUSTICE MORGAN: No, it's not your fault, I am sure. We all have to do our best. Do try, please.

MR WILLIAMS: Thank you. (Pause).

Sir, I have tried to rejoin using Mr Jones's computer, I don't know if you can see and hear me.

MR JUSTICE MORGAN: Yes, I can hear both of those, thanks.

MR WILLIAMS: We will carry on on this basis for the minute. The most important thing is you can see and hear me even if I am masquerading as Mr Jones' screen.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: I don't know where you lost me. I was saying I think that liability was not an issue and I don't know if you got that.

MR JUSTICE MORGAN: Yes. If I just feed back to you the points that I noted. You said that liability was not an issue; in other words there was an infringement here, there was liability, and that matters in the directors' disqualification proceedings, it is not something we have to review or consider, we are concerned with penalty.

You also then said that the fact of an agreement or an arrangement was not an issue and you also then identified the three tenets of the agreement, which again you said were not an issue. The last point I noted was that you made the submission that the proven infringement was of a type at the top of the range of seriousness.

MR WILLIAMS: That is right. So I will pick up there, Sir.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: The point I was making was that in terms of categories of anti-competitive conduct, each of the tenets was at the top of the range of serious competition law infringements. FPM takes a point about exactly how many aggravating and mitigating circumstances are present on the facts of the case, and we will come back to that. But in terms of raw potential to harm competition, this infringement involved the most serious forms of anti-competitive behaviour that are prohibited by Article 101 and Chapter I in combination for almost seven years between parties that between them had between 50 per cent of the market at the outset and over 90 per cent at the end of the period from 2010 onwards, and that is paragraph 2.26 of the Decision.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: So that is not in dispute. It isn't in dispute that as far as FPM is concerned, the cartel was perpetrated by three main persons, that is Eoin and Francis McCann and Andy Cooper.

The McCanns part-owned the business with other members of the McCann family and they are or were at the time the managing director and the operating director. Both company directors, so the cartel went to the very top of the organisation.

What is in dispute? There is a dispute about implementation of the cartel by FPM under ground 1. It is not suggested, as I have said, that the CMA's infringement finding depends on findings of implementation or the findings which FPM objected to. The target of that ground is simply to quash specific findings of fact in specific paragraphs.

In general, and with the exception of the evidence of Mr Williams, the Tribunal is going to have to do two things to resolve ground 1. First, it is going to have to

construe the paragraphs of the Decision which are said to be in issue in the context of the Decision as a whole in order to determine whether those findings contain findings of implementation of the type FPM object to. We have called that customer facing implementation to distinguish it from other things FPM doesn't challenge, for example, like monitoring of the cartel.

Secondly, to the extent that there is a factual dispute, the Tribunal is going to have to resolve that dispute using the available evidence. I will say a bit more about the extent of those disputes and the material in the bundle relating to those disputes in a little while.

But it is a striking thing that FPM has put forward no witness evidence to support its challenge under ground 1, even though the challenge is specifically about what FPM did and did not do. It has not put forward Mr Cooper, to whom several of the findings specifically relate, and we say there is very little which is a real dispute of fact to which witness evidence would obviously be relevant. This is mainly a matter of interpretation and to the extent that FPM does want to dispute facts, the fact that it has not put forward any witness evidence to counter the CMA's findings does suggest that the challenge is less than wholehearted.

MR JUSTICE MORGAN: Can I just understand what you think we are in for in terms of this part of the case? We plainly have to start with the Decision for some purposes in some way, and as I understand it, we will pay attention to the findings expressed in the Decision on the question of implementation, and I will just bracket it together as the question of effects.

So we will look at those findings and there appears to be, perhaps surprisingly, argument about what the findings actually say. But we will determine what they say by reading them and interpreting them and, if there is an argument,

we will resolve that.

Then having taken that step, we will try to identify which of the findings interpreted by us are being challenged because we -- I hope perhaps when we do that exercise, there won't be that many challenges to direct findings of fact. But let us assume there will be some. If there are some, then we have to decide what finding is appropriate and with the exception of Mr David Williams, we are not getting any further evidence to assist us, so we have the evidence which is summarised by the CMA, and we have material in the bundles, and I suppose we will be on occasions, perhaps not too often, taken to material in the bundles and asked to make a finding or review a finding, but generally speaking without the benefit of oral evidence, only by reference to documents.

We will have Mr David Williams and he will give his evidence and we will hear submissions about what to make of it. Then at the end of that exercise, we will settle upon the findings which have survived challenge and then we will move on to the relevance of those findings in relation to penalty.

Now, that is my understanding of the journey ahead. Have I missed out anything critical in summarising it that way?

MR WILLIAMS: No, I don't think so, Sir. I think the only point I would add is that having construed the findings in the way you have described, Sir, you will need to then look at what the parties say about those findings. In many instances, as we have said in our skeleton, there is not actually a dispute about what the evidence shows, the dispute is about what the finding in the Decision was meant to mean. So the territory of the dispute is in that sense possibly even narrower than your Lordship described.

MR JUSTICE MORGAN: Right. That is encouraging because we are all familiar with the process of interpretation and I expect we will confine ourselves most

of the time to the Decision itself and just read it; understand it and read one statement in the context of the whole Decision, but then resolve a difference between the parties, right.

MR WILLIAMS: I have a little bit to say about burden of proof and I was going to say a little bit about --

MR JUSTICE MORGAN: Yes, please. I interrupted you, but it has been helpful because I have more confidence, I know the journey we are about to embark on. Thank you.

MR WILLIAMS: As you were saying, Sir, the exception to the picture you were just describing is Mr Williams. His evidence actually only goes to one strand or sub-strand of ground 1, which is the CMA's finding of a no poaching agreement in relation to term deals and the agreement itself is not in issue. What is in issue in broad terms is the evidence he gives about being instructed not to poach customers. The Tribunal will hear from Mr Williams, and I do hope I will have a little time at the end of dealing with the grounds Mr O'Donoghue dealt with to introduce that evidence.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: On FPM's case, the dispute about implementation goes to one consequential issue as you said, Sir, which is an argument that FPM's penalty should be reduced. We say that argument is in any event wrong in law for reasons which are addressed in ground 3, and that takes us to the penalty grounds.

The Tribunal has seen that the point taken under grounds 2 and 3 are major points of principle with significant implications for competition law enforcement generally. Ground 2 is a root and branch challenge to the whole way the CMA assess its penalties and includes a *vires* challenge to the published

guidance. Ground 3 is about the extent to which an analysis of effects impacts on the penalty in an object case, and I am going to park those grounds, as Mr O'Donoghue did, until later in the week. They are not affected by any of the witness evidence and Mr O'Donoghue has not developed them yet.

Of the remaining penalty grounds, I will cover as much as I can on grounds 4, 5 and 6. Anything which is left over will be for closing, but I will cover ground 5(d), which Mr O'Donoghue addressed and which Mr Mulholland's evidence goes to.

That leaves ground 7, which are some short points about whether the CMA should have reduced the fine in the Decision because of changes in its case relative to the time of the draft penalty statement in the SO. We say there was no change in the CMA's case, no change which was material to the penalty and, in any event, this issue looks at the issue in the wrong way. The CMA needed to apply its guidance, not to track its final decision on a range against its provisional decision. Those are all points for later in the week, but I hope they won't take up very much time.

I want to say a bit about two aspects of the legal framework. The first is burden and standard of proof, which is relevant to ground 1 in particular. The standard of proof in respect of factual issues is the civil standard, it is not a heightened standard. We have set that out in our Defence at paragraphs 27 to 30 referring to the cases of *Tesco* and *Willis*. I don't know if you would like to go to those, the propositions are fairly elementary but obviously they are important matters.

MR JUSTICE MORGAN: Let me just turn up what you say in the Defence. We have all read this, but let me bring it to the front of my mind.

MR WILLIAMS: Mr Jones tells me it is page 427.

MR JUSTICE MORGAN: I have it, thank you. I have scanned that again. Perhaps you will just elucidate what might be seen as a slight tension in *Tesco Stores* quoted at 27.

First of all, on the burden of proof, there is no dispute that the burden lies on the CMA in relation to establishing facts.

MR WILLIAMS: Yes. I am going to say a little bit about that in a moment, but broadly speaking that is right, Sir, yes.

MR JUSTICE MORGAN: The standard -- well, I mean, like all burdens, it is the ultimate legal burden that is on CMA, but you then have a shifting evidential burden moving -- depending on what evidence is called and what needs rebuttal, which one is familiar. Then the standard of proof, we are told in quite clear terms it is the civil standard, the balance of probabilities.

But it is the last sentence from the quotation:

"Any doubt in the mind of the Tribunal ... as to whether a point is established on the balance of probabilities must operate to the advantage of the undertaking."

This is not beyond reasonable doubt, this is not an attempt to express the criminal standard, it is doubt about the balance of probabilities.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: If you examine the evidence and you apply your ideal probabilities and it really is on a knife edge so that you are doubtful whether it crosses over to be more probable than not, then at that point it is to the advantage of the undertaking.

MR WILLIAMS: That is how I read it, Sir.

MR JUSTICE MORGAN: It is not an attempt to introduce beyond reasonable doubt. It is not an attempt to introduce criminal standard that you must feel sure that

the fact occurred. It is a doubt about where the evidence comes on the balance of probabilities.

MR WILLIAMS: Yes, Sir. The way I read that and at the risk of over-simplifying, my interpretation of it is that 50/50 is not good enough because at that point there is a doubt. But it doesn't put the matter any higher than that.

MR JUSTICE MORGAN: Yes. In practice with the balance of probabilities, you normally can use a process of reasoning to establish which of two alternatives, if there are only two, is more probable, and you usually come to the view that one thing is significantly more probable than the rival thing.

Any fact finder will always have some element of doubt in his or her mind because when you make a finding of fact, you are saying, "This actually happened, this statement was made, this meeting took place." But any fact finder realises the fallibility of the process and you are never certain that it did happen. So there is always a doubt about whether you are right, but that is not the relevant doubt.

The doubt is where the evidence comes on the balance of probabilities, does it make it more probable or less probable? Speaking for myself, usually applying a rational process which probability involves, you usually find that something is clearly more probable than the other candidate, then there is no doubt.

Is that enough for us to guide ourselves with?

MR WILLIAMS: That is enough, subject to one point of nuance which I am about to make. The only caveat I would introduce in relation to what you have just said, Sir, is that very often the Tribunal will be in doubt about what happened, but obviously in this case one does have video recordings of four key meetings and verbatim transcripts, more or less verbatim transcripts of those meetings. So the doubt is narrower than it would be in most cases on those

issues.

The specific point I wanted to make is that if one looks at the beginning of the extract from *Tesco* at paragraph 27, it talks about the burden being on the OFT to establish each of the analytical steps which are prerequisites. If I could put that in my own words, that is saying the burden is on the CMA in this case to establish each element of the infringement on the totality of the evidence.

In this case, the elements of the infringement are not in issue. Our case is that evidence concerning implementation is evidence of the infringement, but it is not the only evidence of the infringement. And as I said, the infringement itself and its tenets are not disputed.

So there is a question about how to apply the burden and the standard of proof in that context. On one view, if the Tribunal were to decide each individual finding of fact challenged by FPM on the balance of probabilities, it would be applying a higher standard than is provided for in the case law. But on the other hand, this is a merits appeal, and it is common ground that where there is a dispute of fact, the Tribunal decides the grounds of appeal on the merits, having regard to the primary evidence, and in broad terms the burden of proof lies on the CMA. So there is a question about how to square those things off.

I have explained in outline that as we see it, very few findings in issue are findings of actual implementation at customer level and that the actual territory of disputed fact is narrow, so this issue is probably more difficult in theory than it is in practice. On that basis, we are content for the Tribunal to decide the relatively few disputed issues of fact that arise in this case on the balance of probabilities so the Tribunal has a workable framework. But that is not a concession that the standard of proof should generally be applied on a disaggregated basis; it is rather that the Tribunal needs a practical approach

to the issues in this case and that is what we suggest.

I hope that is clear, Sir.

MR JUSTICE MORGAN: Just again on *Tesco*, *Tesco* is talking about the proving the infringement.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: You have submitted, and I am not sure this is contentious, that there is no issue about the infringement; there was an infringement and it is an infringement by object. Implementation and effects are not necessary ingredients of such an infringement, so you do not have to prove them to establish the infringement, so you say we move to penalty.

But in connection with penalty, there are a lot of factual assessments and although *Tesco* talks about infringement, do you accept that the burden of proof of a factual matter which is relevant to penalty lies on the party asserting that factual matter?

MR WILLIAMS: I mean, yes.

MR JUSTICE MORGAN: It works both ways. I mean, if you want to set up an aggravating feature which turns on the facts, then on the face of it you have to prove the facts which demonstrate the aggravating feature. If FPM want to establish a mitigating feature, it is not enough for them to make an assertion that mitigation arises, they will have to prove the facts to support their assertion. Is that right?

MR WILLIAMS: Yes, Sir, again with the caveat that in many instances, the matters which are pertinent to penalty will be matters that have been canvassed in the infringement discussion in any event.

MR JUSTICE MORGAN: Yes, certainly. But when I talk about aggravation of mitigation, that can take you, for example, on compliance.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: As a possible mitigating feature, it is not necessarily embraced by the findings as to infringement -- quite separate factual material.

All right. Well, I am sure very wise judges have said in other cases we mustn't get hung up on the burden of proof because very few cases really are critically dependent on it. But we need to know and you have told us what the basic ground rules are, thank you

MR WILLIAMS: I didn't want the desire to come up with a practical approach to this case to suggest that in general the CMA takes the position that before this Tribunal, it has to establish every fact on the balance of probabilities. That is the point, Sir.

MR JUSTICE MORGAN: Okay.

MR WILLIAMS: So at the CMC, the Tribunal raised the question, and we have started to touch on it again today, to what extent the Tribunal need to get into the underlying material. The answer is I think, as you already identified, Sir, in principle yes, but in practice less so really for two reasons.

The first is that the Decision speaks for itself. It is clear, and there are very few instances, in my submission, where the Tribunal will need to go to the underlying material to see what the evidence shows. It is a matter for the Tribunal whether it wants to look at some of that material, but in my submission, it won't need to do so to a large extent, if at all. The second point is as we have touched on already, there are not really a significant number of disputes of fact.

So as a practical matter, I won't have time to take the Tribunal to many of the underlying documents. Ground 1 is really going to be for closing. There is a lot of material on ground 1 and we won't, I don't expect, go through it all.

The Tribunal has full written pleadings on it, but we have produced an index, a table with our skeleton argument.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: The Tribunal wants to go beyond the Decision. Because of the volume of material, we have had to be selective and the material in the bundles is largely based on documents which go to paragraphs of the Decision which are cited in our Defence.

In preparation for this hearing, we have identified a small number of documents, which on reflection one might add in relation to findings that are in issue under ground 1, and I mean six or seven documents. We can either hold that material back and provide it if and when the Tribunal finds it needs it; or if the Tribunal is content to receive a small number of additional documents, we could liaise with Pinsent Masons and provide the material to the Tribunal once we have done that. We are in your hands as to what you would find most useful if it's material the Tribunal may want to go to. At this stage we think it is reasonably unlikely, but one doesn't know.

MR JUSTICE MORGAN: Well, if you think that this might become relevant, I do not think I or the other Members of the Tribunal can say today that it is quite unnecessary to have it, so we had better be given it. We can be referred to it if anyone wants to refer to it either orally or in writing and then when we come to make our decision, we will have it available. It might be we don't do much or anything with it, but I can't predict that. Now that you have raised it, it had better be made available, plainly as you say by co-operation with the other party, and you could bring that to the Tribunal.

Let give you a piece of information. I was told this morning that my colleague's Covid test was negative and although it was too late to re-arrange today's

sitting, unless I hear to the contrary from the parties, the Tribunal's intention is to sit in the Tribunal for the remainder of the hearing. I tell you that because it feeds into the next statement, which is you can bring documents to the hearing and hand them in. Whether you put them on an electronic bundle in addition -- I suppose for consistency you should -- so we have everything electronically so we can consult it remotely later. But the short answer to your question is: yes, please make that material available.

MR WILLIAMS: I am grateful, Sir.

MR JUSTICE MORGAN: Right. Since I have mentioned the next three days of hearing, if one of the parties wants to say anything on that subject, do so at a convenient moment. But if we don't hear anything, we will sit in the hybrid hearing for the remaining days of the hearing. No doubt arrangements have to be made on the basis I have indicated.

We have slightly for my reasons left the main point, but you take it from there, Mr Williams.

MR WILLIAMS: That is everything I wanted to say about burden of proof and documentation.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: I was going to move on now to the legal framework for the penalty.

MR JUSTICE MORGAN: Thank you.

MR WILLIAMS: There are three topics within this. The first is about the Tribunal's powers of jurisdiction and the framework within which the Tribunal will look at these issues. The second is about the extent to which the Tribunal will reappraise discretionary judgments made by the CMA; and the third is about the overall justice of the penalty, which is a point the Tribunal took up with Mr O'Donoghue at the end of yesterday.

I can take the first issue I think reasonably quickly because the ground was canvassed with Mr O'Donoghue yesterday. We accept the Tribunal has jurisdiction to make any decision the CMA could have made, but I think it is common ground that the Tribunal doesn't approach the issue with a blank piece of paper because of its broad jurisdiction.

First of all, as you discussed with Mr O'Donoghue yesterday, the Competition Act has been amended to provide that the Tribunal must have regard to the CMA's guidance. That amendment confirmed the Tribunal's approach in practice prior to the amendment. Clearly now, to the extent that the Tribunal does something different, it will give good reasons for that. Secondly, the CMA's decision as to penalty is taken with regard to the twin statutory objectives of acknowledging the seriousness of the infringement and deterrence.

So it follows that in deciding whether the CMA erred, the Tribunal has to consider the penalty on that basis. In our Defence, we referred to the *National Grid* case, the Court of Appeal case at tab 47, as an example of the Court of Appeal assessing the penalty on the basis of the twin principles which were at that stage referred to in the regulator's guidance -- that was Ofgem. That is tab 47, paragraphs 93 and 105.

That point applies more strongly now given the statutory framework and the reference to the guidance because obviously the guidance represents the CMA's view as to how to achieve the twin statutory purposes.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: It is clear that those principles are the drivers in this Tribunal as they are for the CMA.

The third point is that the Tribunal has to decide the grounds of appeal and other

than ground 2 which follows its own logic, the grounds are in broad terms a critique of the CMA's approach which it took pursuant to the guidance and in the context of the guidance.

In that context, the issue for determination is whether the CMA properly applied its guidance. What that comes to is that the guidance is the appropriate framework, in my submission, for assessing FPM's grounds 3 to 7, recognising of course the Tribunal has the power to do something different if it finds something materially wrong with the approach the CMA took.

In this context yesterday, the Tribunal raised the question of relief, which is to say what happens if FPM succeeds on ground 2 and finds that the starting point in the guidance is unlawful. If I may, Sir, we will reflect on that and cover it in closing.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: There is a question about whether this Tribunal can and should quash the guidance within its powers on this appeal which we want to deal with. Clearly, we understand the argument that the guidance proceeds on an unlawful basis, but there is a separate question about quashing the guidance and --

MR JUSTICE MORGAN: Just help me on that. Are you saying there would have to be proceedings by way of judicial review in the Queen's Bench Division Administrative Court before the guidance could be quashed?

MR WILLIAMS: At the moment, I am not making the submission, Sir. I am just saying we want to reflect on that.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I am putting the point in terms of the question of relief, not the substantive issue before the Tribunal, but it could have knock-on

consequences in terms of other issues. The point is that if the Tribunal doesn't quash the guidance, it decides it starts from the wrong point but it may be that the guidance subsists and the view expressed in the guidance would continue to be influential on other matters.

But we want to reflect on that, Sir, I don't want to say more. I thought I would explain why we want to give that some more consideration.

MR JUSTICE MORGAN: Right, thank you.

MR WILLIAMS: That is the overall framework and in particular the guidance. The second of my overarching points on penalty is that an assessment of how to achieve the statutory objectives inevitably involves subjective and discretionary judgments at various points. The CMA has to exercise discretion in making such decisions, and we do say that is of relevance to the Tribunal's determination of the appeal in the way I am about to describe.

In our Defence, we have referred to *Royal Mail v Ofcom* as an example of the Tribunal not interfering with a reasonable decision of the regulator on a subjective and discretionary issue because it is a reasonable decision on a subjective and discretionary issue.

The recent *Virgin Media* case is another example, and we will look at that a bit later in ground 6. The reference in *Royal Mail*: tab 66, paragraphs 802 to 809.

MR JUSTICE MORGAN: That is which case?

MR WILLIAMS: *Royal Mail v Ofcom*.

MR JUSTICE MORGAN: Right. Well, we will look at that, certainly, either in or out of the hearing. But just summarise it because based on what we heard yesterday and some reading of my own, I think I can see that fixing a penalty does involve a question of judgment at various stages. This is not a mathematical exercise or a mechanical exercise, with the exception of the

maximum 10 per cent cap, which does appear to be mechanical. But otherwise, quite a significant degree of judgment is called for, what is the right response to the circumstances to achieve the policies that are the appropriate policies, and the CMA has done that exercise.

But I thought we were going to do that exercise, reach our judgment -- we are not bound by the CMA's judgment, of course, nor is it judicial review. We don't say, "The CMA was the decision maker, if it didn't go wrong at all and didn't reach a perverse finding, then its decision binds." It is not that.

MR WILLIAMS: No.

MR JUSTICE MORGAN: Tell me if this is wrong: ultimately we have to reach our judgment, although the cases talk about us assessing whether the CMA's penalty is appropriate. But in a way, that is the same thing as saying is the penalty appropriate, or do we need to identify a different penalty in our judgment? If that is wrong, you must tell us. Does *Royal Mail* say something different about deference, respect, marks of appreciation or those things?

MR WILLIAMS: I wanted to take you to one case, which is the *Flynn* case in the Court of Appeal. Mr O'Donoghue referred to *Kier* we don't take issue with what he said about *Kier*. I am going to show you the *Flynn* case and then I will make my submissions about --

MR JUSTICE MORGAN: Right. Do that, please.

MR WILLIAMS: It is Authorities 6, tab 69.

MR JUSTICE MORGAN: I am looking at my sheet, 69 begins at -- are we going to -- yes, it is the main decision, 4488.

MR WILLIAMS: We are going to go to page 4531.

MR JUSTICE MORGAN: I think I can get there more quickly, I was struggling yesterday. Give me a moment to get there. 4531 is the bundle, right, I am

there.

MR WILLIAMS: If I can pick it up at paragraph 141.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Paragraph 141, there is a discussion in the preceding paragraphs about the distinction between the CMA's margin of manoeuvre and appreciation and the supervisory jurisdiction of the Tribunal. This makes the point that the judicial body has the power to substitute its decision, and those are the points I have already been dealing with. But 141 says:

"Notwithstanding the above, the jurisdiction of the Tribunal is not unfettered."

Then it goes on to develop those points. I am not going to read it out in the interests of time, Sir, I am just going to highlight a number of important points.

MR JUSTICE MORGAN: How long is the relevant discussion? 141 to where?

MR WILLIAMS: 147.

MR JUSTICE MORGAN: Right, okay. You highlight the points.

MR WILLIAMS: The first point is 143 which says that the test is one of material error, and this is a point you started to explore with Mr O'Donoghue yesterday; one has to identify not just an arguable error, but whether it actually had consequences.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: 144 says materiality is not an exact science and the Tribunal may be able to do no more than to conclude that it might have made a difference to the final outcome.

145 says there is no fixed list of errors and gives a number of examples. It is 146 I wanted to pick up and stress.

MR JUSTICE MORGAN: Okay.

MR WILLIAMS: Which is that it is consistent with a merits appeal with the Tribunal,

having heard the evidence, to conclude that the approach taken by the CMA in its resulting findings are reasonable in all the circumstances and to refrain from interfering on that basis, and I stress on that basis.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: "If the Tribunal considers the findings of the CMA are reasonable, it might be difficult to say that any findings it arrives at which differ from those from the CMA are material."

Then it goes on to develop the point that the Tribunal has a jurisdiction to hear fresh evidence.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I want to be clear in what I am saying and what I am not saying. I am not saying it is a judicial review jurisdiction and I am not saying the Tribunal defers to the CMA as if there were a judicial review jurisdiction.

I am saying that although this is a merits appeal, the Tribunal will recognise the judgment of the expert regulator. And on matters where there is not obviously a single right answer and the CMA has reached a reasonable conclusion, the Tribunal may decide not to intervene. It won't decide the issue anew as though there were no CMA decision, which is almost the way Mr O'Donoghue puts it. It may be there is not much between us.

MR JUSTICE MORGAN: I see. This is obviously interesting and very important, particularly from this source, Lord Justice Green.

But the question of a penalty, I expect we will reach the view that there is no single point which is the right answer. These are very evaluative judgments; how much for deterrence, how much for proportionality. Proportionality involves broad considerations and different decision makers will come to different points.

We have to fix a penalty expressed as a number. If we said X was a reasonable penalty, we would probably think that X plus a little bit or X minus a little bit was also a reasonable penalty. You are saying that if the CMA has come up with a figure which we think is reasonable, we might have gone a bit higher or a bit lower, we should leave the CMA's figure alone. Is that a way of putting it?

MR WILLIAMS: The point bites at two levels. The way you have just put it to me, Sir, is with reference to the outturn number, and I am going to come to the outturn number in just a minute. But yes, one could put the point with reference to the final penalty number. One can also put the point with reference to individual steps and judgments made en route to that number, proportionality being an example in the *Royal Mail* case, to which I referred you moments ago, being an example of that. The Tribunal are saying: well, this is a judgment and we are not satisfied that the CMA has made an error in exercising its judgment on these issues.

The point I am making is that if the Tribunal concludes that the CMA has reached a reasonable decision, the Tribunal doesn't need as part of its appellate jurisdiction to simply go on and make a new decision. It is entitled to look at what the CMA has done to be satisfied that it is reasonable and to stop there, and one can see the sense in that.

As Lord Justice Green says, the error has to be material, and the point I make is that one can apply that logic to the final number or to an individual stage.

MR JUSTICE MORGAN: Just help me: was that case about a penalty decision which was appealed?

MR WILLIAMS: That issue was not about penalty, no, it was about infringement.

MR JUSTICE MORGAN: All right, we will study that decision. And that you tell us is

the most up-to-date statement of a merits appeal being heard by a Tribunal, is it?

MR WILLIAMS: Well, there are examples since that, I am going to take you to the *Virgin Media* case. I can't now remember whether the *Royal Mail* case came before or after that, but it is a Court of Appeal case, Sir, so it is slightly in its own box.

MR JUSTICE MORGAN: Understood, right. Thank you.

MR WILLIAMS: That is discretionary judgments. The third of my overarching topics was the need to assess the penalty in the round and how that related to specific grounds of challenge. I do not think there is an issue about this, there is just a point to draw out.

If it is satisfactory, I am going to do this by taking out the *Balmoral* case, which is at tab 62, because it contains extracts from the two cases I want to draw on, which are *G F Tomlinson* and *Kier*. I could take you to both of them, but this is a convenient way of doing it.

MR JUSTICE MORGAN: Can you give me a specific page for the passage you want to go to?

MR WILLIAMS: Yes. It is Authorities 5, tab 62, paragraph 135.

MR JUSTICE MORGAN: I know, but I need the page.

MR WILLIAMS: Yes, I realise that, so I will give it to you now. It is page 4026.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: I am going to do this slightly in reverse actually so if you could go on to 4027, there is a point in 135 which is from *G F Tomlinson*.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: If you could just read that.

MR JUSTICE MORGAN: I will. (Pause) right.

MR WILLIAMS: That captures the two aspects of the penalty appeal that I have been describing, which is adjudication on the specific grounds of complaint about specific stages and the assessment of the justice of the penalty overall.

Above that is a passage from *Kier* which Mr O'Donoghue took you through yesterday, and that makes the point that the ultimate issue for the Tribunal is the justice of the outturn penalty and that is more important than the precise way one reaches that number. That is a point which is consistently made in the authorities and I obviously don't take issue with that.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: But the point I wanted to pick up is the point at the end of paragraph 76 of *Kier*, which says -- it is about six lines from the bottom, do you see that?

MR JUSTICE MORGAN: Paragraph 76 of *Kier*?

MR WILLIAMS: Yes, it is immediately above paragraph 135.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: It says:

"Provided the penalty ultimately arrived at is in the Tribunal's view appropriate, it will rarely serve much purpose to examine minutely the way in which the OFT interpreted and applied the guidance at each step."

I am sorry, I have taken you to the wrong paragraph. It is paragraph 77.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: It says:

"On the other hand, if as in the present Appeals, the ultimate penalty appears to be excessive it will be important for the Tribunal to investigate and identify at which stage of the OFT's process error has crept in. Assuming the Guidance itself is unimpugned …, the imposition of an excessive or unjust penalty is

likely to reflect some misapplication or misinterpretation of the Guidance."

Clearly on ground 2, the guidance is impugned, but if one gets beyond ground 2, one is debating the application of the guidance. The point being made here is a practical point, which is that if there is an error, it probably needs the guidance to be applied. That is because, in my submission, the guidance is an appropriate and flexible framework for achieving the statutory objectives, so the problem is more likely to be with the application of the guidance than the guidance itself.

So that is why, in my submission, there is really not a tension between the two strands of looking at the penalty overall in the context of the statutory purposes and through the prism of the specific steps which the CMA took because the steps are a means to the end.

MR JUSTICE MORGAN: One of the points made in *Kier*, it may be in another part of *Kier*, is that because the penalty is arrived at by following a number of steps or applying a number of steps, the CMA chose its answer at one step having regard to its earlier answer in an earlier step.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Take step 1. If we feel that the CMA misapplied the guidance at step 1 and went too high, it doesn't follow that we simply substitute our figure for the CMA's step 1 and leave everything else to be calculated through because at a later stage, perhaps a multiplier stage, the CMA chose a multiplier or chose an uplift percentage knowing what it had decided earlier.

If we change step 1, it doesn't mean the CMA would have come to the same conclusions and all the later ones. If we adjust step 1, if the CMA had adjusted step 1, they might have adjusted the other steps, too.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Penalty involves quite a lot of standing back at the final stage and saying: have I got this right? It is not a mechanical exercise, these are interlocking steps is another way of putting it.

MR WILLIAMS: Exactly. In fact, that was going to be my last point -- it won't really be my last point, Sir, you have made the point.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: But the significance of the point in this case, you started to draw it out with Mr O'Donoghue yesterday when you said to him what is your case on ground 6? It's not for you to criticise it, you have to demonstrate that the answer to ground 6 ought to have taken you to a number which is below £28 million and indeed in the final analysis below the cap.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: On the facts of this case, it is a very simple point because at step 2, the CMA's penalty was £49 million, at step 3 it was £59 million, and then it came down to £28 million and then £25 million. So those two stages more than halved the penalty and it follows -- and I think this is the point you are making, Sir -- quite a lot of the detail of steps 1 and 3 was in the final analysis superseded by those later steps.

One can see a plethora of ways in the context of this appeal that that may mean grounds of appeal are not material. The example I was going -- you gave one example to Mr O'Donoghue yesterday under ground 6 -- the example I was going to give is: assume for the sake of argument we succeed on grounds 2, 3 and 4 but the Tribunal accept one or more aspects of ground 5, for those complaints to affect the penalty, they would need to have a greater impact than the reduction that was in fact made at step 4; that is to say the halving of

the penalty from £59 million to £28 million because those complaints relate to step 3.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: In our submission, it is clear that ground 5 is not a 50 per cent ground. The complaint about co-operation I think is 5 per cent, the complaint about compliance is 10 per cent. If you put the points together, they are not going to be worth £30 million.

MR JUSTICE MORGAN: No. There is an enormous reduction from £59 million to £28 million and if it is demonstrated that the £59 million might have been something else -- let's just take £50m, it is not an indication of anything, just an example. Say we think: well, we would have been at £50m at that point, £28m might still be spot on and right as the reduced figure. We don't have to take the earlier scale or percentage of the drop and apply it to £50m. We might still say what is wrong with £28m?

MR WILLIAMS: Yes, that is the point, Sir.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: The Tribunal will obviously need to consider this in the final analysis once it has resolved all of the grounds. It is not that you can look at any one ground in isolation, that is indeed the point. But it is another way of illustrating the general point that it is not enough for FPM to critique the CMA's analysis. It has to show that it was fined too much and, in our submission, quite a lot of their grounds stop short really of demonstrating materiality.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: With that introduction, I am going to move on to ground 4 now and perhaps I can try and deal with that and then see where we are at about 11.30 am and whether I get through all of that or whether we break in the

middle of my submissions.

The pleaded ground 4 is where Mr O'Donoghue started. It is probably not where I would have started but to assist the Tribunal, we are going to cover the same ground. The pleaded ground 4 deals firstly with relevant turnover and secondly with duration.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Where we reached with Mr O'Donoghue yesterday was that really this is about turnover. The argument on the multiplier issue assumes that there is still a problem with turnover and uses the multiplier as another way to correct that problem.

But as we have said in our Defence and skeleton and as you said yesterday, Sir, FPM is going to win or lose its argument on relevant turnover and once it has won or lost, there is not a separate duration issue, and I think in the end Mr O'Donoghue agreed with that yesterday.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: It is common ground that the guidance provides for the CMA to use turnover in the last year of the infringement as the relevant turnover, and I am going to show you the key authorities in a moment. Just to tell you where I am going, the purpose of using that relevant turnover is to give a sense of the scale of the undertakings activity in the market during the period of the infringement. It is one measure of that.

The reason that is relevant, as we will see from *Kier*, is that it is a measure of the actual or potential impact of that undertaking/participation in the infringement. Other measures could obviously have been used in the guidance for that purpose. An average could have been chosen, but that is not what the guidance does. The guidance uses the last year of the infringement.

I am going to show you two authorities, Sir, *Kier* and *Eden Brown*. If you could take out *Kier*, it is Authorities 4, tab 49. I am going to page 3053.

MR JUSTICE MORGAN: Thank you.

MR WILLIAMS: What happened in this case was that the OFT's guidance referred to I think the last year and as a practical matter, the OFT didn't change the guidance but -- and it once used the last year of the infringement as the last year, but it actually changed its approach to start treating the last year before the decision as the last year. So it used the same label but changed what it was doing as a matter of substance.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: There was a challenge to that, there was a challenge to the use of the year before the decision as the year for relevant turnover rather than the last year of the infringement.

Paragraph 132 explains that and if you could read that paragraph -- it is probably best you read the paragraph for context, but you can see what is being said.

MR JUSTICE MORGAN: We will do that. (Pause). For myself, I have read 132.

MR WILLIAMS: That is the case against year before the decision as against last year of the infringement.

MR JUSTICE MORGAN: Yes. At a time when you are trying to assess the seriousness of the infringement and the powerful effects actual or potential on the specific market, et cetera.

MR WILLIAMS: Yes, exactly. You should look at the time when the conduct occurred rather than a later point in time.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: So that is the case against, if you like. Then 138 is the conclusion to that discussion, which Mr O'Donoghue did show you. I can't remember if

he showed you 132, I am afraid, but I think he did take you to 138.

MR JUSTICE MORGAN: Right, I will just scan that again. Yes.

MR WILLIAMS: That is the case in favour of last year of the infringement and there is reference to the Commission's current practice.

At this time, the same issue was being litigated in the Tribunal in the construction appeals, *Kier*, and also construction recruitment, which is *Eden Brown* and that is at tab 52. One gets some useful explanation in *Eden Brown* of the same issues.

Eden Brown is tab 52, I want to go to 3371. Just before you look at these paragraphs, *Eden Brown* is an important authority because it also deals with points we get to later on about why turnover at the time of the decision is used at step 4. That is covered in *Kier* as well in other paragraphs, which we will look at later on.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Your point, Sir, about trying to get a sense of the overall picture and why different turnovers are used at different stages for different purposes, and in my submission *Eden Brown* is helpful on this.

Paragraphs 63 and 64 are covering the same ground as *Kier*, but I think you will want to look at them.

MR JUSTICE MORGAN: Thank you.

MR WILLIAMS: It is the same point. 65 is a useful paragraph in the appeal as a whole:

"... submitted that its current approach has the benefit that the impact of the penalty and in particular the specific deterrent effect is calibrated to recent rather than historical levels of turnover."

And this is the helpful bit:

"However, step 1 is designed to relate not to the impact of the penalty but the impact of the infringement."

Deterrence is specifically addressed under step 3 -- now it's step 4 but it was step 3 then:

"When it comes to the consideration of whether the sum should be increased to provide effective deterrence, then it is appropriate to have regard to the undertakings' current financial position by reference to the last business year before the decision [but that is in a different context]."

I am looking ahead a little bit and trying to give the Tribunal --

MR JUSTICE MORGAN: No, it is very helpful. I did put to Mr O'Donoghue that turnover was being referred to in different places, apparently for different purposes; and for different purposes you could use different times, which is now established by the guidance. Right.

MR WILLIAMS: Yes, that is right, and it is really supported by these authorities as well.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Towards the end of paragraph 67, it picks up the point we saw in *Kier*, which is identifying the approach of using the last full year of participation in the infringement is also the approach taken by the Commission at the equivalent of step 1.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Paragraph 68 says:

"Accordingly, under the fining methodology applied by the EU institutions, the pre-end of infringement turnover is used for the purpose of the starting point whereas the pre-decision turnover is used to determine the statutory maximum fine."

That supports the logic of this approach, this is again a principled approach to different turnovers.

Then finally paragraph 107, which is on page 3385. This to some extent echoes what we saw in paragraph 66 or 67. But if you could read, I think it is again useful in pulling some of the strands together.

MR JUSTICE MORGAN: Yes. Just a moment, I am going back to 107.

MR WILLIAMS: 3385.

MR JUSTICE MORGAN: Yes, understood.

MR WILLIAMS: The only point I would add to that, that paragraph focuses on deterrence, but we would say that by the same token, if one is think about proportionality in step 4, which is the other side of the coin, then the same point applies. That is to say if you are looking at the impact of the deterrence -- is the penalty going to have a sufficiently great impact at step 4? Proportionality: is the penalty going to have a significant impact? They are two sides to the same coin, but they are considered at the same point in time, and I will come back to that later on.

MR O'DONOGHUE: While it is open, can we look at 109?

MR JUSTICE MORGAN: Yes, right, I will do that.

I have read that, thank you.

MR WILLIAMS: Coming back to ground 4 for the minute, these authorities approve and encourage the use of the last year of the infringement for step 1 purposes as a measure of the impact on the infringement.

Essentially, the OFT was told it should be locking at the last year of the infringement and not looking at the year before the decision. They effectively required the OFT to avert to what had been its historic practice of looking at the last year of the infringement.

MR JUSTICE MORGAN: I am sure you are right but as far as I can see -- I am just going to put my camera on again -- there wasn't any issue in those cases as to whether it was the last year or the average over the years when the infringement occurred. That wasn't the point. The point was this quite separate point, and indeed it might be there wasn't an averaging point because the periods of the infringement were not lengthy periods.

MR WILLIAMS: No, no, that wasn't the issue.

MR JUSTICE MORGAN: I think in *Kier* it was 1.2 years or something, was it, if I have the right dates?

MR WILLIAMS: It was double pricing, so was not sort of cartel we have in this case. But I think the point I am making -- what you say is quite right, Sir -- the point I am making is that there is reference to the real economic situation test.

MR JUSTICE MORGAN: There is.

MR WILLIAMS: There is no suggestion which means one needs to look at an average or to look at the whole period. The whole thrust of it, on the contrary, it is sufficient as a starting point for the CMA to look at the last year for the purposes of identifying the real economic situation, and that is indeed what the CMA's guidance does.

So it is not authority to suggest that merely if one follows the logic of that, one should be driven towards averaging. It is not saying that, indeed it is saying the opposite, in the sense that it approves the approach based on the last year.

There are good reasons for the approach in the CMA's guidance and they are, if I may say so, obvious and, Sir, you identified them in exchanges with Mr O'Donoghue yesterday.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: It is a simple approach which avoids the need to get into multiple

years. Within the parameters of the infringement, it is the most up-to-date information and that means, as you said, one doesn't need to get into inflation. It is a sensible proxy or measure to capture the actual or potential significance of the undertaking's participation in the cartel.

It is not a precise science, the guidance could have done other things. But that is what the guidance does and once the guidance takes that approach, one needs a good reason to do something different. There are of course exceptions or departures from that starting point where the last business year is out of the ordinary and doesn't provide an appropriate point of reference, and we will come to some examples later on, including *Balmoral*.

So the CMA doesn't say it is wedded to the last business year where there is a good reason why it shouldn't be used. But in our submission, FPM's submissions go much further than that. It basically says the year needs to be representative in the sense that it needs to be close to the average, it needs to be representative of the average, so if there is a material difference between the last year and the average, the CMA should be switching to the average. There would be a good reason in that situation to use the average.

Mr O'Donoghue submitted that the CMA should depart from its guidance if there is more than a *de minimis* difference and he did say that yesterday. In my respectful submission, he is really making the argument for a policy of using the average as a default position in the guidance. But that is not the CMA's policy. If your policy is not to use the average, it cannot be a sufficient reason to depart from your policy that the number deviates from the average.

To state the obvious, turnover in any business tends to fluctuate and, in a growing business, it grows. So it is really par for the course that when the CMA fines a company, it does so against the background where its turnover is not so

stable that taking an average wouldn't give you a different figure. Very often, the last year will be a higher figure because in good times businesses tend to grow. Sometimes it is a lower figure. It is of course true that using an average would eliminate any deviation, subject to your Lordship's point about inflation, but that is not what the guidance provides for.

There is another point to make here, which is that the longer the infringement goes on, the greater the scope for variation. Of course, I don't put that too high because there is a multiplier for duration which takes account of the total duration in years. The main point here is that the infringement went so far back that it included the financial crisis in 2009, and that is an outlier.

MR JUSTICE MORGAN: You have given us the figures in 188 of your Defence. It might be worth, certainly I would feel it is worth having that open.

MR WILLIAMS: That is my next point, Sir. I am glad my submissions are following a logical sequence.

MR JUSTICE MORGAN: It must be coherent if I am on the same pathway.

MR WILLIAMS: I hope so.

MR JUSTICE MORGAN: You take your course, Mr Williams. I am sorry --

MR WILLIAMS: That is my course, Sir. I was going to ask you to open that up next.

MR JUSTICE MORGAN: 188, I think.

MR WILLIAMS: 188. The point I was really drawing together there is that the question isn't whether the last year is representative in the sense that it gives you the same answer roughly as the average, it is whether FPM has made out a good enough reason to depart from the guidance, and one has to consider that in the context of the figures at 188. And these --

MR JUSTICE MORGAN: Sir Iain has a question, I think.

SIR IAIN: Yes, if I may come in here; thank you, Chairman.

Mr Williams, if you have not read it at all times to the final year and you would at times look for a more representative figure but you rule out using the average, what formula would you use to strike a representative figure?

MR WILLIAMS: Again, Sir Iain, we don't rule out using an average. The submission I am making is really that if one has a policy of using the final year, one cannot make the argument that you should depart from your policy where the final year doesn't give you more or less the average. Because that is by definition the consequence of the policy. So one is looking for more than a deviation from the average.

I absolutely don't say we would never use the average. But to answer your question, there are cases in which the CMA simply goes to the preceding year, and *Balmoral* is an example of that. *Balmoral* was an infringement where the infringement actually was perpetrated only at one meeting, so there was only ever going to be a single *de minimis* point and the question was whether the year in which the meeting took place was the correct data point; and one didn't have a question about averaging, one didn't have a question about which year should we take.

But that does I think draw out an answer to your question, which is you might not take the average, you might take the preceding year, for example, because you might say actually the last year was exceptional but going back a stage gives you a number which is more useful.

I hope that answers the question, Sir.

SIR IAIN: I think it does. Am I right in thinking that clearly you looked at the preceding year for the Decision, the global turnover was much higher than it had been in previous years, but you understood that that was because of an acquisition which then added significantly to the turnover in that year, and you

felt that that was appropriate?

MR WILLIAMS: Perhaps if we look at paragraph 188, I will make my submissions. It is true that as part of the overall picture, FPM refers to the fact that acquisitions are made. In its Notice of Appeal, it refers in particular to the acquisition of Ennstone in I think 2008. That is the specific example it gives. Actually if one looks at paragraph 188, one doesn't particularly see that hit the numbers, if I can put it that way. But that is a point they have made. My response is to say: well, we understand that as a contextual matter, but it is not obvious in the numbers really where one sees that. Our position in relation to the numbers at 188 really is this -- just by way of instruction, these numbers don't include I think an adjustment for rebates, I think the Tribunal has this point. The final number in 188(f) came down a bit because FPM provided some information about rebates afterwards and so that year came down. I think all of these numbers would be the pre-rebated numbers but in a sense, I think that is a detail. One can see the pattern across the years from these numbers.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Really what we say is this: the last three years are really very stable at a number around the level at which the CMA adopted. There is some variation in the earlier years, most particularly in 2009 as I have said, which is the year the financial crisis hit. 2008 and 2010 are a bit lower, but 2008 is pushing £20 million as the starting point, so one has that, range, if you like: £20 million to £25 million with a dip for the financial crisis and then a recovery back up from that number. The CMA looked at this and it simply didn't consider that the pattern of the turnover

here was sufficiently out of the norm to merit a departure from its guidance. It used the word "exceptional" in the footnote to which Mr O'Donoghue has referred, but really all we are saying is that FPM was asking for an exception to the guidance and the issue is whether there was a good reason to make an exception or do something different.

We do say that on a merits appeal, the Tribunal has to focus on that question of substance and not the linguistic difference between good reason for an exception or the exceptional circumstances. I do not think there is any difference between us in terms of the substantive issue.

The answer --

MR JUSTICE MORGAN: One or two points of detail, Mr Williams, if I can raise them and perhaps we will then have our break.

SIR IAIN: Chairman, could I ask one more question of Mr Williams, if I may?

MR JUSTICE MORGAN: Yes.

SIR IAIN: Thank you very much. It is this: looking at my notes here, it does seem as if the Order of the year 2000 makes the previous business year the law. The question is: do you have discretion to depart from the law if that is what it is?

MR WILLIAMS: I think the order you are referring to, Sir Iain, may be the Order which prescribes the approach to the cap.

SIR IAIN: Yes. It is the previous business year for the cap, yes.

MR WILLIAMS: So that is step 5 under the guidance.

SIR IAIN: Yes.

MR WILLIAMS: We don't have discretion about that, absolutely not.

SIR IAIN: Right.

MR WILLIAMS: But here we are at step 1. The step 1 approach is set out in the

guidance, and we accept we have discretion to depart from our own guidance if there is sufficiently good reason to do so. So yes, we accept that, and that is why, as I said earlier on, we are not wedded to the last year of the infringement.

SIR IAIN: Good, thank you very much. Chairman, thank you.

MR JUSTICE MORGAN: Just to get some numbers clear. In 188, the last year, (f), you have a figure above £25 million, you told us that was reduced. Looking at the Decision -- don't turn it up, I will just read out the number -- the turnover you took was £24,456,000 and the explanation is an adjustment for rebates; is that it?

MR WILLIAMS: Broadly speaking, yes. Mr O'Donoghue will tell you if there is more detail you need on that, but that is broadly the picture, yes, Sir.

MR JUSTICE MORGAN: Right. But when we look at the figures in your 188, these are all pre-adjustment. The only one you bothered to adjust, I suppose, is (f), so (a) to (f) are unadjusted. If you did adjust (a) to (f), you would get a different figure for each year; is that right?

MR WILLIAMS: I believe so, but I am proceeding on the working assumption that the pattern would look the same.

MR JUSTICE MORGAN: That is right. If the pattern of rebates was the same, then the pattern would follow through into the adjusted figures. The second thing you told us, which I understand, is that we all know what happened with the financial crisis in 2008, so the revenue to January 2009 was harmed or hit by the financial crisis, you say.

The other -- I think Sir Iain or one person asked -- what about acquisitions. We are told that in the early days of this infringement, the three companies between them had a 50 per cent market share and in the later years they had

a 90 per cent market share. What was happening to FPM, is part of the increase in the figures due to it acquiring other companies and thereby acquiring a bigger market share? Can we drill into that sort of issue?

MR WILLIAMS: Well, I think the best thing I can do is give you the reference.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: I was alluding to earlier on, Sir, which is Ennstone, Notice of Appeal, hearing bundle 1, tab 2, paragraph 88. That seemed to be the main point about acquisitions, which was an acquisition in December 2008.

On this appeal, I think that is as far as the point has gone, so that is the point I have addressed. The way I have addressed it is it say: just looking at the numbers, one doesn't really see an acquisition in 2008 wash through. Whether it is because it was going in one direction and the crisis was going in another direction, I cannot say, Sir.

MR JUSTICE MORGAN: Right. Just as a matter of curiosity then, how was it that the combined market share grew from 50 per cent to 90 per cent? Was it acquisitions by the other companies?

MR WILLIAMS: Can I take that question --

MR JUSTICE MORGAN: Just to understand it because Mr O'Donoghue's case is that we should get a representative turnover, not a turnover of one year. So it might help us to have a deeper understanding of why the figures moved around. But you've assisted us on that point, thank you.

We have gone past 11.30. I think for the transcriber, we ought to have a short break. Is this a convenient moment?

MR WILLIAMS: Yes, it is convenient, Sir.

MR O'DONOGHUE: My Lord, can I raise one question, if I may?

MR JUSTICE MORGAN: Yes, of course.

MR O'DONOGHUE: We are obviously very happy that we get to see the Tribunal in person tomorrow which we are looking forward to and from my perspective --

MR JUSTICE MORGAN: That is kind of you, Mr O'Donoghue. Can I reciprocate and say we look forward to see all the parties.

MR O'DONOGHUE: Thank you.

As your Lordship will understand, cross-examining remotely is part of my deal for all series of reasons. I haven't raised this with Mr Williams, but I don't know if it would be possible for Mr David Williams to attend tomorrow. I would certainly undertake to finish Dr Grenfell and David Williams tomorrow, so it won't delay us in any way. From my perspective, if he can attend, I would very much prefer that.

MR WILLIAMS: Sir, I believe he is going to be waiting for his test result until tomorrow, so we can reflect on the position. When we came into the Tribunal this morning, I do not think my solicitors had managed to speak to him today yet.

I think we have now, so I will see whether there is an update. But if he is still waiting for a test result, then it is quite difficult to see how that could work, Sir.

MR JUSTICE MORGAN: Well, let me not react immediately. Why don't both of you think about that and if the time permits, maybe communicate, and if not, we may have to leave you to discuss it between 1.00 and 2.00.

From the Tribunal's point of view, if one party wants something and it doesn't cause inconvenience and it doesn't disrupt the later stages of the hearing, the Tribunal will accede to the request. We are not here to create difficulties of our own. But on the other hand, if the request does cause inconvenience to the other party or to the smooth running of the hearing, then we would have to decline the request. That is as much guidance as I can give, it is pretty

obvious.

I think we will have a ten minute break because we had a slightly longer morning. My computer says 11.41, so shall we resume at 11.50 and we will try to keep to the timing and not drift past it.

Thank you until we meet again.

(11.41 am)

(A short break)

(11.51 am)

MR JUSTICE MORGAN: I think we are all back in the hearing room. You can proceed, Mr Williams, please.

MR WILLIAMS: I am grateful, Sir. Just picking up your question about acquisitions before the short break -- this is not a complete answer, but I think it gives you a bit more than you have at the moment -- if you could take out the Decision, bundle page 160, paragraph 4.275.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Paragraph 4.275 is actually making the point in the context of the market sharing agreement and it is making the point that market shares were stable from 2010, which is a point that comes up in other contexts.

But you can see that the reason things appear on the face of this paragraph -- and I have to say this is not an issue I focused on particularly -- but just looking at the paragraph, it appears that following the acquisition, the picture settled down in 2010, which is why one then sees stability. It says, "Following a series of acquisitions ..."

Then if one then looks at footnote 795, it says here that FPM has made representations that its market share fluctuated reflecting competition, and FPM then provided numbers up to 2010. You can see in that discussion that

it refers to Ennstone as having an estimated market share of 22 per cent. That is a non-trivial number, a significant number, and one can see why they might have picked up that in their Notice of Appeal, as I have said. I can't really help you with how that washes through the figures for the reasons I have explained, but I suppose one interpretation, and I say this with some trepidation, is that the difference between the number in 2008 and the difference between the numbers later on is largely accounted for by Ennstone, and what one sees is a dip for the financial crisis and then a recovery to a point where one really sees Ennstone in those numbers. But that is a barrister's interpretation of those numbers, not evidence.

MR JUSTICE MORGAN: Right, understood.

MR WILLIAMS: That would be at least consistent with the emphasis FPM has placed on the Ennstone point in its Notice.

Just to finish some of the points I was making before we broke: the CMA starts with the final year of the infringement, relevant turnover in the final year of the infringement. If the CMA had taken the previous year, it would have been materially the same, we have seen that. If it had taken a three-year average or the last three-year average, which is something the CMA does in a different context at step 4, the number would be the same.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: So that is three out of the six years we have data for and the most recent three years in which the figures are stable at materially the same level. Of course we see the turnover is a bit lower to start with, then there is this fluctuation around the crisis as I have described. But putting FPM's case at its highest, there is a variation of something like 20 per cent from the average over a six-year period, and that shows a degree of variability. But it is not an

abnormal level of variability over a period of that length.

Really, Mr O'Donoghue has picked up on authorities which talk about volatile turnover. This is not volatile turnover. It looks like two things going on; there is the financial crisis and, it seems, one significant acquisition. The financial crisis obviously applied to everyone, it is not a measure of volatility, and the average without the financial crisis -- I am afraid this is not a precise calculation, but it is of the order of £22 million, which is indicative of the fact that here the pattern is actually relatively steady and stable, it is very far from volatile. That is why we say there is not a good reason for the CMA here not to take the approach set out in its guidance, and if this was a case which merited the use of an average, then the average would become the rule.

By way of contrast, there is the *Balmoral* case, which is at tab 62. Mr O'Donoghue took you there. I am not going to take you back to it, but if I can describe it in this way: there the business was growing so rapidly that the CMA took the view that it did need to depart from the guidance. I think it is right to say that the business grew 100 times, not 100 per cent but 100 times in a year. It went from a turnover of £19,000 to £1.9 million. To account for that, the CMA took an intermediate figure, but even the intermediate figure was 40 times the previous year, 40 times the number it would have used if it had followed the guidance, which was about £800,000 as opposed to £20,000.

So that was a case in which there was a single data point which was completely unsuitable to represent the impact of the infringement. It was out by a factor of 40 at a minimum, and one has to contrast that with this case, which is simply a plea to use the average.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Also *LCD Screens*, the Commission in that case described the

growth in turnover as exponential. That is tab 81, page 8904, paragraph 384, another one of Mr O'Donoghue's comparators. In my submission, it is not a comparator.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Then *Thermal Systems*, tab 82, page 4956, paragraphs 119 and 121. That is the case in which there was considerable volatility, which is again not a comparator for this case.

So FPM has referred to various examples and indeed other examples, but all they show is that there are factual situations in which it is appropriate to depart from the default position and they don't provide the answer to this case, in my submission. That is ground 4.

MR JUSTICE MORGAN: Thank you.

MR WILLIAMS: Ground 5(d), moving on to compliance. This does raise an important point of principle about the circumstances in which an undertaking is entitled to a discount for compliance. FPM's case is that it operated a compliance programme and there is evidence of it in operation; and it says it is a sufficient programme, hence it is entitled to a discount. I would like to take out the CMA's guidance again before we delve into this page, which is Authorities 1, tab 21.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: We will go to page 324 of that bundle.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: This is paragraph 2.19, "Mitigating factors include ..." and the third bullet is:

"Adequate steps having been taken with a view to ensuring [ensuring] compliance with Articles 101 and 102 and the Chapter I and Chapter II prohibitions."

So we do have the recital "ensuring".

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Footnote 33 fleshes this out:

"The CMA will consider carefully whether evidence presented of an undertaking's compliance activities merits a discount from the penalty of up to 10 per cent. The mere existence of compliance activities will not be treated as a mitigating factor. Compliance activities are likely to be treated as a mitigating factor where an undertaking demonstrates that adequate steps appropriate to the size of the business concerned have been taken to achieve clear and unambiguous commitment to competition law compliance throughout the undertaking from the top down."

That is the standard the CMA applied in the Decision, and it decided the standard was not met. I would like to go back to this. We saw it yesterday, but I think it is important to make our point in the context of what the Decision says. This is page 237, you saw this yesterday.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: 6.54 is the description of the undertaking, FPM's compliance activities. At 6.55 is the standard I just drew from footnote 33 in the guidance. Then we get to the reasons at 6.56. It says:

"Representations made by FPM in response to the CMA's statement of objections, including in particular representations as regards its failure to implement a lack of any effects, indicate a failure to understand and accept the underlying competition law principles and they call into question the adequacy of the compliance training and the commitment to competition law compliance."

So this is really following up on the point in the footnote that achieving compliance, ensuring compliance is not just planning a programme, it is achieving

a position where those in the organisation understand the principle of the competition law and are committed to observing them. Those are linked issues; one cannot have a commitment complying with competition law if you do not understand it, and certainly if you don't understand certain basic propositions.

6.57 goes on to develop the point with particular reference to senior personnel within FPM. You saw this yesterday.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: This is obviously important:

"Senior personnel, in particular directors, will set the tone and direct the staff to carry out the work of the business."

They call the shots at the end of the day. In this paragraph, FPM positively relies on the involvement of the directors. You can see in the final few words, "The company's directors monitor business and compliance risks."

FPM put that point in its favour, but the point clearly cuts both ways. If the Tribunal takes the view that the directors or FPM at a corporate level doesn't understand or accept what competition law requires, what the principles of competition law require, and they don't recognise that certain things are illegal, then that undermines the notion that there is a corporate commitment to achieving compliance from the top down. If the training of the directors has not been effective, then it is not right to say that FPM has taken adequate steps to ensure compliance.

The Tribunal articulated a number of scenarios yesterday where there might be, if you like, different situations with different degrees of risk of non-compliance. One of those situations was the party whose representatives tell the CMA that they simply refused to comply with the law even though they understand it.

That would be the most extreme example of the sort of problem the CMA was grappling with here. But in my submission, that cannot be the standard. It is rare that there is such a stark case where the party says, "Yes, I understand what competition law requires, but I simply refuse to adhere."

The real issue is going to be whether a party can demonstrate that they understand what is required and that they have taken the steps needed to ensure they carry that through. The CMA doesn't take -- Sir Iain.

SIR IAIN: Yes, if I may put a question here. Is it the case then that no matter what a company has done to put in place compliance measures, and so on, if they do not admit the infringement and go to appeal on it, then it is virtually impossible to convince the CMA that actually the culture and their attitude has indeed changed?

MR WILLIAMS: That is the way FPM has tried to steer this point. They have tried to say: if you follow the logic of your position, CMA, this becomes a situation where the undertaking is, if you like, penalised for defending itself.

I will be clear about that. The CMA doesn't say that a party is penalised for defending itself, but it doesn't say that a party which doesn't admit the infringement will never get a compliance discount. It is not black and white.

Conversely, we don't accept FPM's position that a party can take whatever position it likes in respect of the infringement allegation and still maintain that it has a fulsome commitment to compliance in which the CMA can have confidence.

The Tribunal will see the compliance manual in due course. It is fairly general, it is fairly abstract as in the nature of that document. In contrast, the present case provides a very clear and concrete illustration of what FPM thought it could and could not do consistently with competition law.

So our position, Sir Iain -- I am going to take you to the evidence in a minute -- is a

decision about the evidence in this case, as you have seen from paragraph 6.56. It is not a blanket position which would rule out a compliance discount for any party that doesn't simply admit the infringement.

SIR IAIN: Thank you very much.

MR JUSTICE MORGAN: Can I just understand the make-up of the CMA's reasoning. I know we are going to have evidence about compliance, so I don't want to go into that in my question, but there are a number of points made by the CMA. At 6.55, the CMA expresses a conclusion which is by reference to adequate steps to achieve a commitment to compliance from the top down. That is an echo of the guidance plainly is where that comes from, and the conclusion is that FPM, on whom the persuasive burden rested, has not persuaded the CMA of this requirement. That is one point we note.

The second is that the CMA has specific things in mind when it reaches that conclusion. The first specific thing is 6.56, it refers to the representation and it singles out representations as regards the failure to implement the arrangement and the lack of any effects in the market.

We will need at some point to familiarise ourselves with what those representations were -- I beg your pardon?

MR WILLIAMS: I will be taking you to them very shortly.

MR JUSTICE MORGAN: Yes. I am just trying to sketch the territory we are going to cross. We will have to see whether a fair reading of those representations is that FPM was defending itself. Obviously if it defended itself making good points, that cannot be held against it; if it defended itself making bad points, that isn't necessarily proving a failure to commit to compliance, it might be something else.

But what the CMA said is that they understood the representations, quoting from

6.56, "To indicate a failure to understand and accept the principles". So we will have to see if that is a well-founded conclusion. Then 6.57 is a further specific matter. It is the interview material of the three persons, and again we will have to see that, I take it, right?

Before we leave 6.57, there is a footnote, 1105, and in 1105 two points are made: there is no risk register and there is no formal rating of risk. Those are criticisms of the steps, the paper-based steps being taken and we will see if that is -- we did not hear Mr O'Donoghue challenge that footnote, but we will have to form some view of the significance of it.

Then 6.58 is another conclusion. They have not shown a genuine commitment to compliance and then it says, "Beyond a paper-based activity ..."

MR WILLIAMS: I need to address you on that.

MR JUSTICE MORGAN: Yes. Well, what paper-based means -- obviously preparing the paperwork is part of the paper-based activity and you may or may not show us the documents created by the lawyers for FPM. And there are not, it has to be said, specific criticisms of the paperwork, apart from footnote 1105. You may make more criticisms about it being too general, I don't know, but the only criticisms in the Decision are footnote 1105.

Mr O'Donoghue was minded to say, I think, that it is wrong to say it is only paper-based activity because it went beyond creating the paper. It went to having lots of sessions with management when management were advised and instructed in the relevant matters, and so on.

So I wonder what paper-based meant. Did it mean creating the paper or did it mean using the paper? Is "paper-based activity" a phrase which extends to having all these meetings with 43 representatives of management and 43 salesmen, and so on? You are going to address us on what paper-based activity means,

are you?

MR WILLIAMS: Yes. The point is this really: FPM reads it in a strictly literal way and it says there is not just a piece of paper. But we have acknowledged earlier on that they carried out training, and so on, so the CMA wasn't sensibly saying there is nothing beyond the paperwork. That is not what it means.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: One has to read on. It says in particular it has not provided convincing evidence of a genuine cultural shift which is at the heart of compliance.

So really the emphasis of the point is in saying: you have a programme and you are relying very heavily on your programme, but you need to go beyond the programme to demonstrate that the culture of the organisation has changed such that the things that have happened in the past won't happen again.

MR JUSTICE MORGAN: Right, you have helped me. We have gone through the ingredients. It is quite a short condensed passage, but there is quite a lot of cross-referencing which we may need to follow up.

MR WILLIAMS: Yes, I will take you to that material shortly.

MR JUSTICE MORGAN: Thank you.

MR WILLIAMS: But just to give you the headline before we go through it: this is a case, and this is to Sir Iain's question really about is this a matter of not admitting the infringements? Our position is it goes much further than that: FPM resisted an infringement finding in the face of what was frankly overwhelming evidence that it was party to a cartel, four recorded video meetings. It resisted the cartel on the basis of arguments that included or reflected basic misunderstandings of what competition law requires and what is a basis for defending or resisting an allegation of infringement.

I do make this point. None of those arguments are still live. FPM has taken the view that none of the points in turn are points which it wants to test before this Tribunal, and in my respectful submission, that is because the points are not tenable. Ground 1 has boiled down to an argument about a few ultimately immaterial findings which FPM says go to implementation. But none of the arguments it put in terms of whether there was actually an infringement or not are maintained, none of them have withstood the acid test of do we bring them forward on appeal.

We don't say that the programme is a sham and nothing has happened in the real word and it is just a piece of paper in that sense. What we are saying very clearly is it is not enough to have a programme on paper or on a screen if those at the top of the organisation do not understand what is required to comply with competition law.

MR DORAN: Mr Williams, could I just ask you: in order to get any discount for compliance -- sorry, let me put it the other way round. Are you saying that if the senior leaders of the business, the McCann brothers and Mr Cooper in this particular case, don't show the requisite compliance standard that the efforts and the knowledge through the training that otherwise for all we know pervades the organisation would count as nothing?

MR WILLIAMS: Again, Mr Doran, you have put to me in black and white terms. I do not think it is really, in a sense, helpful to hypothesise about the various degrees of situation. What I would like to do is it to show you the evidence which really goes to the corporate view as to what FPM was entitled to do and was not entitled to do. But we do say it is a very influential factor if those at the top of the organisation do not understand what is required and cannot be relied on to promote those values through the organisation.

MR DORAN: I suppose I put it to you in those black and white terms because in truth, the CMA's case is that there is no discount for compliance, principally because of the leaders of the organisation and the --

MR WILLIAMS: Well, it is the position taken by the leaders of the organisation and specific points they take and the fact that they represent, as I have put it to you, basic misunderstandings of what the law does and doesn't permit them to do. One has to look at it in the round and one has to look at the substance of the representations and then assess the position in that light.

There are always questions of degree and there is always territory for debate in these cases. But in this case, our position is that the position FPM took was an extreme one and it raised very serious concerns about the extent to which it understood why what it had done was wrong and whether it was entitled to carry on conducting itself in that way. So one does have to assess it in the round.

I understand the point you put to me, which is one can boil the point of principle down and say would the logic of your point carry you this far? But that is not the way the CMA decided the case. It decided the case on the evidence in the round.

MR DORAN: Thank you.

MR WILLIAMS: If you can take out hearing bundle 3, tab 80, which is FPM's response to the statement of objections.

MR JUSTICE MORGAN: Yes.

SIR IAIN: Do you have a page?

MR WILLIAMS: I do. It is page 1284, and I want to pick it up at 1.5. There are really two themes running through the document, and one can see them at 1.5 and 1.6. The themes are that the agreement was never implemented,

therefore there was no agreement; and in fact all FPM did was go to the meetings trying to extract information for its own benefit which it would then be able to use, and therefore it wasn't participating in the cartel with a view to implementing it and to charging higher prices, and all the rest of it.

As a starting point, that is what we say is the basic misunderstanding. That is anti-competitive conduct. I will show you, it is a theme running through. 1.5:

"It is a question of fact as to whether agreements were entered into. There was no concurrence of wills or meeting of minds, there is specifically no evidence of implementation or observance of any arrangements which goes to show there was no agreement in the first place."

But it doesn't go to show that. They have been recorded on video at four cartel meetings and it is a theme running through this that as long as they went to the meeting and didn't intend to charge the cartel prices, if that is what they wanted to do, that they could excuse their behaviour.

1.6 is the other side of the point:

"The CMA mischaracterises the evidence arising from the contacts and meetings between FPM and the parties, which was intended by FPM only to enable it to understand and assess market conditions and to engage in a form of posturing or jockeying, behaviour that was intended to impress or mislead in relation to the other parties."

The paragraph doesn't amount to an admission that FPM went to the meetings in order to gather confidential information that it wasn't entitled to gather. But it does say they went to the meetings in receiving mode rather than in giving mode. That is what they say and they treat that as effectively the core plank of their defence, and it is not a defence if one looks at what happened at these meetings.

That is merged into the banter defence, which is, "We just went to the meetings. All we were doing was posturing and jockeying and impressing or misleading". But it is part of the same point: it is not permissible to go to a meeting and to engage in banter and misleading and to soak up what you can extract from the meeting as long as you don't intend to go away and charge cartel prices. It is not a defence at all.

The core tenets of this defence just represent a misunderstanding or misapplication of what is permitted under competition law and one sees it occur through the document.

I want to turn through to section 5 in a minute but I want to just pause on paragraph 4.1, if I may. 4.1 is the paragraph which rather suggested we were in for a more wide-ranging appeal than the Tribunal is dealing with. It says:

"FPM notes that the SO is strikingly thin in terms of contemporaneous evidence."

I do have to pause and inject a sort of degree of reality into this submission. There were four recorded video meetings. If that is not contemporaneous evidence, it is hard to see what is. Then it says:

"It is notable the CMA relies on ex post facto witness evidence from witnesses who are self-confessed liars. It is hopeless and prejudicial to FPM for the CMA to rely so heavily on evidence of this type. FPM fully expects the CMA to make these witnesses available for trial so that their evidence can be properly scrutinised."

That is echoed in 4.17 a bit further down the road, which says:

"They put us on notice of its concern. In the event of an infringement decision which relied on that evidence, FPM would seek to challenge that evidence by cross-examining all relevant witnesses and puts down a firm marker now that the CMA should make all witnesses available for trial."

Of course, none of that has come to pass. FPM has not stood by any of the points taken in this document, and that is because we say none of the points appear.

Moving on to paragraph 5.3, there is a striking heading to this section, "No implementation by FPM". So this is page 1310:

"No implementation by FPM of any arrangement and therefore no agreement at all."

That is the basic legal misapprehension, it is a misunderstanding of what the law is. It is not just a heading because it is carried through into 5.3, for example. It is slightly fudged in 5.3 because it says:

"Consideration of the evidence … shows that no implementation of any of the arrangements under the alleged 'tenets' took place. Accordingly, FPM does not consider that, on the facts, the CMA can conclude that there was an agreement between the parties on these 'tenets' …."

Again, you start off with implementation, they lead off with that. Then they say -- and this is what I say is slightly more fudged:

"This is not a case of an agreement that existed but which happened not to be implemented. Rather, the non-implementation is itself evidence of the non-existence of the agreement in fact."

So we understand that they put it round both ways. But the primary emphasis of this submission is on the fact they never implemented the agreement, so the CMA cannot find an agreement. This is the section which starts to deal with the CMA's alleged conduct, as you can see from the heading in the section. The first point they make is no implementation, therefore no agreement. Then you get to the spot market minimum price tenet at 5.7 and the lead point again is no implementation of a spot market minimum lists tenet.

At one level, one can understand why they are putting the argument in this way because there was an agreement on spot market minimum price lists and that

is admitted now. So one can understand that they are driven back to saying the agreement wasn't implemented. But that is not a reason why there wasn't an infringement.

There is a slightly different point in 5.8, but it is related. They say in 5.8:

"The CMA has ignored the realities of the market, including the price setting process. This is an important error since an object assessment requires consideration of the factual economic context of the markets concerned [and that is right]. In particular, as further explained below, the list prices in the spot market are not the actual prices paid by customers. This is due to the significant discounts that are typically offered to customers and individually negotiated with them."

Now that is true but it is not recognising the mischief that follows from an exchange of pricing information. It is not a defence to say, "We exchanged confidential pricing information and everyone discounted from those prices," because you have already poisoned the well. So that is not acknowledging, it is not recognising the harm that flows from an exchange of strategic pricing information, even if other prices are ultimately charged. It is a really critical and basic misunderstanding.

At 5.37, this is market shares, "No agreement to maintain market shares," and this is the banter defence again. One sees the emphasis:

"It was a form of banter and jockeying with no intention to be acted on."

The theme runs through the whole document. One can see again the same point, 5.66.2.

MR JUSTICE MORGAN: Is your reference 5.62?

MR WILLIAMS: Sorry, I beg your pardon. 5.66, this is 1335.

MR JUSTICE MORGAN: Yes. I have it. 5.66.2. Right.

MR WILLIAMS: Actually the reference is on 1336.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I don't want to overstate this because the point they are making is that this is not mere cheating. They are not saying cheating isn't a defence, they are saying this isn't mere cheating. But one sees again at the top of 1336, it says:

"The CMA's case mischaracterises the reality that as a matter of fact, FPM continued to compete against the other parties in every respect such that there was never any agreement in the first place."

So it is again putting all the emphasis on what happened after the fact rather than what actually happened at the cartel meetings.

Final reference, 6.17, which is on page 1361. This is about no agreement on term deals. This is again a slightly fudged point:

"The agreement is strongly disputed by FPM. They clearly demonstrate that it did not in fact agree or observe any non-poaching or non-compete agreements such that there was no agreement at all."

They do say they didn't agree or observe, but the point is again giving significant weight to the extent to which it observed the agreement, which is a strand running through this.

I have picked up those references and I think those give a clear sense of the particular concerns the CMA picked up in the Decision. I just want to reiterate the point that the concern is if you take all that together, FPM's position is broadly speaking that as long as it engages in this conduct with its intention of doing its own thing at the end of the day, then there is not a problem. As long as it doesn't intend to implement and doesn't implement and as long as it goes to the meeting with the intention of gathering information rather than

charging a cartel price, then it is able to defend its conduct, and that is a fundamental problem of what it was saying.

It is not just a lawyer's submission because it is what the FPM personnel were saying themselves to the CMA when they were interviewed. I want to go to hearing bundle 5 now, tab 148.

MR JUSTICE MORGAN: Just give me a moment to make a note.

SIR IAIN: Do you have a page number?

MR WILLIAMS: You can see this is an interview with Francis McCann. I am going to page 2835. I am hoping I am going to give you enough context, obviously these interviews have their own flow and one can keep going back and back. But I am going to pick up the discussion at a point where I think it is clear what is being dealt with.

Page 2835, the third quote down in that quote from "Smiley", I don't know if the Tribunal has that. It says:

"Question: You've got a 40 per cent market share. How did he know you've got a 40 per cent market share?

"Answer: As I said earlier, it was a very open market, it was something we talked about in very boyish terms and really banter as I said earlier on.

"Question: What, banter about the market share?

"Answer: Yes, who had the biggest, pardon the use of the word, who had the biggest balls.

"Question: Right. But when you say banter, what do you mean by banter?

"Answer: Who had the biggest balls.

What Mr McCann doesn't say is the information is untrue. This is not the response, in my submission, of someone who takes competition law compliance seriously or who understands what is required. It is not taking responsibility

for what is a barn door breach of competition law. And this is not a momentary lapse because if one turns on to page 2847, there is a discussion about volumes. Mr McNab puts the question about volumes and he says:

"Answer: They're working out their market share at that point in time, they're working out what the total market is to date.

"Question: Why, what are you doing that?

"Answer: Because we've covered this numerous times. I said to you a while ago, it's to see who has the biggest balls, and I apologise for using those words but that is how I can explain it best."

If you carry on actually, this is a contextual point, but the point which is put to Mr McCann -- and I should say this is an interview which took place May 2019, so really quite an advanced stage. This is not an interview as they stepped out of the cartel meeting, they have had many years to reflect on the position. He says:

"Answer: To go into such details and calculate the market.

"Question: But there wasn't a calculation. This is information you shouldn't have, you shouldn't be discussing.

"Answer: I wasn't aware of that at the time.

"Question: It is against the law.

"Answer: Well, I wasn't aware of that. I had no training in that at that time.

"Question: You signed a declaration of the trade organisation to say that you wouldn't discuss market shares 23 times.

"Answer: I had no training in the market at that time.

"Question: Yet you were chairman of the CPSA as well.

"Answer: I never had any training, nor have I had any training."

It is of some note here that Mr McCann has form in signing things and then doing something different, and the CMA is entitled against the background of this very sustained cartel to look for evidence that history is not going to repeat itself. If I can then turn on to the next --

MR JUSTICE MORGAN: Just give me the last reference again, would you? I have page 2835 and page 2847, what was the third reference?

MR WILLIAMS: It was over the page, page 2848, I think.

MR JUSTICE MORGAN: I will mark that.

MR WILLIAMS: The next tab is Eoin McCann and this is another interview in May 2019. Can you look at page 2882.

In the middle of the page, Mr McNab highlights a discussion in which Mr Stacey of CPM says, "I keep saying to you that 5 per cent is not enough," and Eoin McCann says, "No, I'm trying to come up with a system that these men don't have to ring, they know who their customers are and they're automatically," and Stacey says, "We need to police it".

"Question: What is this about?"

"Answer: I can't really remember the context."

"Question: The context appears to be about getting prices up and then we get --

"Answer: That is just posturing and jockeying, nothing. Having a craic, that's all."

And obviously familiar with the McCann's position:

"Question: So this is what you would describe as banter.

"Answer: Yes, the evidence supplied to you by Oxera points absolutely to the case that we never automatically price increase, it's absolutely clear."

This is conspicuously tied into the corporate response, the SO response, and what is said is: well, you seem to be talking to your competitors about getting prices up. The response is: well if you look at what our econometrician has done,

you will see we never implemented that.

So the SO, there is not a sort of disconnect between the lawyer's arguments and FPM's corporate position. This is what Mr McCann himself says.

Then we get more banter, craic, jockeying, posturing and then again at line 17:

"You know … we have looked at all our prices. We've looked very, very clearly at them; know the allegations you have made with set prices; and we cannot find one instance where we set our price and invoiced it to a supplier. We cannot find one."

So it is implementation again, "We cannot find one." Mr McNab says -- now we are on page 2884:

"I am aware of your response, but what was the purpose of the meetings? You agreed you need to get the prices up ..."

Sorry, I should take this a bit more slowly. Line 7:

"We're not agreeing. There is no agreement, absolutely … if I refer you back to the reply on - to the statement of objections on the work that we have done. We analysed it very, very carefully. There was never an agreement. There was never an implementation. Na … not one. Not one."

Then there is a bit more. Back at line 19, he says:

"Question: You are agreeing with him about prices.

"Answer: I am not.

"Question: You tell -- that is only a bit of banter, you tell me, you tell me where we put this price to bat. Give me a product, give me a customer, give me an instance."

So it is the same point over and over again; and really, this is again another manifestly anti-competitive exchange. It is brushed off with this sloganised rebuttal about banter and craic and no effects, no implementation, and it is an

absolute misunderstanding of the law.

MR JUSTICE MORGAN: We have to consider what to make of this, but I think you are saying that there are recordings of these gentlemen speaking, you see the words they use. The words they use amount to agreements to restrict competition in specific ways and the two McCann brothers are asked about this. Jumping to the second answer they give, they are saying, "Well, we didn't implement it."

That might be a relevant matter if they didn't implement it, but it doesn't on any view mean they acted properly. It remains that they made an unlawful agreement but they are now saying they didn't implement it.

Just to continue my thought, the first thing they said is, "Because we didn't implement it, that shows that when we said we agree to restrict competition, that was craic or banter." Well, it doesn't sound like -- I mean, "banter" and "craic" are just the wrong words. It may be what the McCanns are saying is, "When we said it, we didn't mean it. The other people thought we meant it, but we didn't mean it and to show you we didn't mean it, we didn't do it. That shows we didn't mean it."

Now doing the best you can to work out what they are trying to say might be something along those lines, but you are saying there are lots of things wrong with that attitude. First, it is totally unrealistic. They are caught, you would say, bang to rights, making an agreement to restrict the competition and they are not prepared to admit it. They unrealistically tried to change the subject or wish it away. We might be persuaded that is the right view.

But in order to show whether they understood the requirements of competition law and whether they were prepared to comply with them, I suppose you say: well they were saying to the CMA, "There is nothing wrong with what we did. We

were able to go to meetings, we were able to discuss restricting competition, we were able to get the other parties to agree to restrict competition. We made a statement ourselves that we would restrict competition, but there is nothing wrong with that."

If that is the right reading of it, that would show a failure to understand the requirements of the law. Is that something along the way you wish to express it?

MR WILLIAMS: It is very much along the line you put it. The point we have made is what they are saying in the interviews absolutely ties in to the basis on which they say there is no infringement.

So if one tries to take this together and say they have this compliance programme -- I mean, these people have done the training, yet their corporate position is there is nothing wrong and so they don't understand what they are and are not entitled to do. The CMA cannot have confidence in the culture of the organisation and in the values, the standards that they are going to promote in the organisation as directors of the organisation, and frankly they are not taking responsibility for what is needed within the organisation to comply with competition law.

They are not taking responsibility for what they have done, they are not showing an attitude which can give the CMA confidence that next time are given the opportunity to do this that they won't engage in more banter, craic and posturing and take away from these meetings anything they can glean from it using the meeting for their own purposes. It is all of those points, Sir, yes.

Can I just complete the picture of Mr --

MR JUSTICE MORGAN: Yes, certainly.

MR WILLIAMS: This is the next tab, again this is August 2019, and if we can go to

2986. Actually, it is probably good for you to go back to the bottom of 2985. It says.

"Question: Was it Eoin who invited you to the meetings?

"Answer: I couldn't recall, to be honest, who invited me now, going back to 2000, it is 10 years ago. But there was discussion about bases and innovation, there were discussions about customers. It was a wide discussion.

"Question: In prices?

"Answer: The prices surprised me. … The one thing that Eoin did say to me is "I want you to play the game"; that was the words that he said. And a lot of what we did was inaccurate in terms of deliberately told them things that we didn't follow through on, and that's why they became very, very upset with us on the price. They became very upset indeed, because we were being quite inaccurate with the numbers that we were talking. Yes, we did play the game with them and talk price, but a lot of what we said was inaccurate, it was extremely inaccurate, and I then took some of their business, and then, obviously, there's transcripts of them getting very upset over us doing that."

That is the very much the point you have seen in paragraphs 1.5 and 1.6 of the SO. Essentially Mr Cooper is saying, "What Mr McCann told me to do was to go to the meeting, get what you can from the meeting, play the game, steal their business, and it doesn't really matter if you upset them and it doesn't really matter if what you tell them is inaccurate." And as you were saying, Sir, it is all simply not compliant with competition law.

If you go on to if you carry on with that, that is put to Mr Cooper by Mr McNab at the bottom of the page. He says:

"Question: Explain to you, you were going to the meeting.

"Answer: I do not recall that exact conversation but became quite clear after

a couple of meetings. I said to him that's not wholly accurate, let's go after the volume. He was very determined to attack them on volume."

Then the question carries on:

"I am trying to paraphrase and summarise, it was about going in there, giving them false information, extract information from them and then using that to try and attack their business and get volume from them and it seemed very much that way. The other thing, and I'll use an Irish term if you don't mind, Eoin liked the craic."

And Mr McNab, who I think also comes from that part of the world says, "We all do". He says:

"Sometimes I go to the meeting, and so on, so it was all banter and it was all craic."

So it was more of the banter and craic. This is the party line, "Eoin likes the craic." But that is a very vivid description of what FPM thought it could frankly get away with in this situation and it absolutely ties in to their corporate response, which is, "We simply went in receiving mode."

That is the interview material and those are the broad points we make on the basis of it. The Tribunal is going to hear from Mr Mulholland a bit later on.

There are another set of issues in this part of the case about equal treatment and I think there are two broad points. The first is: was FPM penalised for making points that CPM made; and secondly, was FPM given less of a chance to persuade the CMA on the compliance issue than other parties? That is broadly how it was put.

If I can deal with CPM first. The first letter was at tab 53, which is hearing bundle 2, page 944.

MR JUSTICE MORGAN: Thank you.

MR WILLIAMS: Sub-paragraph 4 on that page talks about lack of evidence of

implementation and in the middle of the paragraph, CMA says, "We don't need to show effects," and Mr Barnfather says on behalf of CPM two points arise: the first being that if it proves there was an implemented agreement, it would be material to penalty; and secondly it may be relevant as to whether an agreement existed at all.

So that is a half-baked version of the point that FPM ran. It is put very low, "It may be relevant". It certainly does not compare, in my submission, with FPM's sort of sustained campaign on this point across all the material the Tribunal has seen. It is pretty much a passing comment. But actually the Tribunal doesn't need to rely just on that difference of degree, even though it is an obvious and stark difference of degree. In the end, CPM did admit the infringement. It recognised that its compliance programme needed to prevent a repetition of the conduct in this case, so there is really no comparison between CPM's position on this issue and FPM's.

The second document -- sorry, I have put that bundle away, but there is another document in that folder at tab 60. This is a letter written in August 2018, so we are now well into the second phase of the CPM case. Under the heading "Balancing comment required" -- I do stress the balancing comment required" -- the first paragraph says --

MR JUSTICE MORGAN: What is the page number?

MR WILLIAMS: I am so sorry, it is 901. It is actually not visible on this page, but I am sure in the electronic version you will find it.

MR JUSTICE MORGAN: Yes, thank you.

MR WILLIAMS: The heading is "Balancing comment required" to show that minimum prices were rarely adhered to. I don't want to labour it, but the first paragraph admits the agreement, admits the infringement and it goes on to

say:

"... but in describing the agreement for balance, we would like you to say that as evidenced the agreement was not implemented."

CPM obviously has its reasons for wanting that in the Decision, but it is absolutely not the position that FPM took in respect of non-implementation.

Mr O'Donoghue then took you to the interviews of Mr Stacey at volume 4, tab 144, and the first reference is at 2495. But there is a headline point about all this which is that Mr Stacey uses the word "banter" -- it is obviously a word with particular resonance in this sector -- but he is not saying he had competitive exchanges of banter, he was saying there was lots of banter at the meetings. But the Tribunal has seen what Mr Stacey says in the Decision: CPM settled and he gave voluminous evidence admitting the infringement and explaining CPM's participation in it. So it is not really a point to pick the word "banter" out at selected moments in the transcript and say, "They used the word banter so that cannot really be a problem." He is just talking about something else.

So 4495, the top of the page, one only needs to look a few lines above. Part of that is discussing minimum prices:

"Answer: It wasn't only about that, it was a lot of blooming banter and rubbish.

"Question: No, I understand, but part of it was discussing [then it goes to line 16] an agreed minimum.

"Answer: Yes."

So he agrees that they discussed and agreed minimum prices. He just says there was no (Inaudible) to the fact. It is just not the same point.

Sorry, I keep putting files away. 2528 is the next reference.

MR JUSTICE MORGAN: 2528, right.

MR WILLIAMS: The context of this is at 2527 where Mr McNab says:

"What was the purpose of meeting up with these individuals?".

"Answer: I'll say it was vital in the sense that it's better the devil you know, or keep your friends close but you keep your enemies even closer, and we needed to know what they were doing. We could get market feedback on what they were up to, particularly Stanton's, because Barry Cooper's the biggest cheat and devious so-and-so under the sun. He'd take the sugar out of your tea, he was, he was that devious and so we had to have a chat - a lot of that, as you'll see, is just general banter as well, you know, about a number of subjects, some of them not repeatable, but it was vital that you maintained that contact to ensure that we were maintaining our market share, nobody was undermining us."

He is just saying, "We bantered as well," but he is admitting to a discussion about market shares with a view to maintaining market share, so again it is just the word banter. The clearest example, if one needs a clearer example, is 2545, which was another reference to banter. Line 6 on 2545:

"Question: Did you have any agendas for the meeting?

"Answer: No, no, just general chit-chat. A lot of them were a waste of time because there was a lot of banter about various things, football or whatever, and very little, you know, market share business."

I mean, it couldn't be clearer that it is not the anti-competitive exchanges which were described as banter, it is the rest of it. Of course I have made the point that Mr Stacey gave a full account of what happened as part of the cartel, which is all reflected in the Decision.

The other point made by FPM prior to yesterday is that as a matter of process, the CMA had a different number of exchanges with CPM and SPC, compared with FPM, and it is not clear to us what that is supposed to show, the inquiries

of a function of the questions and queries that the CMA had about those parties' compliance programmes.

As it happened, the CMA had relatively few queries for FPM. The way it was put previously was, "You didn't really engage with us, but you engaged with them," and the point was slightly put the other way round yesterday. But the Tribunal has seen the issue between the CMA and FPM on this compliance point. It is a point of principle, really, which subsists now. FPM has not brought any other evidence or arguments to bear on the issue, so considering the issue further in the administrative process wouldn't have taken the issue any further. There is not an unequal treatment issue.

It is notable that this submission went in a different direction yesterday where it was suggested that the other parties were coached; they were coached by the CMA into providing the CMA with the information the CMA wanted in order to be able to give them a compliance discount.

The particular point which Mr O'Donoghue made was about SBC, and he more or less said that in July 2018, the CMA proposed a 5 per cent reduction for compliance, SBC made no representations, and then the CMA, if you like, led them into providing more information that would give them a higher discount, and that is not at all what happened, as one can see from hearing bundle 2, tab 56, page 955. In the middle of the page, you will see it says, "Mitigating compliance 5 per cent" with a footnote, footnote 7.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Footnote 7 says:

"This is the minimum percentage deduction to be applied reflecting the compliance steps taken so far as set out in SBC's compliance submission dated 10th and 17th. If SBC is able to provide evidence that it implemented the other

outstanding measures provided in those submissions, then the CMA will consider that before determining the final adjustment."

So SBC is not being coached, it is simply saying, "You have already told us you are planning to do other things and if you do those things before we make our decision, then we will take that into account." So the points came from SBC, it is not the CMA feeding it the pathway to a higher discount.

If you turn on to tab 76, in particular page 1052, you can see that SBC through its lawyers, DLA Piper, say they want to attend a settlement meeting to explain the additional compliance steps that have been implemented. So they then come forward with the explanation.

That is the process which was followed. It is not the CMA coaching SBC in (Inaudible), it is the CMA effectively following through on what SBC had said it would do and giving it the opportunity to provide the up-to-date position.

It is 1.00. I have one point left to finish on compliance, which is the complaint that FPM was led into making the case it did by the content of the SO and I can deal with that before lunch or after lunch. I think it will take five minutes possibly.

MR JUSTICE MORGAN: When you have made that point, what will happen next? What do you need to do after that?

MR WILLIAMS: Well, I was going to cover proportionality. I did hope to introduce Mr Williams's evidence. Obviously I have to talk to my learned friend about that over lunch, but I think the position is from our point of view, Mr Williams is awaiting his test result and indeed he lives in an area where I believe there is a local lock-down.

Taking those two things together, the CMA feels he ought to be given the opportunity to give his evidence electronically. For our part, if he doesn't give his

evidence now and doesn't give evidence tomorrow because he is waiting for his test result, we don't really see that the hearing can accommodate his evidence later in the week because we have already rejigged things to accommodate.

MR JUSTICE MORGAN: He is in Wrexham, I think I was told. He has Covid symptoms, he has had the test, he doesn't know the answer. He is ready to give his evidence electronically today.

MR WILLIAMS: Yes, yes. I was hoping to spend a bit of time on that, but obviously there is proportionality and I was going to deal with that. I think what I would like to do is finish this point before or after lunch, whichever.

MR JUSTICE MORGAN: It sounds like it is better to spend five minutes on it straight away.

MR WILLIAMS: I am grateful.

MR JUSTICE MORGAN: Then we have dealt with the topic. Then we will have an exchange about Mr Williams involving you and Mr O'Donoghue, and then we will adjourn for lunch.

Go on to your further compliance point.

MR WILLIAMS: This is FPM's complaint that it was led into making its case based on no implementation, no effect, by what the SO said. We say this really is a bad point, and it is true the SO had a section dealing with implementation. Nothing in the SO suggested that effects or implementation were necessarily ingredients of an infringement; or indeed that it was a defence to label anti-competitive exchanges as banter or craic, and manifestly that is not a proper argument.

The strategy, if I may say so, was obviously deflection and the strategy has not achieved its goal because the CMA made an infringement decision and the

points are not pursued any more. What has happened is that FPM has built up an argument based on a few words in our Defence, in which we were explaining why the Decision is structured differently from the SO and that the CMA wanted to make its decision clearer.

It is a totally opportunistic submission, if I may say so, because what the Defence says is that under ground 1(a), the change in the structure of the Decision is not to have headed findings about implementation under the heading of implementation, which makes them appear to be findings of implementation per se.

In the Decision, the findings are redistributed and linked to the tenets of the agreement of which they are evidence. In other words, implementation was no longer a topic in itself, but it was a strand of evidence of the agreement, and that is what we explain in our Defence at paragraph 62.

The Tribunal is not going to have to decide that under ground 1(a) any more because that issue has gone away. But we say that is really clear on the face of the documents and from the way the material is redistributed.

The point we go on to make in our Defence is that FPM appeared to treat the findings of implementation as bound up with the question of effects because in their representations on the SO, they linked those topics, they dealt with them under the same heading. And the CMA wasn't dealing with effects, this is an object case and it didn't want its findings to be perceived as findings of effects, and that was another reason to redistribute the material in the way I have described. But that was never a point going to whether there was infringement or not because the CMA's original finding was a decision of infringement by object.

Really nothing in the CMA's presentation of the evidence about implementation was

capable of suggesting to FPM that the points it was making in its response to the statement of objections and the points it made in interview were a proper basis for denying an infringement but that they were basic misunderstandings or misrepresentations of the law. That is the central point, really, in terms of a change is made from the SO and the Decision. It has nothing to do with whether there was implementation (Inaudible), it never did.

Beyond that, we accepted in paragraph 63 of our Defence that one sentence in the SO was ambiguous and so it was removed in the Decision and FPM has cited this as an admission that our Decision was ambiguous. It was one sentence and that really is not a basis on which to claim that FPM couldn't understand our findings or had a proper basis on which to deny any infringement at all to claim that it was entitled to a 10 per cent discount. So we say it is an opportunistic point, but it is also wrong in our eyes.

That is the end of what I wanted to say about compliance.

MR JUSTICE MORGAN: Right. Then let me hear what Mr O'Donoghue says about the evidence by Mr Williams. Mr O'Donoghue, I have your icon but I cannot see you on video. Perhaps you are coming through now.

MR O'DONOGHUE: Is that better?

MR JUSTICE MORGAN: Yes, there you are. Very good, thank you. Mr Williams QC is proposing we hear Mr David Williams' evidence this afternoon. What is your position in relation to his suggestion?

MR O'DONOGHUE: My Lord, I am obviously going to be practical about this. If Mr Williams QC can confirm that as of today Mr David Williams has not had his test results back, then in a sense I am stuck with that.

MR JUSTICE MORGAN: The reasoning is that if he has not had his test results, he shouldn't travel or when he gets his result, if it is positive, that would then stop

him, and we might end up not having him in person. Is that the relevance of the test result?

MR O'DONOGHUE: My Lord yes. If he has not today had the result, then it cannot come before tomorrow and therefore he cannot appear in person tomorrow. If he has the result today or may get it, we would much prefer to cross-examine him in person.

MR JUSTICE MORGAN: He could only come tomorrow if he gets a negative result today.

MR O'DONOGHUE: My Lord, yes, of course.

MR JUSTICE MORGAN: If it is a positive result or no result, then he cannot come tomorrow.

MR O'DONOGHUE: My Lord, yes. That is what it boils down to.

MR JUSTICE MORGAN: That does seem to be it. We were told he has not had his result.

MR O'DONOGHUE: We were told on Sunday that he thought it would take up to three days. What we have not been told is whether someone has actually spoken to him over the course of lunchtime and that remains the position.

MR JUSTICE MORGAN: It is the obvious question: what is the up-to-date position so far as you are aware?

MR WILLIAMS: The up-to-date position is that he has not had his result yet.

MR JUSTICE MORGAN: That is up-to-date, that is as of this morning?

MR WILLIAMS: That is as of this morning, I think an hour ago.

MR JUSTICE MORGAN: An hour ago, right. I think, Mr O'Donoghue, we will hear him remotely and it will be this afternoon, which apparently he is well enough to give his evidence remotely. If we put it off, we might not be able to hear his evidence in person either because he gets a positive result or because we are

still in the dark about his result. Does that then resolve the question of hearing Mr Williams this afternoon? I think it does, so we are now able to adjourn.

It is 1.10. Would anyone object to resuming at 2.00 to make the best use of time? If someone says they have things to do in connection with the case and they need the full hour, then I will accept that. But let me ask the question: are we able to start again at 2.00?

MR WILLIAMS: I am able to start again at 2.00.

MR JUSTICE MORGAN: What about you, Mr O'Donoghue?

MR O'DONOGHUE: My Lord, yes, of course.

MR JUSTICE MORGAN: That is extremely co-operative of everyone, I am grateful for that. I am going to impose that upon my colleagues without having a formal consultation. I know that they are trapped in the building so they probably are not planning to do other things, so I am going to make the big assumption. We will start again at 2.00. Thank you, everyone.

(1.10 pm)

(The short adjournment)

(2.00 pm)

MR JUSTICE MORGAN: It is 2.00, I have one panel member.

MR DORAN: Both of us, I think.

MR JUSTICE MORGAN: Both, right. I have both leading counsel, so we will return to your submissions, Mr Williams.

MR WILLIAMS: I am grateful, Sir. I am going to now cover as much of ground 6 as I can and anything I don't cover, I will decide whether to come back to it later in the week.

FPM takes a number of points about proportionality and the first point in its Notice of

Appeal is the reasons challenge which came at the end of Mr O'Donoghue's submissions yesterday. I am going to deal with that point first because in that way, I can explain what the CMA actually decided and why it made that decision as a starting point, and then I will move on to deal with points about acquisitions to some degree, if there is time. If I can start by taking out the guidance at Authorities 1 tab 21.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Paragraph 2.20 is at page 325. I think this is a bit of the guidance where I think looking at it with care does pay dividends. Paragraph 2.20 says:

"In considering adjustments at step 4 for specific deterrence and proportionality, the CMA will consider appropriate indicators of the undertaking's size and financial position at the time the penalty is being imposed."

So this is the year before the Decision. We are talking here about a potential adjustment in both directions; upwards for deterrence or downwards for proportionality. The paragraph is clear the CMA may have regard to particular financial indicators when doing that, and the indicators referred to there include turnover and profitability and net assets. In this case, the CMA looked at those metrics.

Paragraph 273 of our Defence gives a potted explanation of why the CMA looks at those three metrics. You can take it out if it is handy. It is the last sentence of 273.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: It is on page 501 and what is said there is:

"The turnover provided in spite of the scale of the business, net assets is a measure of the value of the business and gives an insight into the assets which are available to pay the penalty, and profitability indicates the extent to which the

penalty will deprive shareholders of a return on their investment."

That is not in the guidance, but it is useful colour. Then going back to the guidance, the focus here is on size and financial position. The reason for looking at this and the significance of this depends on whether you are looking at an upwards adjustment or a downwards adjustment. The reason why it is important for an upwards adjustment -- I just pause because some of my visuals have gone blank and I wonder if that means you cannot see or hear me.

MR JUSTICE MORGAN: I can see and hear you.

MR WILLIAMS: Okay, I will continue. The reason why you would be looking at size and financial position for an upwards adjustment is explained in particular in paragraph 221.

What that says is if you are looking at an undertaking where their presence in the market is a small proportion of their overall business, then the penalty derived at steps 1 and 2 may be small for the size of the undertaking, and the point made really is your rich man and champagne example from yesterday, Sir; a penalty based on the relevant market won't necessarily make a dent in the pocket of the large undertaking and it won't have the necessary impact. The CMA looks at the scale of the overall business to see what sort of penalty is going to make its mark.

If the adjustment being contemplated is downwards, it is the reverse of that. The CMA is considering what is proportionate, given the resources or means available to the undertaking. We have called that in our Defence broadly speaking affordability. That may not be a very satisfactory term for those who are financially versed, but we have used that to broadly capture the nature of the exercise.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: It is the same issue of the impact on the undertakings. On the one hand, is the impact sufficient to deter; on the other hand, is it proportionate so that it is not too onerous?

The Tribunal will probably see that there is some overlap between what I have just said about proportionality under the guidance and what we say is the purpose of the cap under ground 2. I am not going to get into that in detail now, but the headline point is that the cap is a blanket legislative rule which refers to one particular measure, which is 10 per cent of the turnover of the undertaking worldwide.

Step 4 envisages something which is more fact-specific and which considers a range of measures. That is why we say that one can legitimately and sensibly come up with a number at step 4, which is above the cap, and the cap is a backstop. I will come back to that under ground 2.

What one can see then in the following paragraphs of the guidance is that the decision at step 4 is a balance between those two objectives or those two purposes; that is to say making sure that the penalty is sufficient to have a deterrent impact given the size and the financial position of the undertaking, and on the other hand it is not disproportionate in the context of the size and financial position of the undertaking. In fact, that is captured in 2.23, and then in 2.24 it is actually all about a balance; and it is a slightly more wide-ranging balance, but it is all part of that process.

FPM argues that the CMA should have had particular regard at step 4 to the fact that some of its turnover at the point of the Decision is derived from acquisitions it had made and specifically acquisitions it had made in sectors that are connected with the infringement. In my respectful submission, although my

learned friend put that squarely on the basis of proportionality, he struggled really to explain how that adjustment should be made and why it fits in with the logic at step 4. One can see why he struggled, in my respectful submission, because it is not really a point which fits in with what I have been explaining.

Steps 1 to 3 by definition leave out turnover in unconnected markets because that is relevant to turnover. Then one gets to step 4 and the question is whether the penalty which is based on the relevant turnover should be increased given the wider position of the business, the wider position of the undertaking. So the specific purpose of step 4 is to consider whether to move away from a number which is derived from turnover in the relevant markets at the time of the infringement or principal reason; that is to say do we need a higher number to deter, should we have a lower number to make sure it is proportionate? In both of those contexts, the fact that the turnover relates to another sector, or the fact that it is derived from a post-infringement acquisition is not obviously all that relevant.

We do not say that we will never consider this. In fact, the guidance specifically says we might look back to indicators from the time of the infringement. But it is not really of particular significance that the turnover is derived from acquisitions in other sectors when one considers that the purpose of the adjustment.

That is the framework under the guidance. Sorry, there was an echo -- there still is an echo.

MR JUSTICE MORGAN: Yes, I can hear something. I can also hear a whistle now, but it seems to have gone.

MR WILLIAMS: Good. This complaint under ground 6(a) has travelled on a bit of

a journey. If the Tribunal would turn back to the appellant's Notice of Appeal, hearing bundle 1, tab 2, page 338, FPM says there the only -- they complain about the clarity of the Decision, the Tribunal heard yesterday. (break in transmission) ... plucked out of the air by the CMA and (break in transmission) the comparison to turnover and assets -- sorry, is there a problem with my audio?

MR JUSTICE MORGAN: Yes. We could not clearly hear it. While you were reading out a paragraph, it didn't matter, but then you added your own comment and I think we have lost it. We did not get the last minute or so.

MR WILLIAMS: All right, okay. We have this laptop connected to a screen and we have unplugged that to see whether it is interfering with the connectivity. I don't know whether that will improve matters.

MR JUSTICE MORGAN: I can hear you at present, certainly.

MR WILLIAMS: The quote, you can probably see it in front of you, members of the Tribunal. It says:

"The metrics have been added to lend a false appearance of objectivity and it is difficult to avoid the impression that the CMA is intent on finding ways to maximise the penalty on the non-settled party."

The comment I was making is it is incredibly strong stuff. It is alleging the whole thing is a sham and the CMA has a vendetta against FPM for not settling. It is not a submission Mr O'Donoghue made yesterday, he didn't come close to that, and really these allegations shouldn't really be made, they are not proper allegations.

Really, yesterday this came down to two issues: are the CMA's reasons for its Decision clear, do they meet the standard required in law, which is that they are adequately intelligible; and has the CMA appeared to treat the parties

differently, broadly speaking for two reasons? First of all, because CPM had a larger reduction in its penalty and, secondly, because the metrics didn't turn out in exactly the same way for the different undertakings.

Mr O'Donoghue did blend into this discussion points about Marshalls and different calculations that were based at different points on the possibility that the penalty for CPM might be based on the Marshalls turnover. I am going to leave those out, Sir, because it is manifestly clear that the CMA's thinking moved on in terms of the way it was going to divide CPM's penalty, and one can't really draw any kind of comparison between what it did based on the CPM only figures with what it was doing when it was using Marshalls figures. It is just a different calculation. So those previous calculations are really uninformative and do not provide any meaningful point of reference.

If we can then turn to the Decision at 6.61, The CMA deals with proportionality in this section. It starts off by explaining its overall approach with reference to the guidance. The principles that are set out are those which one sees in the guidance, so the CMA directed itself properly with reference to the guidance.

At 6.65 is SBC and in broad terms, the CMA decided that the step 3 penalty for SBC, Stanton Bonna, didn't need to be reduced and it didn't need to be increased. It was a sort of Goldilocks just right penalty.

That had something to do with the fact that Stanton Bonna was a leniency party, it had an extensive compliance programme. That reasoning is quite particular to Stanton Bonna and you will see in a moment that the numbers turned out differently for CPM, so there is more similarity between the steps that were followed for CPM than for FPM.

6.69 is the discussion of CPM. The first thing to note about this is that one can see the metrics for CPM. The first one is striking, the step 3 penalty was

100 per cent of CPM's annual worldwide turnover, not profit but turnover. Actually, if you look down those metrics, they are large numbers, and if you flick over the page and look at 6.73, you can see they are much higher than the initial indicators for FPM. It is 100 per cent of the turnover versus 23/26 per cent, 400 per cent of net assets versus 45 per cent, and so on.

So when FPM claims it is a deep mystery as to why CPM got a bigger reduction from step 3 to step 4, it is not a mystery at all. It is plain on the face of the Decision what is going on here. There is quite a lot of law about this sort of argument where a party selectively picks out comparisons with things that are done for other parties, and the Tribunal on more than one occasion has cautioned against that and said, "You cannot make that kind of selective comparison, you have to follow through the steps." When we have dealt with this in our Defence at paragraph 286, citing *Balmoral* and *G F Tomlinson*, that point doesn't really take FPM anywhere. One can see straight away that the penalty for CPM was going to have to be reduced or it will be deprived of a whole year's turnover, and it is very onerous on other measures as well.

Moving on to FPM. The structure of the discussion is similar. The CMA decided that the penalty is large having regard to these various metrics, and at 6.74 they say they are going to make a reduction. 6.75 states the conclusion that the reduction is going to be to £28 million and it says taking account of the serious nature of the infringement, direct active participation and the impact on competition, these are all factors that go into deterrence, broadly speaking.

Then 6.76 is the other side of the coin, if I can put it this way. They say the figure achieved specific deterrence at a level which is fair, reasonable and proportionate. Then they set out the different metrics. There are numerous metrics, different metrics over different periods -- single year, three-year

average, and so on and so forth, net assets, adjusted assets -- and that is all assessed in the round.

If I can pause there, the actual substantive conclusion in 6.76 that this is a penalty which FPM can reasonably bear at this level is not actually challenged. It was at one stage the subject of quite significant debate. But it is not challenged, we now have a reasons challenge, but I am going to come back to this point. The fact there was a clear debate about it shows that this is not really a mystery after all.

The conclusion in 6.76, I note in passing, is not affected by the fact that some of the turnover had come from another unconnected market or from acquisition. The CMA is here balancing the need for proportionality against the need for deterrence, and both of those factors need to take account of the overall size of the business.

You then have the paragraphs dealing with delay, which we will skip over for the minute. 6.79 picks up the point of principle, which is connected to the delay, but is related to the discussion we are having now about the reason why most recent available audited accounts should be used for the purposes of proportionality and deterrence because the Tribunal wants the most accurate reflection of its size and financial position at the time of the penalty decision.

Then 6.80 basically explains there are cross-checks within the methodology. One is the fact that the CMA has looked at the data over a number of years, and the other is that it has looked at the financial indicators for SBC and CPM. So that is the shape of the reasoning.

Picking up that last point, FPM did complain in its Notice, and I think this didn't make this point in its skeleton quite so much, but it picked it up in submissions yesterday, it complained of differences across the parties. One point is the

reduction for CPM's scale of the reduction, and I have dealt with that point. The second point is it says the metrics are different. It is true that the metrics are different but that is really because there is absolutely no way that all three metrics are going to be the same for every undertaking on every measure across one year and three years.

In our Defence, we have set that out in some detail, in particular at paragraph 287. I think it is worth just showing you that now so you have it in mind. This is tab 5, 289, page 504.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I am sorry, there are two different points. 289 makes the point that you cannot expect the metrics to be the same for every undertaking because you are not comparing apples with apples. It says if you have a discrepancy on one measure, then you cannot align across all measures, you have to go one way or the other.

You can see, for example, that 289(a) says CPM's penalties were similar on global turnover but bigger discrepancy on net assets. The point is when you have that position, you cannot align on both measures, it is just not possible.

In terms of the outturn numbers, 297 and following say that although one cannot achieve parity, there is a striking level of consistency for CPM and FPM. The numbers for global turnover, in 289, are pretty similar; FPM's is 11% and 9% and CPM's is 10% and 12%, so CPM's is ever so slightly higher, I suppose.

Average operating profit over three years, again really quite similar with the amount for CPM being slightly higher. 289 deals with other indicators and says again CPM is notably higher. So there is certainly a level of comparability across the measures and where there is not comparability, there is a tendency towards the comparison being favourable to FPM.

But the point we make more generally is that this has to be looked at in a broad, general way. There is never going to be parity but the CMA has done a sensible and meaningful cross-check which tends to suggest that the penalties are even-handed. That deals I think with the complaint about comparability.

In its skeleton, FPM complained that the CMA shouldn't have been looking at affordability at all as part of proportionality and it said this is covered elsewhere in the guidance under the heading of "Hardship". Just standing back, it is a surprising submission that the CMA shouldn't have halved FPM's penalty on this basis because it was concerned the penalty was too onerous, too disproportionate. The point was not repeated yesterday, but in any event, the answer to the point is the CMA has followed its guidance, and the guidance provides for the CMA to balance various factors against the size and financial position of the undertaking and to reduce the penalty to the extent it thinks it ought to and that is what the CMA did.

It is possible that on that approach, the CMA will come up with a penalty it considered to be proportionate but where there would still be a case for relief on grounds of hardship because the proportionality assessment is a balance between factors pushing up and factors pushing down. So it is not illogical to say that one can come up with a penalty we think is proportionate but which nevertheless might be subject to reduction. Clearly the proportionality assessment is doing some of the same work, but it is not illogical to say that there might be room at the end of the process for a hardship reduction. But anyway, the point is that the CMA has followed its guidance and it has done what it said it would do.

I think it is important to show you that FPM did understand that this was the issue

because one can see that from its response to the draft penalty statement, which is hearing bundle 3, tab 85, at 1599. One can see from that page, this section is specifically about step 4. If you move through to page 1603, paragraph 5.8.4, this says:

"FPM also considers that a penalty of this scale in very high proportion to its current net assets and profitability would have a real and immediate impact on how FPM carries its business going forward ..."

(a) talks about significant impact on current net assets, then the discussion moves on to -- so it starts off talking very much in the language of the guidance and the metrics, then it goes on to talk more generally about FPM's financial position and what I would broadly call questions of affordability and financial impact.

Then if you turn on to tab 90, which is page 1749. this is representations on materials, further representations in relation to the DPS, draft penalty statement. Then if you go to 1756, they then provide further particulars of the impact of the proposed fine on FPM. 3.11 is more information about net assets and then it goes on to talk about the impact on banking covenants, and so on.

They are saying they cannot afford it, they are specifically saying under step 4 and the proportionality assessment that they cannot afford it. They are engaging in a debate on the terms of the guidance and making the representation they want make about how the CMA ought to approach this. It is important to make the point that those arguments were all made but they are not made any more. FPM doesn't say the penalty was disproportionate having regard to all that evidence, it is not pursuing that point.

The point we make really is that if one judges the CMA's Decision on its own terms in

terms of the way it applied the guidance, the things it took into account and the conclusion it reached, it is not actually an issue that the penalty is proportionate in the sense that it won't have an undue financial impact on FPM, FPM can bear the penalty. All the points it made about financial impact and prejudice and banking covenants, and so on, it doesn't make those points any more.

There is no basis for a merits appeal against that Decision, and indeed there is not a merits appeal against it. The complaint is on the basis that the Decision is not clear. We say that FPM fully understood the way the CMA approached this: the things it took into account, the balance it was striking and it made its representations. The broad shape and purpose of its Decision is not really an in issue. What is left of this is in essence a complaint that the Decision isn't granular enough and that the CMA has not explained exactly why 11 per cent of turnover is the right number, and so on. But we have two answers to that point.

The first is that is not the nature of the Decision; first of all, it is a balance between the factors pushing the penalty up -- deterrence -- and the factors pushing the penalty down; and secondly, within the financial impact assessment, it is a balance between several different metrics over different periods and indeed across different parties.

So the question is not why a penalty which satisfies any particular metric at a particular level is appropriate, it is what is the purpose of the judgment in the round. I have explained the nature of that judgment and when the CMA's judgment is assessed on its own terms, it is not actually challenged.

The second point --

MR JUSTICE MORGAN: Can I just fit in the submissions I am receiving via

a reasons challenge with the submissions I am receiving about the nature of an appeal.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: We are familiar with what a decision maker must do in terms of giving adequate reasons. In the judicial forum, if the lower court does not give adequate reasons for its decision, then that is an error of law and its decision can be set aside for error of law. That does not of itself get you anywhere, that is just setting aside the decision. A new decision has to be made by somebody; it can be remitted to the lower court or it can be determined by the appeal court. If we say the reasons were adequate, that is the end of ground 6(a) as you submit; is that right?

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: 6(b) is different, but 6(a) is the reasons are not adequate. If we say they are adequate, then we have dealt with that ground of appeal. If we say the reasons are not adequate and the ground of appeal is upheld, what does one then do? Would we have to set aside the decision or that part of the decision and somebody would have to make it again and this time giving adequate reasons?

MR WILLIAMS: Yes. I mean, this is linked to your discussion with Mr O'Donoghue at the end of yesterday, Sir, when you said what are you actually asking us to do.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: But the points are linked to the points I have been making in this event, Sir: they complain they cannot understand the Decision -- a variety of points, but the main point they seemed to be making in the first place was that the Decision wasn't granular enough. But actually there is a disconnect

between that point and the fact that they have not actually challenged the Decision on the merits.

MR JUSTICE MORGAN: Let me go to that. Is that -- you may be right, just let us explore it. If they had wanted to say that on this appeal the £28 million figure or the amount of the deduction at step 4 was not appropriate, it would be open to them to say that because we are able to say what we think is appropriate, subject to the points you have made about the approach.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: But ground 6(a) is not, you say, a statement that the figure is not appropriate, it is a challenge to the reasoning, then 6(b) is a specific point about acquisitions. They don't substantiate that ground of appeal because it was perfectly permissible and appropriate to take the up-to-date financial position of FPM when considering both deterrence and proportionality.

MR WILLIAMS: Yes, Sir, but I think the way --

MR JUSTICE MORGAN: Those are the -- sorry, you have frozen again.

MR WILLIAMS: Yes, sorry, I thought I might be. I don't know if I am still frozen.

MR JUSTICE MORGAN: Go ahead.

MR WILLIAMS: I was only going to say that actually the way ground 6(a) is put, it is put in terms which really are academic because the FPM have the debate with the CMA about the substantive question of proportionality and affordability, it engaged on things like net assets and profitability and all the rest of it. If those were all points it wanted to pursue, they could have pursued them alongside a reasons challenge. But it has not pursued those points, so ground 6(a), if the Tribunal accepts my submission that we have had that debate with FPM and they have not renewed it, then ground 6(a) is academic,

Sir.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: FPM would no doubt say, "Well, actually that logic doesn't work because if we do not understand the Decision well enough because there is a lack of reasoning, then it is very difficult for us to challenge it on the merits." But there is an absolute disconnect, in my respectful submission, between that sort of explanation of its position and what one has already seen in the response to the DPS.

MR JUSTICE MORGAN: I will just pursue this a little longer. It may go a little further that a reasons challenge or an appeal of this kind on its own, if it is just a reasons challenge, it doesn't really get you anywhere. You have to really combine a reasons challenge with an appropriate challenge.

What we are asked to do is to come up with the appropriate penalty and if it was said the figure is too high, it is not appropriate, well, we would have to engage with that. We would properly listen to the submissions made to us and we wouldn't be restricted to the reasons given by the CMA.

For example, say the CMA did not put forward a particular reason but you make the submission to us, which we think is absolutely right, that the best reason for doing something is the following reason. We would be free to give effect to that because it has been put to us and it is a merits appeal.

MR WILLIAMS: Unfortunately, it is not quite that, Sir, in the sense that it is a merits appeal from FPM's point of view, but there are rules which say the CMA cannot embroider its decision. There is case law which --

MR JUSTICE MORGAN: Yes, we went into that -- you are quite right. We went into that at the case management conference.

MR WILLIAMS: Yes. But it is true that if you took the view that the CMA's penalty

was proportionate for reasons the CMA had not given, but (Inaudible) reason to support that level of penalty. If you concluded that, then you could impose the same penalty for different reasons.

MR JUSTICE MORGAN: I think the earlier cases you are referring to about putting forward new matters was really about new evidence, was it not --

MR WILLIAMS: That might be right.

MR JUSTICE MORGAN: -- not new argument. These questions on proportionality are matters of evaluation and based on all of the evidence which is already in. My reaction is it would be open to you to submit to us that that evidence provides a powerful reason for a particular result and we would listen to the argument and we would not step outside all of the evidence already in, but we would adopt reasoning that was persuasive. The fact that the CMA had not urged that consideration in its own reasoning, at the moment I doubt that would stop us giving effect to it.

But where I am getting to is if there is no appeal against the Decision to reduce £59 million to £28 million on the grounds it is inappropriate, then where does the reasons challenge take the appellant?

MR WILLIAMS: Yes. I think we have tried to make the point both in our Defence and in our skeleton that they don't actually dispute the substantive conclusion that the penalty is proportionate.

MR JUSTICE MORGAN: So you are making that point, in which case as you put it a moment ago or five minutes ago, this debate about intelligibility and clarity of reasons is academic.

MR WILLIAMS: Yes. I am sure Mr O'Donoghue --

MR JUSTICE MORGAN: The other point which Mr O'Donoghue will grapple with is if we do have to engage with this point and we do have to form some view as

to a minimum standard for reasons, we will see how he explains to us how you address proportionality. You are going to consider decreasing the figure earlier arrived at, you are going to have regard to a number of financial indicators because you are not plucking a figure out of the air but you are feeling your way to a conclusion which you feel properly reflects the tensions in play.

The English language can only do so much to describe that process. Ultimately a judge has to say: I think this is right in evaluative questions like these. Is that wrong?

MR WILLIAMS: No, no, that is very much how we put it. In fact, the last point I am going to make about this is with reference to a case which more or less says that, Sir.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: I want to make one point to you --

MR JUSTICE MORGAN: Please do.

MR WILLIAMS: -- to something which you have just said. In our submission, it is going to be extremely difficult for Mr O'Donoghue to now say at what level he thinks the penalty ought to have been imposed to satisfy the requirement of proportionality without reviving an argument which FPM put to the CMA as part of its response to the DPS but which represents an unpleaded ground of appeal. All of those arguments were made, none of them have been renewed, and all they have chosen to bring forward is the reasons challenge.

It is not acceptable, in my respectful submission, for Mr O'Donoghue to basically close the case on the basis of a point which they have chosen not to pursue by way of appeal, which I fear he is going to have to do in order to answer your question, Sir.

MR JUSTICE MORGAN: I did ask the question. I did say, "How do you put it?" and what you are saying to me and to the Tribunal is if he doesn't answer that question, it will be open to you to say that is not a pleaded ground of appeal.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: All right, we will see how that develops. Thank you.

MR WILLIAMS: I said I was going to show you the *Virgin Media* case at tab 67. I am not sure Mr Doran needs to be shown it, actually, I believe it is familiar to him.

MR JUSTICE MORGAN: He will know it, I daresay, but you show the rest of us.

MR DORAN: A refresher is never any harm.

MR JUSTICE MORGAN: There you are. You are encouraged to tell us more about it.

MR WILLIAMS: It is Authorities 6, tab 67.

MR JUSTICE MORGAN: What page is that?

MR WILLIAMS: I am going to pick it up at paragraph 115, which is Ofcom's penalties guidelines. I am not going to read them out, but the broad point is --

MR JUSTICE MORGAN: I need the page too electronically. Sorry, I am not being pedantic, I just need it.

MR WILLIAMS: No, I understand, Sir. It is 4429.

Paragraph 115 is just for your note, that is the guidelines. The point we make about the guidelines is that they are not the same multi-stage structured approach one sees the CMA's penalty guidelines, it is much more looking at a range of matters in the round.

If one moves forward, 117 says:

"Whilst Virgin Media did not challenge the guidelines as such, in substance their case came close to it. The fundamental objection was that the penalty had

been set "in the round", rather than by a staged process might allow Virgin Media to determine by how much the quantum of the penalty was affected by individual factors. But considering all the circumstances in the round is precisely what the decision maker is mandated to do by the guidelines. Furthermore, that approach is a legitimate one to adopt. Whilst it is essential that a decision is adequately reasoned such that it can be understood how the decision was reached, it does not follow that the decision maker must spell out precisely how each item is weighed in the balance".

So we are very much in the territory we are in in this case, Sir.

I just wanted to make the point that the CMA's penalty guidance is multi-stage but paragraph 224 is, in the end, an assessment in the round on step 4, so it is in that sense on all fours with the exercise which is being considered in this case.

Moving through to 127. This is more grist to the mill of the paragraph we were just looking at. It makes the point that:

"Where a decision maker makes a decision in the round, that may make it more difficult to determine the relative weight of different factors. That does not mean the decision is unfair or arbitrary or that it is inadequately reasoned. Virgin Media is not in the position of it being unable to understand the process or prevent it from being able to challenge the penalty effectively."

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: This is where I think the points I made about the DPS comes in because we had that debate on the merits and FPM made the point it wanted to make. They are not renewed, but it is not the case that the approach to the penalty has foreclosed meaningful debate. It is just that FPM has not pursued those points.

128 describes the weighing of various factors in the balance in that case and explains that kind of reasoning is satisfactory. If one then moves through to 4443, this is really just to make good a point I made earlier on, paragraphs 152 and 153. This is an example of the approach I described earlier on where the Tribunal has regard to the fact that this is a subjective and discretionary assessment and they don't find any fault with what Ofcom had done and therefore they leave it alone.

So it is an illustration of how in an appeal for various jurisdictions, it is perfectly permissible to recognise that the decision maker has made a reasonable decision where there is no single right answer and no basis to set it aside, and the Tribunal doesn't inevitably wade in and make its own decision in that situation.

MR JUSTICE MORGAN: I will just scan those paragraphs, if you give me a moment. (Pause). I have read that, thank you.

MR WILLIAMS: Sir, we rely on those observations as an illustration of the general points I made this morning. But we also rely on the case generally as supporting the view that it is entirely lawful for the CMA in this sort of context to make a judgment in the round to explain the factors that it has weighed. It is perfectly obvious within what framework that the CMA has weighed those factors and, in all the circumstances, there is no question of this being an inadequately reasoned Decision.

Really, the two points I have made under this heading tie together because I made the point that the nature of the judgment is not really susceptible of a breakdown, it is a judgment in the round. It must follow that if that is the case, it cannot be unlawful to set out your reasoning in that way in fact.

That is ground 6(a). I have started to touch on ground 6(b) and its focus on

acquisitions, I have given you the principal reasons why the proportionality assessment takes account of that total turnover at the point of the decision. Ground 6(b) has evolved significantly since the Notice of Appeal when it appeared to be making points about the cap. We will deal with the argument as it is now put.

The point that is made under ground 6(b), the first point made, is that actually *Kier* gives some credence to this point about acquisitions and I just want to deal with that. This is Authorities 4, tab 49, and the first thing I want to do is to show you what the issue is because you raised this with Mr O'Donoghue yesterday, this issue about the MDT, or minimum deterrence threshold.

MR JUSTICE MORGAN: Yes. I have read *Kier* overnight but by all means take us to it. It begins at page 3007, I will just get to the beginning of the case.

MR WILLIAMS: The MDT is explained on page 3023, paragraphs 46 and 47.

MR JUSTICE MORGAN: I am just getting there. 3023, yes.

MR WILLIAMS: If the Tribunal just wants to look at paragraphs 46 and 47.

MR JUSTICE MORGAN: Yes. (Pause). Right.

MR WILLIAMS: So that is the issue in *Kier* and the complaint about the MDT is dealt with starting at 164, which is on page 3064. You have read this, Sir, so I will not belabour it.

MR JUSTICE MORGAN: Yes, I have.

MR WILLIAMS: I just want to pick up the points, really. At 164, one of the main complaints is that the MDT is one size fits all and doesn't follow a case-by-case basis. That is the issue in a nutshell there. The consequence of that approach as 165 explains is often an enormous uplift.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: As 166 identifies, there is a concern that if one takes that one size

fits all approach, the OFT, as it then was, failed to stand back and assess whether the penalty was proportionate. That is the issue, that is the concern.

You then get to paragraph 169, which is the paragraph on which Mr O'Donoghue places particular reliance, and in particular the example of the multinational oil corporation, which is dealt with towards the end of that paragraph. The objection is debating the penalty for such an undertaking on the one size fits all mechanical calculation.

This is not a point about whether the turnover of that undertaking in unconnected markets should be particularly in focus or out of focus as part of the penalty assessment; the objection is to a process of deriving that undertakings penalty on the basis of a flat percentage which is going to generate a huge and disproportionate number.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: So this case is not saying that the CMA should be cautious about basing its penalty at step 4 on turnover which includes acquisitions in other markets, it is not making that point at all. It is saying that the OFT shouldn't have used a blunt instrument to decide what sort of penalty should be applied for deterrence purposes.

Just to pick up a couple of other references: 170 makes the point that the MDT was one dimensional in the sense they only have one metric. That is not a point or a criticism that can be made in what the CMA has done in this case. In particular, at 177, it comes back to the point of principle and says:

"It is perfectly rational for a bigger undertaking to receive a more severe penalty than a smaller company, not just because its turnover in the marketplace would be bigger, but also because the OFT is entitled to form the view that having regard to its size and financial strength, such a company will would require a

larger amount."

So that is exactly the point in the guidance.

One can see what the issue in *Kier* was: the Tribunal objected to the MDT because it was a one size fits all blunt tool. It absolutely isn't saying the CMA should disregard turnover which is unconnected with the infringement or that there is a particular sensitivity about that. In fact, 177 is actually saying the opposite: the oil company is an example of the vice of the MDT, it is not a point in itself.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: That is *Kier*. The rest of 6(b), we then move into the CPM and Marshalls issue. Obviously we have limited time in this hearing, Sir, and it did seem it me from your exchanges with Mr O'Donoghue that you really have in mind the points that we made about this and the reasons why FPM really cannot make this point add up to a ground of appeal in its own favour.

I am not inviting you to comment on that at the moment, but I do have to make a decision about how best to use my time.

MR JUSTICE MORGAN: Yes. That is absolutely fine, yes.

MR WILLIAMS: If you have particular questions about this part of the case, I am sure you will put them to me. But in a nutshell, what we say about this is that FPM is trying to work up an argument that what is really is going on here is that the CMA has decided to exclude from the penalty Marshalls' turnover because it is turnover relating to acquisitions and unconnected with the infringements. It says, "If you take that view, you should do the same for us," to which we say that is not what we did, we didn't bring into account Marshalls' turnover because it did not commit any infringement, it is not a party to the Decision and we didn't fine it.

We never got to the stage of excluding turnover based on acquisitions because they

were not even a party to the infringement, to which FPM says, "They should have been a party to your Decision because it is part of one undertaking." Now, we do think we are slightly through the looking glass at this point of the argument, but there is a legal point I just need to make in relation to that bit of the case.

FPM relies on the successor liability line of cases which says that where the person that commits an infringement no longer exists legally or economically, the CMA can attach liability to the economic successor to make sure there is someone to enforce against.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Just to be clear, we don't say this line of case law only applies to entities which have ceased to exist legally, but I think one sentence in our skeleton might have been a bit compressed, but we absolutely don't take that point.

The point we make is that the CMA is not obliged to enforce against the successor. This is a power which exists to make sure there is someone to enforce against. If CPM had ceased to exist legally and economically, this would have been a classic succession case. But actually CPM didn't cease to exist legally, albeit it transferred its assets, but the CMA considered the position and found it was able to fine CPM on a basis which it thought was adequate for the statutory purposes. So the CMA didn't need to use its power to penalise its successor.

Was that an error of law? I want to show you three authorities. The first is the *Stora Kopparbergs* case, which is Authorities A7, and I just want to show you one paragraph.

MR JUSTICE MORGAN: What page?

MR WILLIAMS: It is page 5232.

MR JUSTICE MORGAN: Thank you. I am there.

MR WILLIAMS: 37 says:

"It falls in principle to the natural legal person managing the undertaking in question when the infringement was committed to answer for the infringement, even if at the time of the decision finding the infringement another person had assumed responsibility for operating the undertaking."

So that is why on the face of it, Marshalls isn't at play. FPM relies on two succession cases. The first is in this bundle at tab 92, and this is the Autorita case. I hope you don't think I am taking this too quickly, Sir, I just want to show you.

MR JUSTICE MORGAN: No, just give us the references, the page I need to be reading on.

MR WILLIAMS: It is page 5614.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Paragraph 39 articulates the principle of personal responsibility based on an entity infringing the rules, and then notably 14:

"As for the circumstances in which an entity which is not responsible for the infringement can nevertheless be penalised for that infringement. It must be held that this situation arises if the entity that has committed has ceased to exist in law or economically."

So that is a power to hold an entity liable if that is necessary to find someone to enforce against.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: There is an observation at the end of 40. It says that:

"A penalty imposed on an undertaking that continues to exist but has ceased economic activity is likely to have no deterrent effect."

One can understand the concern in general terms, but the CMA found in this case that it was able to fine CPM on a basis which met the purposes or met the statutory objectives. You can see from 41 that that is the rationale for the successor principle.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: That is saying we need to make sure you can enforce against somebody, but it is not suggesting that the authority is under any obligation to do so. *Skanska* is the other authority on this point. That is in the last authorities bundle, I think, tab 127.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I think the key paragraph in all these cases seems to be 39, it seems to be almost a magic number -- it is not quite actually, paragraphs 38 to 40.

MR JUSTICE MORGAN: 514, I will go there.

MR WILLIAMS: 7537.

MR JUSTICE MORGAN: Thank you.

MR WILLIAMS: 38 says:

"A restructure does not necessarily create a new undertaking free of liability.

"39. It is not contrary to individual responsibility to attribute liability for an infringement to a company which has taken over the company where the latter has to exist.

"40. The court stated for the effective implementation of the rules, it may be necessary to consider that the purchaser is liable ..."

It is the same point: it is a power to enforce but there is no obligation to enforce. In my submission, there is no reason to do so if one can impose an appropriate penalty on the undertaking that is actually liable for the infringement and who

committed the infringement.

I think, Sir, you have all the consequential points about even if that were wrong, there is no unequal treatment because FPM is not arguing the same decision should be extended to it, it is arguing for a different decision, and so on and so forth. I do not think I need to labour those points, they are clearly dealt with in writing.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: But I thought it was helpful to take you through those legal authorities because actually the argument breaks down at that point, quite apart from anything else.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: I think there is one other new point I need to make in relation to this ground. I see the time and I will just pause and take stock in a moment. The new point is footnote 1130, which was the suggestion that the CMA had brought FPM's group turnover into account but had not done the same as far as CPM and Marshalls were concerned.

It is probably helpful for you to have that footnote in front of you because it is --

MR JUSTICE MORGAN: Yes, I have that, right.

MR WILLIAMS: We are reaching the stage of the case where my bundles are falling apart, Sir, I will just take a moment. It is page 242.

MR JUSTICE MORGAN: I have it. It is 1130.

MR WILLIAMS: That is right. I am going to tell you what this footnote is about and you can then look at the footnote in that context.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: One can see in 6.73 that the worldwide turnover is an average over -- sorry, it is a single year on average over three years, and I think C and

D are also averages. B is not an average, it is a single net assets figure.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: But the concern in relying on a single year's figure is that the figure may be depressed by transfers of assets out of the business, particularly in the run-up to a decision to impose a fine which is going to take account of these kind of metrics, but also as part of a wider appraisal of the undertakings's financial position.

So there are two things going on in this footnote. The first is that the CMA explains that the adjusted net assets figure reflects the reduction of dividends of almost £17 million. So that is the difference between the net assets and the adjusted net assets figures.

Then there is a second point going on, which is that over a comparable three-year period, FPM had transferred the sum of £58 million out of its business to the group parent. The CMA took that into account because although this is a single year point reference, it looks at these numbers over a three-year period and in 2016 or looking back over that period, that sum of money had been FPM's assets. As part of that broad exercise of looking back over three years, it noted that within that three-year period that sum had been FPM's and that is taken into account in the calculation.

But the purpose of that is to identify what were the assets of FPM itself in that window and in that sense, what the CMA is doing is comparable to what it did to CPM, which is to look at the assets of CPM as opposed to Marshalls, which wasn't party to the infringement.

I don't need to labour the point because I think, Sir, you have the point that whatever is going on in this footnote has absolutely nothing to do with the complaint made about acquisitions made by FPM over the relevant period, it is just

dealing with something else completely. But I thought it was helpful to give you that additional explanation.

MR JUSTICE MORGAN: If we go to 6.76(b) where we have the same point about now we are having percentages by reference to £28 million rather than £59 million.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: So 6.76(b) is 21 per cent of the net assets even after it has given £58 million to group company. One could just look at that figure, 21 per cent, and assess whether that is a disproportionately high percentage. But if we bring in footnote 1130, we then find it is 19 per cent of adjusted net assets.

MR WILLIAMS: I think it is right to say that the adjustment of £58 million is not the adjustment made in the adjusted net assets figure, it is taken into account in the first figure because if one looks back over that three-year window, it was part of FPM's assets. It is a point that was made for the first time yesterday -- it is a new point and so I am explaining without the benefit of the pleadings or submissions -- but I thought it was important to respond and to explain to you that that is what is going on. It is not bringing in the turnover of the FPM parent company, which is the way Mr O'Donoghue sought to put it, it is the opposite. It is actually making sure that they have a proper picture of what were FPM's assets over the relevant period.

MR JUSTICE MORGAN: Yes, they were FPM's assets, and if they had kept them then, you would be dealing with 19 per cent of its net assets. But because it gave them away -- or transferred them, to use a more neutral term -- to its group company, its net assets went down so the fine becomes a higher percentage, 21 per cent.

MR WILLIAMS: No, I think it is right to say that the difference between the 21 per cent and 19 per cent is just the dividends figure, so the adjustment is the adjustment for dividends.

MR JUSTICE MORGAN: I was going to ask you: footnote 1130 gives me two asset figures which are £17 million apart, £131 million and £148 million.

MR WILLIAMS: That £17 million-odd is attributable to the dividends.

MR JUSTICE MORGAN: Just dividends?

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: So what is done with the £58.3 million?

MR WILLIAMS: I believe that is already reflected in the 45 per cent and the 21 per cent.

MR JUSTICE MORGAN: But take these figures £131 million and £148 million, have they adjusted upwards to put back the £58.3 million?

MR WILLIAMS: Yes, I think the answer is yes.

MR JUSTICE MORGAN: Both of them, £131m and £148m?

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Those include the £58.3m?

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Let me make a note. (Pause).

If you did something wrong here by putting back the £58.3m, one would need to reduce -- take the £148m, you need to reduce £148m by £58.3m. You would need to reduce it to £90 million but then you would need to express the fine as a percentage of £90 million. Is that how you would take this point forward?

MR WILLIAMS: You say if we did something wrong. There has never been a complaint about this, and these are obviously FPM's own numbers.

MR JUSTICE MORGAN: (Overspeaking) that this shows erroneous treatment of the

position because you are not reflecting FPM's assets, you are increasing their assets at the relevant time by £58.3m, so he is saying you cannot do that. I am not saying he is right, but if he were right, then I would reduce £148m by £58m and get £92 million. I have then expressed £28 million as a percentage of £90 million, which would be 30-odd, 32/33 per cent?

MR WILLIAMS: I am afraid I haven't got the numbers in my head, Sir. I think the sort of calculation you are describing is the calculation that would follow from a complaint that this shouldn't have happened. The point I make is that it has never been suggested as a matter of pleading that this is something that shouldn't have happened. What has been suggested is that this is an example of the CMA doing something which demonstrates that it took into account parent company.

MR JUSTICE MORGAN: Right, I think I understand everything that has been said, so that is all you have to do. Right.

MR WILLIAMS: I see the time, it is 3.15, and we do have two witnesses to deal with. I haven't said anything to introduce Mr Williams's evidence which I wanted to do, I have been slightly thrown out of that course with a view to responding to the Appellant's (Inaudible) submissions.

MR JUSTICE MORGAN: We do really need to begin the evidence, so I would encourage the parties to go to that stage. We have closing submissions which can sweep up any missing points.

Which witness will be called first?

MR WILLIAMS: I believe Mr Mulholland.

MR O'DONOGHUE: My Lord, yes, that would be the usual sequence.

MR JUSTICE MORGAN: Indeed it would. Will Mr Mulholland take the oath or affirm?

MR O'DONOGHUE: My Lord, I think he will affirm.

MR JUSTICE MORGAN: I will ask him. I will take him through the form of affirmation when he presents himself as a witness.

Can he be made ready, and so on, to participate? We will get on with him. His statement is in bundle 1 at divider 4.

MR O'DONOGHUE: My Lord, yes. I think you are muted, Mr Mulholland. We cannot hear you, Mr Mulholland, I think you are still muted.

My Lord, I wonder whether that could be a convenient moment for a break to see if this technical issue could be sorted out in the next five minutes?

MR JUSTICE MORGAN: Can anyone see Mr Mulholland? I can see his icon but not his picture.

SIR IAIN: I can see him, but I can't hear him.

MR DORAN: Likewise.

MR JUSTICE MORGAN: I cannot see him. I clicked on his thumbnail but I am not getting him.

MR O'DONOGHUE: My Lord, would it make sense to break for five minutes for this to be resolved?

MR JUSTICE MORGAN: Yes, we will take our five-minute break at this point and then sit through with the witnesses. The Tribunal members will leave the hearing and we will be back in five minutes. If there is a problem, you can come back to us.

(3.20 pm)

(A short break)

(3.26 pm)

MR JUSTICE MORGAN: We are back in session, we have Mr Mulholland. Thank you, Mr Mulholland, for coming to give evidence. Your evidence will be

on affirmation, as I understand it. Will you repeat the affirmation slowly, and if you follow them, you will say them after me.

Is your full name Don Mulholland, or is it a different full name?

A. Donald Patrick Mulholland.

MR JUSTICE MORGAN: I think I will put my speaker up a bit because you were a bit faint there.

MR DONALD PATRICK MULHOLLAND (affirmed)

Examination in chief by MR O'DONOGHUE

MR O'DONOGHUE: Mr Mulholland, good afternoon. My name is Mr O'Donoghue, I am FPM's counsel in these proceedings.

I hope, Mr Mulholland, you have in front of you a bundle of documents. In my bundle, it is the first hearing bundle, tab 4, if you can turn to that. It contains a copy of your statement and if you can open up tab 4, please, is this your first witness statement in these proceedings dated 16 December 2019?

A. That is correct, yes.

Q. Within the same document, if you can turn to -- in my bundle it is page 403, it is page 5 of the document you are looking at.

A. Right, okay.

Q. Is that your signature under the statement of truth?

A. That is correct.

Q. Does the evidence in this witness statement remain your evidence in these proceedings?

A. It is.

MR O'DONOGHUE: If you can wait there, Mr Williams for the CMA may have some questions for you.

A. Thank you.

Cross-examination by MR WILLIAMS

MR WILLIAMS: Good afternoon, Mr Mulholland.

A. Good afternoon.

Q. I am Mr Williams, I am going to be asking you some questions about FPM's compliance policy and its compliance programme.

You refer in your witness statement to some training slides, which I think contain the training programme prepared by Pinsent Masons, is that right?

A. That is correct, yes.

Q. You also refer to a competition law compliance manual?

A. That is correct, yes.

Q. Is it right that these two things, the training slides and the compliance manual, they cover basically the same ground but the manual is a bit more detailed?

A. They are largely one and the same thing, yes.

Q. So if someone has completed the training, they should understand the competition law rules set out in the manual; is that right?

A. They should have a reasonable understanding, yes.

Q. I am going to ask you some questions using the manual because I think it describes things a bit more fully.

A. Yes.

Q. The manual is in folder 3. Do you have the manual in the same format, or do you have them in a different setup?

A. Go ahead, yes.

Q. I see you have it on a screen; is that right?

A. That is correct, yes. Go ahead.

Q. Do you have the manual in front of you?

A. Yes, I have.

Q. You say in your statement that this manual was approved by the FPM board, so does that mean all of the board will have read the manual?

A. That is correct, yes.

Q. Do you know whether people who have done the training programme that you refer to, whether they will have actually read the manual as well as having seen the slides?

A. Well, they are directed to -- each and every time that training was undertaken, they were directed to the manual which we -- which we have prepared.

Q. Are they directed to that to read it for themselves or are they directed to it as a point of reference when they need it?

A. They are directed to read it for themselves and as a point of reference if they think they need to.

Q. Can you turn to internal page 12 of that manual which has the heading "Information exchange".

MR JUSTICE MORGAN: Can you give me the particular page reference?

MR WILLIAMS: It is 1622, Sir. From now on, I will give both references. I am not sure whether Mr Mulholland is working off the same pagination.

MR JUSTICE MORGAN: I just want to check your reference. Did you say 1162?

MR WILLIAMS: 1622.

MR JUSTICE MORGAN: Sorry, right.

MR WILLIAMS: Sorry, Mr Mulholland. You can let me know when you have got there if that helps.

A. Yes. Which part of the compliance manual, sorry?

Q. I was looking at page 12 which has the heading "Information Exchange".

A. Right, go ahead.

Q. Do you see there is a box there which says "Case study: T-Mobile". Underneath that box, there are three paragraphs.

A. Apologies.

Q. When you find them, I would like you to read those three paragraphs to yourself which start, "As the next case study shows ..."

A. Yes, "As the next study shows ..."

Q. That is right. Do you want to read that to yourself?

A. Yes, I have.

Q. This section of the manual is explaining the competition rule that it is unlawful to attend a meeting where confidential information is shared between competitors even if you don't share any of it yourself. Do you agree with that?

A. Yes.

Q. Would someone who has done the training and understood it understand that principle?

A. Yes. Yes, my understanding is yes, they would understand, they would understand that particular premise of that -- that they are not to share information.

Q. At least they should understand it?

A. That is correct, yes.

Q. Someone who has completed and understood the training would know that it is not permissible to go to a meeting with competitors and, if I can put it this way, bluff your way through, giving nothing away, but taking away confidential information about your competitors' plans; do you agree with that?

A. That -- that is correct. I suppose we are saying here what is -- what we have done here is we have engaged legal advice, you know, to give the what is allowed and what is not allowed. That -- that is where we were giving

information and sort of saying, "Look, this is not allowed in, to go to the meetings in the first instance."

Q. Yes, but can I just focus on the specific scenario I put to you. I think we agreed on what this section is saying about the competition law rule, and the question I asked you was whether someone who has completed the training would know that they shouldn't go to a meeting with competitors and effectively give nothing away but take away confidential information about their competitors?

A. That is correct.

Q. If they have not understood that, the training has not done its job; do you agree?

A. That would be correct, yes.

Q. If you now look at the next page, page 13.

A. Yes.

Q. Do you see there is a heading which says "4.2: Guidelines"?

A. Yes.

Q. Then the third paragraph -- feel free to read the three paragraphs if you like. It is the third paragraph I am interested in.

A. "It does not matter..." that one?

Q. Yes.

"It does not matter if their agreement has no effect, e.g. an attempt between competitors to raise prices can be anti-competitive if that attempt fails or was never actually implemented in practice."

Someone who has done this training and understood it would know that if you enter into an anti-competitive agreement but you don't implement it, in the words of this paragraph, that doesn't matter, there is still an infringement of competition law?

A. That is correct.

Q. So there has been an infringement of the competition rules even if the agreement doesn't affect pricing at all?

A. Pardon, could you repeat that again please, sorry?

Q. Yes. The training is telling people who do the training that there can be an infringement of competition law even if anti-competitive agreement doesn't affect prices at all?

A. Yes, that is what the training does -- does allude to.

Q. Again, someone who has completed and understood this training, would you confirm -- sorry, I think there is quite a lot of noise on the line. I don't know whether it is ...

A. Apologies, could you repeat that last question again, Mr Williams?

Q. Of course. Someone who has completed the training and understood it would know that if they enter into an anti-competitive agreement, it really doesn't matter whether the agreement affects prices, they have still infringed competition law?

A. Yes, someone that has undertaken that training should know that.

Q. Can we consider the position where someone goes to a meeting with competitors, they make an anti-competitive agreement, let's say not to chase each other's customers, and then they break that agreement and they do chase the customer. Do you understand the example?

A. Say it again? Apologies.

Q. Yes. Two competitors go to a meeting and they reach an agreement not to chase each other's customers, not to compete for each other's customers. Then after the meeting, one of them breaks the agreement and does chase his competitor's customer. In that situation, would someone who has done the training know that that is not allowed?

A. That would be correct, yes.

Q. It is not a defence to say, "I did not stick to the agreement," they would understand that?

A. Well, that would be my understanding, yes.

Q. That is what you think someone who has done --

A. That is correct. Apologies, you froze there and I did not get that last sentence.

Q. I am sorry. You said that is your understanding and that is what you think someone who has done the training should understand as well?

A. That is correct.

Q. In your role as compliance officer, would you say you have got a good grasp of basic competition law rules?

A. You cannot always -- I am not a legal expert, Mr Williams. I suppose that is why we engaged a firm of London solicitors to undertake the training for FP McCann Limited.

Q. That is very fair. Thinking about it from your perspective as someone in the business rather than [break in transmission] the rules -- could be taking away from the training from a commercial point of view [break in transmission].

A. I am sorry, you have logged out again. Apologies.

MR JUSTICE MORGAN: Mr Williams, I did not hear, I think Mr Mulholland was in the same position. Could you put the whole question again, please?

MR WILLIAMS: I can, yes.

Mr Mulholland said to me he is not a lawyer. I said that is very fair, so let's think about this question from the perspective from someone who is in the business grappling with competition law rules. From that perspective, the rules we have been talking about, things about no implementation, no effects, one-sided exchanges, are those some of the key lessons you think

commercial people in FPM's business should be taking away from the training?

A. That would be correct, yes. That would be my understanding.

Q. So if someone does the course and they don't learn those principles, then the training has failed to do its job?

A. You could argue that point, yes. Some people may have undertaken the training two or three times at this stage.

Q. Eoin McCann has done the training. I think he has done it, has he not?

A. Yes, that is correct.

Q. How many times has he done the training?

A. I believe three times.

Q. And Francis McCann?

A. Certainly two, I believe three as well.

Q. And Andy Cooper?

A. Yes, I believe that he would have done that two or three times as well.

Q. Would that be in 2013 and 2017?

A. 2013, 2017 and the start of 2020.

Q. Okay. I want to turn back in the manual now to page -- sorry, for the Tribunal, it is 1617, for you it is page 7, Mr Mulholland. This is the section headed "Avoid Anti-competitive Conversations".

A. Apologies. Sorry, go ahead with the question, sorry.

Q. Page 7, "Avoid Anti-competitive Conversations", are you there?

A. Unfortunately the document's contained within an overall document so it is not my page 7.

Q. If you are on that page, then that is fine. It starts off with:

"Do not agree or even discuss with a competitor prices."

Is that right?

A. Yes.

Q. Okay. This section about prices refers here to current and future prices or price rises or individual elements of prices or costs. One thing it doesn't mention is list prices, for example list prices on the spot market.

Would a person who has done the training think that this lesson in this bullet point applies to listed prices?

A. They should do, yes.

Q. Yes. I was going to ask you whether you think it should refer to list prices, or whether you think it is so obvious you do not need to refer to it because they are a type of price?

A. Yes, list prices is a very bland price ...

Q. But let's say it is a price for these purposes, the principle here is do not agree or even discuss with a competitor current or future prices. So my question is: does that obviously extend, for example, to list prices, you shouldn't agree list prices with competitor?

A. That would be correct, yes.

Q. So you think it is obvious?

A. Yes.

Q. If you look further down, there is a section about markets. This one says:

"Do not agree or even discuss with a competitor [and then it says] carving up or allocating territories."

I noted that this is a bit different from the one we were just looking at on prices because the first one really talks about not agreeing or discussing price information, but this says, "Don't discuss carving up the market."

The question is: do you think this section about markets also says that you shouldn't

discuss market share information with a competitor?

A. That would be correct, yes.

Q. It doesn't say it in terms, but you think it is obvious?

A. In the sense of a run-of-the-mill employee, they wouldn't really be discussing allocation of territories.

Q. No, but they might talk about what market share they have at the moment if they are having a chat with a competitor, and my question is: do you think it is obvious that the guidance is telling employees not to discuss market share information with competitors even if they don't carve up the market?

MR O'DONOGHUE: My Lord, I am not sure the premise of the question is entirely fair because a discussion of market shares may be lawful or unlawful, and Mr Williams cannot hedge his bets. In fairness to the witness, he needs make clear what category he is talking about. If the market shares are public, there would not be an issue, for example.

MR JUSTICE MORGAN: Mr Williams, you have heard that. Do you want to rephrase your question so there is no argument about the significance of the answer later in the hearing?

MR WILLIAMS: Yes. The paragraph which starts with the words, "Carving up or allocating territories," that talks about not discussing with a competitor, allocating customers or territories to each other. Do you agree that is what it is focused on?

A. Yes.

Q. My question is: is it your understanding that discussing information about market shares with a competitor may be anti-competitive even if you don't go as far as carving up or allocating territories?

MR O'DONOGHUE: My Lord, again the question is meaningless, it has to be put on

a more precise basis. It is unfair to the witness.

MR JUSTICE MORGAN: Mr Williams, I think Mr O'Donoghue's point is if the information about market share is in the public domain, it can be referred to. If on the other hand it is confidential business information, it may not. In case that is a relevant qualification, can you ask your question by reference to market shares which are not public information and see if we can make progress that way.

MR O'DONOGHUE: It is more complicated than that because, for example, aggregated market share information would also be fine, historic market share information would also be fine. Mr Williams needs to be precise, this is not good enough.

MR WILLIAMS: Sir, I will address Mr Mulholland.

The point I am driving at, Mr Mulholland -- it is not a criticism -- I am just identifying that this paragraph is focused only on carving up or allocating the market. I am asking you whether discussing, for example, private analysis of your own market share which is not in the public domain, whether that can be anti-competitive even if the competitors don't get as far as carving up the market between them?

MR O'DONOGHUE: My Lord, I am sorry, that is not a fair question.

MR JUSTICE MORGAN: I am not sure there is anything unfair about the question, but I equally want to make sure that questions are asked that are going to be of relevance to the argument which follows. If it occurs to Mr Williams -- have a case that FPM did make a specific agreement about market shares, you can ask Mr Mulholland whether behaving that way, making a specific agreement about market shares, would be understood by a trainee as being contrary to that paragraph or any other paragraph in the manual. Or else if you don't

want to do that, I think we will move to another question.

MR WILLIAMS: Actually, this was the last question, Sir.

MR JUSTICE MORGAN: The other thing is that although it is entirely proper for you to ask Mr Mulholland, this could be dealt with in submission because what the manual means to an ordinary person can be the subject of submissions, right?

MR WILLIAMS: The question has generated a surprising level of controversy, Sir.

MR JUSTICE MORGAN: Indeed.

MR WILLIAMS: I was only drawing the distinction between agreement and information exchanges, but I think on reflection, I do not think it is something I need to press. I think I have covered the topics I really needed to cover.

I do not have any more questions for you, Mr Mulholland.

MR JUSTICE MORGAN: Right. Any re-examination, Mr O'Donoghue?

MR O'DONOGHUE: A couple of questions, if I may.

MR JUSTICE MORGAN: Yes, certainly.

Re-examination by MR O'DONOGHUE

MR O'DONOGHUE: Mr Mulholland, if we can go to paragraph 4.10 of the compliance manual -- I think it is internal page 17, I am not sure which page. It is 1627 in the electronic bundle, internal page 17. It may be a different page in the document before you.

A. Yes, go ahead.

Q. You see it is headed "Competitive Contact Reports".

4.10, "Competitor Contact Reports"?

A. Hang on a second. Yes, got it.

Q. You were asked by Mr Williams about people attending meetings with competitors and doing this and that. On the basis of section 4.10, can you tell

the Tribunal a bit more about competitor contact reports, please?

A. Yes, well, if one of our employees has come into contact with a competitor and feels that there has been any -- any issue, they are within right then to get in contact with me, to explain the situation as to what has happened and I can then raise it up to another level if I think it is necessary.

Q. Thank you.

From your recollection, did Andrew Cooper, and Ian McCann have occasion to file such reports?

A. They would have, yes.

Q. Thank you.

Finally can we go to paragraph 10 of your witness statement, please. On the basis of what is set out there, can you elaborate for the Tribunal what, if anything, you would do in relation to contact reports?

A. I would get them to send me an e-mail to say that they had met a competitor in whatever context it was, whether that be, you know, a trade association or a dinner and they would let me know who they had met, who they had spoken to and/or that there was no other material, rates or anything, discussed or anything like that.

Q. If you were in doubt, what, if anything, would you do?

A. I would bring it up to -- with Pinsent Masons and I would take advice from them.

MR O'DONOGHUE: Thank you.

My Lord, I have no further questions in re-examination.

MR JUSTICE MORGAN: Right.

Mr Mulholland, I have no questions for you. Let me see if any other members of the Tribunal wishes to ask you a question.

Do the other members of the Tribunal wish to ask a question of the witness?

MR DORAN: None from me, Mr Chairman.

MR JUSTICE MORGAN: Right.

Mr Mulholland, that completes your evidence. Thank you very much.

A. Thank you, my Lord.

MR JUSTICE MORGAN: Right.

Can we take steps to have the next witness participate, please?

It is Mr Williams, isn't it, Mr Williams?

MR WILLIAMS: I am sorry, yes, Mr Williams:

MR JUSTICE MORGAN: I cannot see Mr Williams, no.

MR O'DONOGHUE: I cannot see him either.

MR DAVID WILLIAMS: It is not allowing me to turn my video camera on. It is allowing me to turn on my -- it is not allowing me to turn my volume on.

(Short discussion on technical aspect)

MR JUSTICE MORGAN: Please do that, Mr Williams.

MR DAVID WILLIAMS (affirmed)

MR JUSTICE MORGAN: I can see Mr Williams now.

Mr Williams, you will give your evidence under oath or under affirmation, do you wish to take the oath or to affirm?

A. I would like to affirm, please.

MR JUSTICE MORGAN: I have your statement. Your name is David Williams.

A. Yes.

MR JUSTICE MORGAN: I will read out the affirmation will you repeat after me as we work our way through it. It is:

I, David Williams, do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth, and nothing but the

truth.

Thank you very much, Mr Williams.

Examination-in-chief by MR WILLIAMS

MR WILLIAMS: Hello, Mr Williams. This is Rob Williams. Do you have a copy of your witness statement in front of you?

A. I have five lever-arch files ...

Q. Your witness statement was in folder 1 at tab 6.

A. I have it, you will have to bear with me. Okay.

Q. Are you looking at your statement, do you recognise it?

A. Yes, I do.

Q. Is that your signature on the first page, about half-way down the middle of the page?

A. Yes, it is and at the bottom.

Q. And at the bottom of every page in fact I think of this statement?

A. Yes, that is correct.

MR WILLIAMS: Mr O'Donoghue is going to have some questions for you.

Cross-examination by MR O'DONOGHUE

MR O'DONOGHUE: Mr Williams, your 2016 statement was in the context of a criminal investigation, was it not?

A. Yes, I assume so. I was asked to meet some people in Manchester.

Q. You can see from the heading of the statement before you it says Criminal Justice Act 1987 and so on.

A. Okay.

Q. That is clear. You therefore knew that in giving this statement you could be prosecuted for giving false evidence?

A. Yes.

Q. In fact it says so in the heading.

A. Yes.

Q. You also knew in giving this statement that your evidence could be relied upon to prosecute former colleagues and others for criminal conviction, which could have included a period of imprisonment?

A. Yes, correct.

Q. You also knew in giving this evidence in a criminal context that it could have significant implications for the company?

A. Well I assume so, yes. I didn't think of it at the time, I was just asked to give evidence.

Q. You certainly knew as you have just accepted that it could lead to criminal convictions for one or more individuals, including former colleagues?

A. Yes.

Q. You were therefore acutely aware of the need for your statement to be truthful, accurate and complete?

A. Yes.

Q. Can we go to your statement, please, starting at paragraph 10. You see there you refer to an e-mail with Andy Cooper, 28 November.

A. Yes.

Q. You then say at paragraph 13 -- paragraph 12, sorry, "The McCanns made me redundant not long after this e-mail exchange"?

A. Yes.

Q. And that you left around Christmas 2011?

A. Yes.

Q. That is not the case is it, in fact you were still employed until the end of

March 2012?

A. I think I was on enforced absence from work at the time for a while. They -- the situation you are talking about, I was not actually working for them. I think it took a couple of months to negotiate my leaving.

Q. You didn't actually leave the company until the end of March 2012, correct?

A. I have seen from an e-mail today that is the case, yes.

Q. So that was --

A. But I wasn't actually doing any work in that period, and I think I had turned my phone off and so on.

Q. The point I am putting to you is you seem to link at paragraphs 10 and 12 the 28 November 20011 e-mail and your departure, but your departure in fact was four months after this e-mail.

A. Okay.

Q. Correct?

A. Yes.

Q. Your dismissal had nothing to do with this e-mail exchange, did it?

A. No.

Q. You say in paragraph 13 that you were dismissed because you had driven to see a customer in Solihull and the customer had gone on holiday and you say, and I quote, "Eoin McCann was giving me a hard time about excess mileage". Correct?

A. Excuse me, may I interrupt? On my paragraph -- no, it does not say that on my paragraph 13, I am afraid.

Q. Again, it is 12, forgive me. About three lines down, "Eoin McCann was giving me a hard time about excess mileage". Correct?

A. Yes, it was not just solely Eoin McCann, it wasn't just for myself, it was basically

a board directive towards all staff that fuel costs had gone up and giving us all a little bit of a hard time about using ... necessary journeys and so on and so forth.

Q. FPM used a customer relationship management or CRM system, didn't it?

A. Yes, it did.

Q. One of the purposes of this system was to enable you to log visits to customers, telephone calls and the like?

A. That is correct.

Q. If you visited a customer you would log that in the CRM system; would you not?

A. That is correct.

Q. In March 2012 you made an entry into the CRM system, that was sent to you today, do you have that in front of you?

A. I do, yes.

MR O'DONOGHUE: My Lord, does the Tribunal have that document?

MR JUSTICE MORGAN: Speaking for myself I have it and I believe the other members have it also.

MR DORAN: Yes, I have it.

MR O'DONOGHUE: Thank you.

It is highlighted in yellow. You made an entry in March 2012 which stated:

"Meeting with Argemiro Diaz and it appears that work is beginning to flood in from ST. He will send over some drawings forthwith."

Mr Diaz was a senior figure within the engineering company Grontmij, wasn't he?

A. Grontmij, yes, he was.

Q. You didn't actually meet with Mr Diaz, did you?

A. No, I did not.

Q. This entry which I have shown you is false, isn't it?

A. Yes, it was.

Q. He didn't therefore tell you that work was beginning to flood in from ST, did he?

A. No.

Q. That entry was also false, was it not?

A. Yes?

Q. He didn't therefore tell you that he will send over some drawings forthwith, did he?

A. No.

Q. So that entry was also false?

A. Yes.

Q. As a result of this you were confronted about your use of the CRM system by Andy Cooper and Ian McCann at a disciplinary hearing on 21 March 2012, were you not?

A. No, it wasn't a disciplinary hearing at all. It was at my sales meeting.

Q. Well, you admitted it at a sales meeting or disciplinary meeting, it does not matter.

A. It wasn't a disciplinary meeting, it was a standardised sales meeting.

Q. Well, you admitted that you had falsified the entry --

A. Yes.

Q. -- to Mr McCann and Mr Cooper, correct?

A. Yes, I did. I am not exactly sure about the date, but it was at a sales meeting and I admitted I falsified that entry, yes.

Q. That is why you were suspended from work immediately?

A. Yes.

Q. In the second document we sent you today, you said, and I quote that you had:

"... made an incorrect decision on inserting a falsehood in the CRM system."

Did you not?

A. Yes, I did.

Q. When you say in paragraph 12 of your statement that Eoin McCann was giving you a hard about excess mileage, that is completely untrue isn't it?

A. No.

Q. The truth is you deliberately falsified a record of a customer visit to defraud the company of money?

A. No. The truth is I went to the call and, as is often the case -- or perhaps not often, but occasionally the case in the job I do. People ... you make an appointment and people forget about it and they will go off on holiday or something will arise and they will go away and they will forget you are coming. I basically turned up at Solihull -- that is not in dispute -- spoke to a receptionist, who then told me he had gone on holiday. I spoke to a colleague of his, but I just ... and that is the truth. I mean there is no doubt that I turned up there, there is no doubt I drove and I just felt a little bit awkward, because I had made an appointment someone wasn't in, after being told about excess mileage it was playing on my mind a little bit.

Q. Hang on, that is not quite right. You accept in the e-mail which you were sent today that you inserted a false entry, correct?

A. Yes.

Q. We saw the CRM entry, where you admitted that in three respects you provided false information in the entry.

A. Yes?

Q. It was false that you had actually met Mr Diaz. It was false that he had told you that work was beginning to flood in. It was false that he would send over drawings forthwith.

A. Yes, but I also say in the e-mail that I called in and receptionist said he had gone on holiday and I spoke to a colleague of his.

Q. It's your entry, I am discussing your entry and the entry was false in at least the three respects I mentioned to you?

A. Yes.

Q. You accept that in your e-mail?

A. Yes.

Q. You said:

"I made an incorrect decision on inserting a falsehood in the CRM system."

A. Yes, the falsehood was I should have said he had been on holiday and I spoke to a friend or a colleague of his, what I didn't -- but I did not do that, but I actually went to the office and spoke to somebody there. I just didn't change and say, "Look, Argemiro had gone on holiday and not informed me of it". But, as I say, this happened -- I also say this on the e-mail. This has happened previously, not particularly with that person but other customers and normally I would put it in and say I had gone to Joe Bloggs and he wasn't there or he had been called to site or whatever the reason might be. That would be the normal case.

But in this instance, I felt a little bit under pressure because of all the -- the previous meeting about excess mileage and excess fuel use. It was not just for myself, I am sure other members of staff would confirm that.

Q. You attempted to claim mileage expenses on the basis of a falsified account?

A. I think the fuel was paid, but I did not get any money for the mileage. It was not paid to me it was just ... and I drove there. There is no disputing I drove to the office, I had a fuel card so it was not any benefit to me financially.

Q. When you say in paragraph 12 that you were getting a hard time on excess

mileage, that is not the reason you were suspended?

A. No.

Q. You were suspended for falsifying, in multiple respects, an entry in the CRM system?

A. Yes, I did.

Q. You admitted to Andy Cooper and to Ian McCann that you had lied?

A. Yes.

Q. By contrast you told the CMA something else, that you were simply getting a hard time about mileage. That doesn't even begin to explain the true position, does it?

A. No, we all got a hard time about mileage, not just myself. And I made a mistake. I should have said that Argemiro Diaz had gone on holiday and forgotten I was coming, but because of the situation at work I felt a little bit uncomfortable and I ... well, yes, I put a falsehood in. But I did do the trip, I did go to the office and I did speak to a colleague of his. I just didn't say that Argemiro had gone on holiday.

Q. We don't see any of this in your statement to the CMA, do we?

A. No.

Q. You also claim this is a one-off incident?

A. I think I mentioned the hard time in the statement and I also said that I had gone to and spoken to a colleague.

Q. You didn't mention that you had falsified your CRM entry, did you?

A. No.

Q. You have also suggested this was a one-off incident, whereas in fact prior to the meeting on 21 March 2012, you were informed of six other instances of falsified entries in the CRM system.

A. Sorry, that is not correct.

Q. That was of the basis on which the disciplinary proceeding took place, was it not? It was not just one entry, there were multiple entries which were queried?

A. No, it was not a disciplinary hearing, it was at a sales meeting as I said earlier. They brought up this one instance and I was put on suspension. The next meeting I had with Andy Cooper was to sort of decide on my leaving the company.

Q. He also put to you multiple other incidents; did he not?

A. No, he did not. If you look at the e-mail sent, I actually asked for clarification on that point.

Q. Which he provided?

A. Which he didn't provide.

Q. Can we look at your role within FPM?

A. Yes.

Q. You worked with FPM for about four years, between 2008 to 2012, correct?

A. Yes, around that sort of period.

Q. During that time you had no involvement in the pricing of products as part of your job, did you?

A. Which policy are you referring to?

Q. Well I am referring to paragraph 3 of your statement, where you say, "I had no involvement in the pricing of products".

A. Yes, I did not involve myself with the standard products that McCanns were selling at the time, no. I had no involvement with that at all.

Q. You equally say, in paragraph 6 of your statement, that you were not involved on a day-to-day basis with commercial negotiations with contractors who had deals with FPM?

A. That is correct.

Q. Because that was the responsibility of the sales representatives; was it not?

A. That is absolutely correct.

Q. By contrast, your job, as you set out in paragraphs 1 and 3, was to get products approved by water companies?

A. Yes.

Q. Your involvement with customers was narrow and limited?

A. Well, I would be involved with the framework contractors when I am talking about -- I have to go back a little bit really, because I had a product called an Easi-Base, which I am sure you will all be familiar with, and my job initially when I was taken on was to get that approved by water companies so that contractors could use it.

So, yes, I would have understanding of pricing for that product but not the standard products that FP McCann made.

Q. It is fair to describe your role as being more in the nature of customer approvals and regulatory approvals, correct?

A. Regulatory, yes, absolutely and to get approval by the 11 main water companies in the UK, but in the same instance they would ask the question: how much does it cost? So I was involved with pricing of that particular product, but not standard FP McCann products. For the first two, two and a half years, that it took to get all those regulations approved.

Q. As a result, it is fair to say that you had limited involvement or knowledge in relation to FP McCann's commercial strategy?

A. Well, we obviously had discussions about it. I was out selling one of their products, but yes we had to get it approved first. But I wasn't sitting in with Trevor Beddow and the sales teams on their meetings, because sales

meetings were done individually so that was quite difficult.

Q. In fact you worked mainly from home in Wrexham at the time?

A. I didn't work mainly from home, I covered the whole country. But I worked from my office at home, yes.

Q. Yes.

It is fair to say you didn't particularly enjoy your four years at FP McCann, correct?

A. I think it started off okay, but the last 18 months went a little bit downhill.

Q. Can we look at paragraph 2 of your statement?

A. Yes.

Q. You say, "I thought they struggled to see the necessity of my role".

A. Yes.

Q. You felt your role wasn't valued within the company, correct?

A. No, because it is a massively important role. You cannot sell a product in this country unless you go through the regulatory bodies initially, so no, I don't think it was devalued. I just think they did not seem to have an awful lot of interest.

Q. Yes, if you continue in paragraph 2, we see, for example, you say, that there were meetings you would turn up at 8.30, you would wait all day and then at the end there was a brief meeting involving you.

Essentially you give the strong impression that they didn't have much interest in what you were doing.

A. I think it is more a question the format was, and it was nothing to do with me, individual sales reps or managers would go in from 8.30 in the morning and I don't know how many they had, maybe 10, 12 and at the end of that I would be called in for mine. I think the last two or three I did lasted for a sum total of 10, 15 minutes. Quite often it was late in the afternoon, they had to catch

a plane back to Ireland ... so no I did not feel they had a great deal ... and it is very difficult to quantify what I did. I mean, all you can say is we are in the process of getting a product approved. It is not like a salesperson who goes in and says, "I sold X amount of a product". So it is hard to quantify where you are in a process.

Q. You say in paragraph 13 that it was a mistake for you to work with FP McCann?

A. With hindsight, I think I probably did make a bad decision.

Q. Your role within the company was a source of frustration to you?

A. As I say, the first two and a half years were fine because we had products to work with and I had a job to do.

The last 18 months, there weren't new products coming through and I was used more as a help to the salespeople, I got more involved with them.

Q. It was a supporting role?

A. To the sales staff, yes.

Q. I do not mean to be disrespectful, but I would suggest to you that you were in reality on the fringes of the company?

A. Well, I disagree completely with you, because if I don't do my job the sales staff cannot do their job.

Q. What I mean in particular is in terms of commercial matters and pricing, you were not at the centre?

A. Initially with the Easi-Base it was just myself, and so I was aware of pricing for that product. All the other products that McCanns did were responsibility for the sales staff.

The last 18 months, when I was asked to go out with the sales staff and support them technically, I became more aware of pricing procedures.

Q. You say in your statement at paragraph 4:

"There was a no poaching arrangement between FP McCann, CPM and Stanton Bonna."

If you can look again at paragraph 8 and read until the end of the sentence over the page.

A. You want me to read paragraph 8?

Q. Yes.

A. "I do not know how this arrangement about not poaching each other's customers ..."

Q. You can read it to yourself.

A. Oh, sorry. (Pause)

Okay.

Q. You say at the top of the page that you assumed the three companies had carved up the market between them at CPSA meetings?

A. Yes.

Q. No one actually told you that, did they?

A. As I said earlier, I don't know how it was formed but I assumed that that would be an area where they would meet and talk, yes.

Q. This assumption was speculation on your part?

A. I was told not to poach CPM and Stanton Bonna, but how that actually came about is assumption, yes.

Q. Let's take it in stages.

Are you aware that the CMA has found that there is no evidence that the three companies carved up the market at CPSA meetings?

A. I am not aware of that, no.

Q. Can I show you the Decision, please, Volume 1, paragraph 2.53.

A. I must say, I was told not to read any of these volumes prior to this, so that is why

...

Q. You can read it now, take your time. Paragraph 2.53.

A. Which section?

Q. It is on internal page 21, the bottom right. 2.53.

A. Okay, "There is no evidence ..." Okay.

Q. Yes.

Your assumption was wrong in this case, wasn't it?

A. Yes.

Q. If we go back to paragraph 8, it starts, "No-one said ..."

If you can read the last four lines again just to refresh your memory.

A. Okay.

Q. You say here it was a sort of gentleman's agreement, but that is not accurate either. Once again, you are speculating about things you don't know about. Indeed you say no-one ever said that to me. This is speculation, isn't it?

A. Yes. What I did say is what I was told and then I was asked about how that came about.

Yes, I did speculate on that, but what I was told is what I was told.

Q. We will come to that, let's take it in stages.

If you turn back to paragraph 7 of your statement. If you can read that please, to yourself.

A. Okay.

Q. You say here that Andrew Cooper and Trevor Beddow would sort it out if CPM tried to undercut FP McCann. But in fact you are speculating here again, aren't you?

A. Yes.

Q. You say you assumed that a phone call would be made or an e-mail would be

sent?

A. Yes.

Q. You never saw these e-mails, they were never copied to you, correct?

A. That is correct.

Q. You cannot actually say whether Andrew Cooper or Trevor Beddow ever picked up the phone or sent an e-mail along the lines you suggest to CPM or Stanton Bonna, you cannot give direct evidence on that, can you?

A. That is correct. I said I assumed.

Q. If we go to paragraph 4 of your statement, if you can read that and can I ask you in particular to look around the middle of the paragraph.

A. Okay.

Q. You say in your witness statement here that you believe that FP McCann sales staff were made aware of the no poaching agreement. You have no way of knowing whether FP McCann sales staff were instructed in this way; do you?

A. Only from the latterly 18 months. When I was out with them they would say we cannot approach them, so they have said that directly to me.

Q. Well, you say here that there was a -- the FPM sales staff were made aware of the no poaching agreement.

A. Yes.

Q. You have no way of knowing whether they were told of this alleged agreement in this way?

A. I also state in that paragraph when I went out with them they would tell me, "We cannot approach that customer because it is a CPM or a Stanton Bonna customer". They are telling me directly.

Q. Please listen to the question. You say in paragraph 4 that you believe FPM's sales staff were made aware of the no poaching agreement?

A. Yes.

Q. I am putting to you, the reason you say you believe is that you have no direct knowledge that they were made aware?

A. No, I don't know how they were told or if -- but the fact they tell me led me to believe that they had been told. I do not think one of the sales managers would off his own bat sit there and say, "Dave, we cannot approach these people because they are CPM".

From that I believe they had been told. Same as I had been told not to approach CPM and Stanton Bonna customers.

Q. But you say you believe, you don't say you know. There is an important difference.

A. Yes, I appreciate that and I said I believed it because they told me.

Q. So this is another assumption on your part?

A. Well, if somebody tells me something, I believe it.

Q. We disagree on that. I am coming to that.

If we look at paragraph 5 of your witness statement.

A. Yes.

Q. This time Trevor Beddow. You say here:

"Trevor Beddow would also have known without a doubt that there was a no poaching agreement."

You never actually heard Mr McCann or Mr Cooper tell him that, did you?

A. Tell?

Q. Mr Beddow that.

A. No, I did not.

But, again, the structure would be that the sales staff would report to Trevor Beddow. Now, if the sales staff are telling me not to approach customers, I would have

to assume that they have been told and the most likely person would be Trevor Beddow. But I do not know, I was not there when they were told or I wouldn't know who they were told by.

Q. You accept that you have no way of knowing what Mr Beddow knew, do you?

A. No, I don't, but he was -- in the chain of reporting, he was their direct boss.

Q. But, Mr Williams, in paragraph 5 you don't pull your punches, you say, "... without a doubt he would have known". You have now told the Tribunal that you don't actually know what he knew.

A. It is true, but I would -- I would assume, again, I am making the assumption, as he was their immediate superior that that instruction would have come from Trevor.

But, no, I wasn't in the room when it was said but the fact that two of the sales staff told me not to approach customers alongside Mr Cooper and Mr McCann, I would assume, rightly or wrongly, as they were sort of higher end of the chain it would come down from them directly.

I find it hard for Ian McCann or Andy Cooper to tell the sales staff something without cutting out their direct superior. It would be strange.

Q. Again, you are assuming, you don't actually know?

A. No, I don't.

Q. You say in paragraph 6 that the no poaching agreement was a rigid instruction and set in stone, so again strong language?

A. Yes.

Q. The fact is, Mr Williams, that FP McCann entered into a very large number of new term deals while you worked there. It entered into 80 new term deals in 2008 alone, didn't it?

A. I wouldn't have access. That was more of a salesperson's remit than myself.

Q. Can I show you the figures. If you look at volume 3 of the documents in front of you.

A. You have to bear with me a second.

Q. Of course, take your time.

A. Which paragraph or which section?

Q. It is table 3, it is on internal page 1344, tab 80.

A. 1344?

Q. Yes, tab 80.

A. Okay.

Q. Do you have the table, Mr Williams?

A. Yes, I do. Yes.

Q. You will see for a number of years the new term deals entered into. You see 80 term deals in 2008, 3 in 2011 a further 23 in 2012, which was the last year of your employment. Do you see that?

It simply isn't true that this was a rigid instruction or set in stone, is it?

A. Well, it certainly was told to me by both Ian McCann, Andy Cooper and the salespeople I worked with.

Q. Look at the data. You say it was set in stone, a rigid instruction. In fact we see large numbers of new term deals.

A. Okay.

Q. Once again you are making assumptions?

A. No, I was told not to approach CPM or Stanton Bonna accounts on numerous occasions, certainly from the first day I started at the company by Andy and Eoin McCann and towards a later time, when I was out with the sales staff. Certainly not in ... the sales staff wouldn't have said it in the first couple of years probably, because I did not really have much involvement with them.

Q. The table in front of you lists around 150 new term deals mainly across your period of employment, and therefore it is simply incorrect to say this was rigid or set in stone, isn't it?

A. No, I am just telling you exactly what I was told.

MR WILLIAMS: Sir, I am not sure Mr Williams can be cross-examined about a table he has never seen before and express a view of whether it is right or wrong. He has answered the question. What is he supposed to say about it?

A. I have no idea how many term deals FP McCann have. It is not my area of business, that was the sales staff too.

MR JUSTICE MORGAN: I think Mr Williams can be asked the following: if it is a fact that FP McCann entered into 80 term deals in 2008, can he explain how that happened in view of the statement made to him that he was not to approach CPM and Stanton Bonna? He cannot verify or deny what is on page 1344, but he may have an explanation or he may not as to whether that page might be consistent with his evidence. He should be invited to --

A. I have no idea how many term deals FP McCann have in total, so I have no idea if 80 is -- what percentage of their term deal 80 represents. It is not something I would get involved with.

All I can say I was told from day 1 not to target CPM and Stanton Bonna deals, by both Eoin McCann and Andy Cooper on numerous occasions. And, latterly, when I went out with the sales staff the same message was conveyed. That is all, I have no involvement in term deals. You find most of the products on the term deals were not ... I was not involved with. Mine was the new products.

MR JUSTICE MORGAN: Mr O'Donoghue, are you putting or are you not putting that the 80 term deals were with established customers of CPM and

Stanton Bonna? Because the evidence the witness is giving is about approaching customers of CPM and Stanton Bonna, as I understand it.

Doing term deals with other customers has nothing really to do with paragraph 4 of Mr Williams's statement.

MR O'DONOGHUE: My Lord, I am certainly putting to him that at least some of these term deals -- by this stage, of course, the market share of FPM, CPM and SB would have been at 80/90 per cent. So I am putting to him that some of these new term deals must have involved the competitors.

MR JUSTICE MORGAN: Putting a figure of 80 itself is not very helpful unless we know are any of them CPM or Stanton Bonna. And if any are, is it 1 or 2 or is it 78 or 79 or something in between?

Mr Williams, let me just see if you are able to help. I am going to be told that in 2008 there were 80 new term deals and I will be told what that means: whether it is a term deal with an existing customer that is renewed, therefore it is a new term deal; or is a term deal with a new customer, who hadn't previously been a McCann customer; or whether any of them are term deals with customers who had previously been Stanton Bonna and CPM.

I don't imagine you know the answer to that either?

A. No, Sir, but I have -- the products I was responsible for from 2008 to 2010ish were all new products and weren't on term deals. I had no involvement with the term deals. It was a sales staff issue.

MR JUSTICE MORGAN: All right.

We have probably gone as far as we can, Mr O'Donoghue, with page 1344 and this witness.

MR O'DONOGHUE: My Lord, yes.

Mr Williams, can we now turn to your e-mail exchange with Andrew Cooper, the

e-mail itself is in volume 3, tab 93.

A. Do you have a page?

Q. Yes, it is 1779.

A. Mine only goes up to 1769. Would it be tab 91.

Q. Tab 93.

A. 93, I have it.

Q. This is the e-mail you discussed at paragraph 10 of your statement?

A. Yes.

Q. This is an e-mail about supplying the Easi-Base product you mentioned to Welsh Waters Framework Contractors, isn't it?

A. That is correct.

Q. You ask a series of questions to Mr Cooper --

A. Yes.

Q. -- at the bottom of the page?

One of those is whether sales staff are allowed to price aggressively for these jobs; do you see that?

A. Yes.

Q. Then you say that you understand we have a no poaching of business agreement.

A. Yes.

Q. If you look at the top of the page, you will see Mr Cooper's response.

A. Yes.

Q. The first thing, if you look at the timestamps, your e-mail was sent at 12:14 and he responds ten minutes later.

A. Okay.

Q. You would not have expected in the space of a few minutes that Mr Cooper

would answer each and every one of your questions, would you?

A. I have got to be honest. I did not recall thinking anything of it at the time but no, I suppose a number of questions I would have expected him to take a little bit longer.

Q. In fact what Mr Cooper says here at the top is that you shouldn't supply Welsh Water because there isn't enough margin in it, doesn't he?

A. Yes.

Q. If we look at paragraph 11 of your statement, the last sentence. You say:

"As far as I was concerned I had asked the question if I could supply and I was told I could not because there was not enough margin in it."

A. Yes.

Q. That is completely unsurprising, isn't it? There is nothing wrong with a company saying, "This is too low a margin business for us, we want to focus on the higher end stuff". There is nothing wrong with that, is there?

A. No, there is nothing wrong with that. But my product that I had gone to see was the higher-end product. Bear in mind, it is quite unique to FP McCann. Yes, CPM and Stanton Bonna at a later date brought out an equivalent product but the Easi-Base was regarded as a higher margin product.

Q. They wanted a high margin and this particular customer was not offering a high margin, correct, that is what he is saying?

A. No. He is saying that the term deal that CPM and Burtons had was quite tight, but that would be a term deal on the standard products, not my product. My product, the Easi-Base, was not on any term deals, it was considered a high-margin innovative product.

Q. He is saying to you that there is not a high enough margin for us to take this business, that is what he is saying?

A. Yes, but there was no equivalent to the product I had been to see Welsh Water about at that time. CPM and Stanton Bonna didn't have an Easi-Base equivalent. It was new to the market, hence I had to get it approved. So there was an opening with a new product, that nobody else could supply, to target. That was the angle I had gone in at:

"Here is a product which you cannot buy anywhere else, it can save you money, it is innovative and it is new."

And that was my, if you want, way of trying to open the door. Which is why I said, "I take it we cannot go any further because the CPM and Burtons tie in". I was under the assumption I couldn't deal with a CPM customer.

Q. Let's look at paragraph 11 of your statement, that is not what you say.

You say:

"As far as I was concerned, I had asked the question if I could supply it and I was told I could not because there was not enough margin."

A. Yes, but not for the single product I was looking after at the time. We are talking about a term deal. You would have ... the situation with Welsh Water -- I have to explain this, I am sorry about this -- is that at the time, before Burdens had gone bust, Burdens was supplying I think approximately 90 to 95 ... if you had to supply anything into Welsh Water, it had to go through Burdens who were a distributor.

Now this -- Burdens were very closely linked to CPM at the time, so I went to see Welsh Water with a product they couldn't buy anywhere else, with a view to trying to sell it into Welsh Water. They couldn't say: well, you will have to put it through Burdens or we would get it through CPM.

So we had a sort of, if you like, an in into an account.

Q. Well, I understand all that. I understand all of that.

The point I am putting to you, and I want you to focus on to be clear, is that in this e-mail as you confirm at paragraph 11 Mr Cooper does not confirm your understanding there was a no poaching agreement. He simply says that the business was not for FPM due to the low margin?

A. Yes, I agree that is exactly what he says.

Q. You say in your witness statement, paragraph 4 and you have said it on more than one occasion today, that Mr Cooper had told you on other occasions that there was a no poaching agreement.

A. Yes.

Q. You don't say this in your e-mail, do you?

A. It says, "Are sales staff allowed to price for these jobs? I understand we have a no poaching of business agreement."

Q. Your evidence is that Mr Cooper had told you on more than one occasion before this that there was a no poaching agreement. Now, if that is true, why are you asking him whether there is a no poaching agreement?

A. I did not ask him that. I say, "I understand we have a no poaching agreement". That is not asking a question. I asked if the sales staff were allowed to price for the jobs and then I say, "I understand we have a no poaching agreement".

Q. If, as your evidence to the Tribunal has been today, he had told you about this on multiple occasions, why are you querying this?

A. I am not querying it. I said I have been in to see Welsh Water. Are we allowed to go and target that account? Are the sales staff allowed to price for these jobs? I understand we have a no poaching agreement.

It was a statement, rather than a question.

Q. If there is a no poaching agreement, which you say is rigid and set in stone, why are you going to him with new business?

A. Because my product wasn't covered. As I have said repeatedly, my product was a new product it was not covered in term deals. It was a new innovative product and it gave us an avenue into markets where we previously -- well certainly as I had been made aware of not allowed to go. We were not going directly as competition to CPM or Stanton Bonna with my product. Mine was unique at the time.

Q. I put it to you that the reason that you were raising the possibility of a no poaching agreement is that he has never mentioned this to you at any stage before, neither had Mr McCann. Again it is speculation on your part?

A. No, absolutely not.

Q. You have not produced any other e-mail which you refer at any stage to any such agreement, have you, just this one e-mail?

A. I did not produce this e-mail. It was produced to me by CMA. I do not have access to my FP McCann e-mails.

Q. Well, there is no other e-mail.

A. I cannot recall if I have ever questioned it before, but certainly verbally I have been told on a number of occasions. I might well have done other e-mails, I don't know. I can't remember every e-mail I have ever sent, but this was produced to me by the CMA on the initial interview.

Q. This is yet another assumption on your part, isn't it?

A. No, it is a statement.

Q. You don't mention any other evidence in your witness statement, do you? This is the only e-mail you mention.

A. I didn't mention the e-mail. I keep saying this, the CMA brought this e-mail to me and asked me to explain it.

Q. You didn't recall any other e-mail, did you?

A. No, I was at the end of a three-and-a-half hour interview in a hotel in Manchester. I have to be honest, my recall of e-mails is not great. I sent thousands of e-mails during my job.

Q. I am putting to you that at no stage did Andy Cooper or Eoin McCann ever suggest to you that they had a no poaching agreement with their competitors.

A. I appreciate that and you have said that previously, but I am standing by what I said. On numerous occasions I was told not to target CPM or Stanton Bonna business.

Q. You were telling the CMA what they wanted to hear, weren't you?

A. No.

Q. That is why your statement is full of beliefs, assumptions, and so on, rather than sticking to what you actually knew?

A. What I actually knew I stated in my statement. I was told by Andy, I was told by Eoin and I was told by the salespeople when I worked with them. The assumptions are assumptions, but I was told by these people not to target CPM and Stanton Bonna business.

Q. You didn't actually know anything, you are assuming?

A. No, I was told those comments. I know those comments, because I was told them.

Q. You are --

A. ... were how it got filtered down and where these comments were borne out of, I have no idea where, I just assumed it would be the CPSA meetings or something like that. I am quite happy to accept that. But I was told by the four people I mentioned not to target CPM and Stanton Bonna business.

Q. I am putting to you that that is completely untrue. The fact is you had an axe to grind against FP McCann, and Eoin McCann in particular, and you say in

paragraph 13 that you detested him.

A. I --

Q. You disliked your work at the company, you hated the owners. You resented being sacked for defrauding your expenses and you took liberties with the truth in this statement, didn't you?

A. I did not say any of that.

Q. Look at paragraph 13.

A. It was a -- yes, I did think the way they performed at sales meetings, he did bully staff and I do think it was a mistake I spent working for them. I think, with hindsight, it probably was the wrong company for me. As I say, the first couple of years was fine. I was doing a job I enjoyed and that is not a problem. It is when we ran out of products that I became -- I suppose they wondered what they could do with me. I don't know, you would have to ask the McCanns that question.

Q. You go further. You say he was a horrible person?

A. Yes, I did not like him.

Q. You detested him?

A. I do not think I said I detested him.

Q. You do not like horrible people, do you?

A. No, I do not like bullies.

Q. Isn't the truth of the matter that you were caught with your fingers in the till, trying to defraud expenses and you are using the benefit of hindsight to make up a series of assumptions against FPM? You didn't actually know anything, did you?

A. The interesting thing is the e-mail was sent months before that and there was no financial benefit for me. I had a fuel card, as I explained. I made no money

out of this. I just went to a meeting, the bloke didn't turn up and I did not report it. That is the crux of it and as I said in my statement.

Q. You admitted this is fraudulent, you said so in your e-mail.

A. I think I said it was a mistake, I cannot recall saying it was fraud.

Q. Let's look at that again, so we are in no doubt.

A. Falsehood I said.

Q. A falsehood, yes.

A. I am not sure that is ... Yes, I made a mistake. I put a falsehood in a reporting to -- there is no financial benefit, as you are inferring, to me.

Q. There were multiple falsehoods, weren't there?

A. No. I actually said at the bottom of my e-mail, "This is my first disciplinary hearing", and if there is anything else that the McCanns had to say about me please tell me, they didn't. And they kept me on, they paid me I think three months just to go away.

I think the truth of the matter is I reached the end of my time with McCanns because there was nothing else really for me to do as I was employed, and this was just an easy excuse to get rid of me to be honest. That is my perspective.

Q. You had an axe to grind?

A. I had no axe to grind with them, I wanted to leave.

Q. And they were glad to see the back of you?

A. Well, that is their choice. I did my job.

My job was to get a certain product approved and it is probably one of their biggest selling products, so I have no reason to look back. I did exactly what they asked me to do.

MR O'DONOGHUE: My Lord, I have no further questions.

MR JUSTICE MORGAN: Any re-examination?

MR WILLIAMS: No, Sir.

MR JUSTICE MORGAN: I have no questions for Mr Williams.

Let me see if other members of the Tribunal wish to ask him a question.

MR DORAN: I have no questions.

Questions from THE TRIBUNAL

SIR IAIN: I think perhaps just one question if I may, Mr Williams.

Just to be clear about this. You had a fuel card so that the fuel for the journeys on business were paid by the company?

A. Yes.

SIR IAIN: And you went to see this customer by appointment, who was not there as he should have been?

A. Yes.

SIR IAIN: What you say is the only thing you did was to falsify the record. You did not have any personal gain involved in this, because it was a company card and the petrol was used and it was paid for by the company. Is that your statement?

A. That is exactly correct. It happens all the time it even happens in my current job, sometimes people are called away to an emergency because of the nature of the business we do, you make an appointment three weeks in advance, something crops up, someone goes and you would like to think every time someone will ring you and say, "Dave, you don't need to come. I have to go somewhere", but they don't. The truth of the matter is they don't. It just happens unfortunately.

Some people do tell you they have been called away and cancel the appointment, but I would suggest that is very few.

SIR IAIN: One more question, if I may.

A. Yes.

SIR IAIN: In falsifying the statement which you have in your e-mail to Andy Cooper, did you feel that you had to do that because even if it was not your fault that your appointment had not honoured the meeting, that your senior managers would have in some way blamed you for it and criticised you for using petrol that in actual fact turned out to give the company no benefit?

A. That is exactly the point I was trying to make, Sir.

SIR IAIN: Thank you.

No further questions.

MR JUSTICE MORGAN: I think that completes your evidence, Mr Williams. Thank you very much.

A. Thank you very much.

MR JUSTICE MORGAN: We are at a point where I think we will adjourn until tomorrow. As I understand it, we will have the evidence of Dr Grenfell.

Now, as to timing because we are sitting back in the Tribunal building and because the Parties have to set up, I have been asked by the Tribunal to start the hearing at 10.30 to give you time to make an orderly progress into the building and everything will be in its proper place by 10.30. The hearing will begin at 10.30.

I am also told by the Tribunal that in anticipation of Monday, everyone was given a timetable when it would be most convenient for them to arrive and I confirm that that timetable will govern tomorrow morning's circumstances also.

Are there any points I need to deal with tonight or are we in a position to adjourn until 10.30 tomorrow?

Right.

MR WILLIAMS: Sir, there is nothing you need to deal with but I am conscious that given the way openings have unfolded the Tribunal has not heard anything about the context of Dr Grenfell's evidence. I wonder if it would be helpful for the Tribunal to refresh their memories by reading the pleadings and the submissions about that issue, so that there is at least some context to the evidence. In an ideal world, I would have opened that issue but that is not the way things have gone but I think that would be at least a partial substitute.

MR JUSTICE MORGAN: Right. Speaking for myself, that does seem to be a very helpful suggestion and one I will follow. I am sure my colleagues will too. We will be ready to hear you 10.30 tomorrow.

We will now leave the hearing. Thank you.

(4.58 pm)

(The hearing was adjourned until Wednesday, 7 October 2020 at 10.30 am)