IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1337/1/12/19

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

Friday 9 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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Friday, 9 October 2020

(10.00 am)

MR JUSTICE MORGAN: Good morning.

Closing submissions by MR WILLIAMS (continued)

MR WILLIAMS: Members of the Tribunal, I have one more introductory point about Dr Grenfell's evidence, and then I want to move on to the factual issues in relation to delay. There was particular criticism in the cross-examination of Dr Grenfell of the lack of disclosure in relation to the pause, as it was put to him. As I said at the time, we were surprised at issues about whether a proper search had made were taken up with the witness rather than in solicitor correspondence, as one might have expected.

To answer the question about searches for e-mails, on instructions I can say the that CMA has a case inbox for each case to which all communications relating to the conduct of the case should be copied.

That would include Dr Grenfell as the sender or receiver of any e-mails; and very often e-mails, even if they are not copied to the inbox are then forwarded to the inbox afterwards.

As I say that was reviewed. Beyond that, the inboxes of the key members of the criminal and civil case teams were examined as a cross-check, including e-mails to Dr Grenfell. So Dr Grenfell's e-mails weren't examined, but communications with him were looked at from the other side in two ways, and FPM asked about communications between Dr Grenfell and other senior personnel. That reflects FPM's perception that pause is a decision like the case opening decision and Dr Grenfell has explained that wasn't the case, it

was an operational decision which came from the case team; hence the focus of the investigations was on those persons who may have interacted with each other before liaising with Dr Grenfell. And Dr Grenfell explained convincingly that the pause wasn't a formal step like the case opening, so the fact it wasn't documented in the same way is not surprising and it certainly not remarkable.

Moving on then to the duration of the cases and leaving aside my legal point about whether the duration of the criminal case is under scrutiny, I am going to deal with the background position in outline. Two aspects of the criminal case are in focus; one is the time taken and the other is the issue of sequencing, as we started to touch on yesterday afternoon. The issue of sequencing is critical to understanding the timeline of the cases overall and that is because there are good reasons why a criminal case should be pursued before a civil case. There are good reasons to try and run them in parallel, as Dr Grenfell accepted, but to put it at its lowest, there are arguments both ways. FPM purport to run a case that the cases should have been run together, but it simply has not grappled at any point with any of the difficulties that that would have presented, particularly in the early stages. It simply asserts that the cases should have happened in parallel and that is not a realistic position, in my submission.

The Tribunal knows how this issue has been litigated, it has the general factors set out in Ms Radke's letter at volume 1, tab 9, page 569 and I won't go through though those. It includes important points about evidence gathering, witness contamination, and so on; and at the other end the spectrum, there is the obvious practical point that oral witness evidence at the criminal trial may be relevant to the civil decision. Indeed, we made the point that in the *Steel*

Tanks case, the CMA relied in its final civil decision on oral testimony at the criminal trial.

A point which Mr O'Donoghue has been at pains to emphasise is that there is no direct evidence of how the OFT approached the sequencing issue at the outset of the case. This is pre-CMA case and the CMA has not been able to address that issue directly on evidence.

So where does that leave us? Mr O'Donoghue invites the Tribunal to approach the matter on the basis that the OFT simply forgot to think about the issues, they simply overlooked the prospect of opening a civil case. In my submission, it is far more likely that the OFT had in mind to run a civil case, or to at least consider running a civil case, but they wanted to progress a criminal case first for the general reasons which are set out in Ms Radke's letter. So this is a matter of inference in the absence of direct evidence, but we invite the Tribunal to draw the inference that the civil case was not opened until a later stage for good reasons, not simply as a matter of oversight, which is how it is put by FPM.

But in any event, as you said yesterday, Sir, it is not seriously contested that the civil case would have to wait before the end of the criminal case beyond a point. We had that exchange about the SO yesterday, Sir, about when the SO would be issued. It is worth noting that even in the *Steel Tanks* case on which FPM places such great weight, that is what happened. Dr Grenfell gave evidence on Wednesday about the degree to which the civil case could have actually been progressed until the criminal trial was out of the way. I think the reference for that is Day 3, page 64, lines 21 to 25.

While we are on *Tanks*, I think you have this point, Sir, but FPM used this as a benchmark for the criminal case. You have already made the point I would

have made, which is that one cannot use a single case as a benchmark, still less can one use a single case as a benchmark when it involves three suspects rather than nine. There was an attempt to suggest that this case was an easier case than *Tanks* because the CMA had four recorded meetings rather than one. But that is not a logical point, if I may say so, and Dr Grenfell explained that the issue wasn't really about whether there was evidence of a cartel in that period, but how long did the cartel go on and other issues. So the four meetings were very good evidence, but they are obviously not the complete picture.

Two more points on this. If you could take out hearing bundle 1, tab 7 and go to page 555.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: This is the letter the CMA sent FPM on 15 April 2016 at the time of case opening. If you could just go over to the second page and just read the first paragraph under the heading "Next steps". **(Pause)**.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: So even when the case was opened, it was always the case that progress would largely depend on the criminal case and that was conveyed to FPM.

The second point, the Tribunal knows that when the CMA actually tried to make progress with the civil case in parallel, it found that it wasn't productive to do so. So if the Tribunal has to decide whether it was reasonable for the CMA to sequence the investigations in the way it did, the answer, in our submission, is that it was manifestly reasonable to do that, and that point is to a large extent the explanation for the period between March 2013 and the civil decision.

MR JUSTICE MORGAN: Yes. We see that, thank you.

MR WILLIAMS: That is sequencing. Turning then to the duration of the criminal case again on the basis that the Tribunal gets to this issue, Dr Grenfell dealt with this in his first statement in broad terms at paragraph 11 and in oral evidence he provided additional detail. I have already started to touch on the points. This was a case involving nine suspects for a cartel lasting seven years. Dr Grenfell referred to over 100 witness interviews -- can I just say at this point: we have been to a large extent processing FPM's note of yesterday overnight. I do not have transcript references for all of these references to Dr Grenfell's evidence at my fingertips. The points I am making are broad points, but we are very happy to provide those references if it would be of assistance to the Tribunal.

MR JUSTICE MORGAN: Happily it is all in one day of the transcript, a single witness.

MR WILLIAMS: Exactly.

MR JUSTICE MORGAN: The paper transcript doesn't have key words at the back or a total index that one sometimes has, but we have an electronic transcript which no doubt has a search function.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: If we put in "suspects", we will see what he said about suspects.

MR WILLIAMS: Or 130 in this case, but yes.

MR JUSTICE MORGAN: Or interviews.

MR WILLIAMS: Yes. But if that would be of assistance in due course, then we will provide it. I am sorry we have not managed to process everything overnight.

MR JUSTICE MORGAN: We will indicate, I think -- we will discuss that and indicate whether we would be assisted by --

MR WILLIAMS: But the points I am making are fairly (Inaudible), so I think it will register with the Tribunal. I hope they will anyway.

Dr Grenfell also accepted that it was a lot of evidence, but he made the point that that was more evidence to check, corroborate and stress test in the context of the criminal standard of proof and the other particular requirements which apply to criminal proceedings. FPM's suggestion after the event that this should have been a straight forward case once it was caught on camera is a pretty remarkable change of tune, in our submission, and it is really not a credible position for it to take. That is the first point; the size, weight and complexity of the criminal case.

The second point: a relative novelty of the criminal cartel offence when compared with civil enforcement and the differences from civil enforcement. You have the point that there have been many more civil cases than criminal cases and you have the point that at the time, proving the cartel didn't just require proof of the cartel, it required proof of the element of dishonesty -- I will come back to that point.

Ms Radke's letter says the CMA has undertaken four criminal cases. That is the CMA, the OFT obviously did a small number before that, but it is, relative to the civil jurisdiction, a novel jurisdiction and the CMA has only pursued one case to a criminal trial in *Tanks* in which the defendants at trial were found not guilty, which was the summer of 2015, and as in this case there was one guilty plea. For those defendants who contested the allegations, they were found not guilty.

The third point is the overall shape of the criminal case and if I can take this pretty briskly. The Tribunal has the picture I think: suspects were interviewed once or twice immediately when the case opened in which every suspect gave a no

comment interview, including Barry Cooper. One sees that from the section of the Decision starting at 2.81. When I say, "Every suspect gave a no comment interview," some suspects gave other interviews in which they did not say no comment to everything, but one gets a broad picture of the level of transparency at that stage.

After that, there was two years of investigative work. Dr Grenfell was questioned about this and it was suggested to him it was an extraordinary length of time and in my submission, he gave a compelling answer in which he explained in broad terms the challenges of the criminal case. That is page 15, line 13 and following: the need to exhaust other lines of inquiry, the standard of proof, and so on.

After that period, the suspects were interviewed again and on this occasion, Barry Cooper began co-operating with the CMA and gave a full account of the workings of the cartel, that is Decision 2.86. So that is obviously a very material development at that stage of the case and a significant change of direction.

After that, there was a year to Mr Cooper's guilty plea and a year before the decision was taken not to charge any other suspect. Taking the first year first, this is said to be unexplained but it is explained, in my submission, by all the general features of the case to which I have referred. Dr Grenfell also explained that in that period, the CMA was dealing with an issue relating to privileged evidence, which was a particular unexpected difficulty. I take the Tribunal's point that that evidence is of a general nature and I only put it in this way: it is an illustration of the sorts of points the CMA was grappling with over and above the issues which were inherent in the proceedings; grappling with the evidence, looking at the legal tests. That was a specific factor or difficulty. So

the investigation was obviously a heavy one, but it is not out of the ordinary for this period when seen in the context of heavily complex and relatively novel litigation.

Mr O'Donoghue points to incremental slippage in the timetable. In my submission, it is not clear what that is meant to show other than that the case took longer than expected and proved to be more problematic than expected. In my submission, that is life. But a submission which assumes that the initial time estimate was the right time estimate and anything which deviates from that is unreasonable delay, that is not the right way to look at it, Sir.

That is the shape of the criminal case. The final point I want to make about the criminal case is related to that. Dr Grenfell deals in his statement with the fact that the CMA took some time after Barry Cooper's plea to decide that it wouldn't proceed against the remaining individuals. That is Grenfell 1, paragraphs 10 and 11. The point he makes is that this is a significant decision. There is clear evidence of a cartel, one individual had already pleaded guilty, and it was right for the CMA to reach that decision not to charge anyone else with care and attention. Of course the effect of that process of careful consideration was that none of the participants from FPM were charged.

On that, I want to go back to a letter at tab 32, but I am going to hand up a full version of the letter because the version in the bundle which you were shown in cross-examination is one page.

MR JUSTICE MORGAN: We saw that, yes. **(Handed)**.

MR WILLIAMS: It is actually quite a lengthy letter and I would expect the Tribunal would want it read it not in the hearing. There are two points I want to make about the letter.

The first point is that the section which was emphasised in cross-examination was paragraph 2, where it was said this is a serious complaint and Dr Grenfell answers that question and says that is what the parties were saying, and so on. In fact, this was all taken seriously, but it is a separate question whether this is a serious allegation.

But he explained he wasn't responsible for replying and the matter was escalated to him. And actually when you look at that paragraph in context, you can see really why that is the case, or at least the picture is a bit more complicated, which is that these are substantive representations in relation to the charging decision and they are lengthy representations. The main point of the letter is to set out the reasons why it said that Francis McCann should not be charged.

So obviously the letter was considered in that context but to pick out paragraph 2 without looking at it in the context of the rest of the letter to say no-one responded to this complaint is not really looking at the letter in the right way, in my submission. It is a set of substantive representations and obviously the CMA's response to the letter was part of its process of consideration.

The second point, and this is the point the Tribunal will want to I hope look at after the hearing, the letter is a long discussion of the legal complexities of the dishonesty test, and the implications of that in the context of the cartel are not -- I am getting into it now at all, we just rely on the letter as an illustration of some of the very particular issues which arose in the criminal case, even when there was compelling evidence of a cartel. So that was a snapshot of that complaint.

MR JUSTICE MORGAN: Yes. There is a lot about dishonesty and a decision in *Ghosh* --

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: -- which have been removed as an authority on that question more recently.

MR WILLIAMS: *Ghosh*, right. And of course the dishonesty element has been removed from the cartel offence --

MR JUSTICE MORGAN: Indeed, yes. But these facts would always have been on the old law requiring dishonesty.

MR WILLIAMS: Yes. So if the Tribunal is against us on the principle of whether it looks at the duration of the criminal case, we reject the criticism that the headline duration of the criminal investigation creates cause for concern in the context. Beyond that, we say the investigation has been sufficiently explained.

So that is the criminal case. The second phase is the period April 2016 to June 2017. This is the pause. Although it was technically part of the duration of the civil case, on a practical level it wasn't, and I think the Tribunal has that point. In practice, this was the final phase of the criminal case and I think as Dr Grenfell put it, the civil case didn't materially move forward.

So this is the volte-face which Dr Grenfell addressed, albeit with some reluctance. The Tribunal I think understand the reasons for his reluctance and I am not going to labour that. Given that he has addressed the issue directly, I can say that the explanation he provided was not only credible and persuasive, it is intuitive, which is that it is not efficient to try and work on a very substantial evidence base when it is still in flux. In my submission, it is completely realistic to think that that is a practical reality which became apparent after case opening, notwithstanding the desire to get on with things as set out in the PSG paper.

To the extent that it matters, it does tie into one of the typical difficulties, if I can put it

that way, which was described in Ms Radke's letter. You are probably familiar with it, I am happy for you to take it out if it would be helpful, it is tab 9 of bundle 1571.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Point (e):

"It may be undesirable for the criminal investigation team to share evidence with the civil investigation team if the evidence is still being considered and tested. It may not be efficient for the civil team to start building up a case on the basis of material which may take on a different significance in the light of further inquiries."

So the point on the fact is mirrored in the general account which was provided in Ms Radke's letter.

That is the detail. Standing back, the reality of this point is not as dramatic as FPM would have it. The CMA saw a number of reasons why it was desirable to try and progress the two investigations together and it tried to do so but it found that running the cases in parallel was not productive. Dr Grenfell has explained in his second statement that the CMA has only pursued parallel cases twice and this was one of two examples, and this is an arena in which the CMA was feeling its way. That was paragraph 6 of his second statement. That is why FPM runs the case and say well, look at *Steel Tanks*. But one could equally say look at this case, one out of two each way.

So the way this part of the case has been run, the Tribunal has seen it, is to say that because the CMA wrote an internal paper setting out the case for progressing the civil case from 2016, there is now a heavy onus on the CMA to explain its volte-face. In my submission, the position could just as easily be looked at from the reverse perspective. There are strong reasons why the civil case

needed to await the criminal case and so it is not surprising that matters drew to a pause again after the civil case was opened. I have said the CMA had relatively little experience in this area and so its best intentions, as set out in the PSG paper -- they are not proof of anything except that the CMA had the best of intentions.

I am afraid I can't really resist this submission, even though there is not a jury in the room, which is that it does seem the CMA cannot really win here. If it hadn't tried to progress the case, it would no doubt have been criticised for that; and having opened the case and tried to progress it, it is criticised for a volte-face. As I say, the reality really, is not that dramatic.

Finally the civil case: this is the only part of the case where FPM was charged. That charge happened in April 2016 in the sense of the opening of the case, but you have our point that the period until June 2017 is for practical purposes accounted for by the criminal proceedings continuing. There was a repeated attempt in cross-examination to suggest that the SO should have been published within two to six months of the criminal case. But as you pointed out, Sir, that timeline assumed parallel drafting of the SO which did not happen. It may have assumed a longer period for the criminal proceedings if it had gone to a trial, which is time that would have then been used -- a longer period would have been used for the SO. So that line of attack doesn't work.

The period from June 2017 to the Decision is I think two years and four months. FPM has pointed to the current average of 18 months or thereabouts, but the average is the average. It includes cases which are simple and cases which fully settle.

We made the point that the historic average is 30 months, which this case is well below. So we do say even if one makes an allowance for the head start,

which we accept is a fair point as far as it goes, we say 28 months is not a period which causes even prima facie concern, considered in the context of the framework of the cases we looked at yesterday.

If one looks at the timeline, the position is clearer still. The evidence used for the civil case was voluminous but it was a subset of the material that was produced for the criminal proceedings and Dr Grenfell explained that there was a process of filleting, then there was a process of review and processing by the civil team. The timeline for the rest of the case is set out at paragraph 230 of our Defence. I am not asking you to take that out, I will make some points about it.

There was an initial period of deciding whether to proceed and the CMA decided that it would proceed in November 2017. We saw that letter. There were then state of play meetings with the parties in late 2017 and early 2018 at which the CMA invited expressions of interest and settlement, and the Tribunal saw some of that material. After that point, the case became what Dr Grenfell has described as a hybrid case so that the CMA had to complete effectively two processes in one: the settlement process, which was a pre-SO process, and the contested process involving FPM which went the full distance.

The Decision at 2.69 records a point which I think was ventilated in cross-examination, which is that there was a draft SO ready and issued to the settling parties in July 2018. That is around a year from the end of the pause and eight months from the decision to proceed, so not periods which cause alarm by any stretch of the imagination.

There was then a period of five months to December 2018 when the SO was actually issued. In that period, the CMA settled the case with SB [Stanton Bonna] and CPM and importantly obtained additional witness evidence from Mr Stacey

and Mr Turner which it then incorporated into the SO.

Those weren't the only things happening in this period, but I make those points because they are a matter of record. One can see from the bundle index at items 144 to 147 that the interviews were in September 2018 and the witness statements are dated December 2018, very shortly before the SO. The Tribunal has seen the Decision, it has seen the importance of that evidence, evidence building on the evidence that had previously been provided by Barry Cooper, evidence from the cartelists themselves. So that is obviously a significant and important expansion of the evidence base at an advanced stage when the CMA already had a draft SO up and running, and obviously that all needed to be taken in.

The point I tried to ventilate with Dr Grenfell about that timeline, that is the position. It is a matter of record, but I thought if the witness had been able to deal with it, that would have been helpful. But the Tribunal can see how it went. That goes to the question of whether the SO as issued materially different from the SO in July 2018. On any view, confessions from further cartelists is a material difference.

That is one example of relevant evidence which was gathered during the civil case even though the criminal case had yielded a lot of evidence. Another example is the interviews of the McCanns and Mr Cooper in 2019. It was suggested that those interviews were unnecessary. In fact, the Tribunal has been taken to those interviews as a discrete and unique source of evidence on this appeal, so it wasn't a waste of time. And anyway, as Dr Grenfell fairly said, one can't ask whether something was a necessary step with hindsight.

What had gone before in the criminal case didn't alleviate the need to follow each of the procedural steps of a civil investigation: the issue of an SO, access to the

file for FPM, representations on the SO, the issue of a draft penalty statement and the Decision. All of those steps were followed as far as FPM is concerned over and above the settlement process, and one does have to keep it in mind that until we received FPM's Notice of Appeal, it didn't admit one iota of the CMA's case. So every point was in issue.

In broad terms, the CMA had completed the settlement process and issued the SO within a period of 18 months of June 2017. It had received FPM's representations within another two months, it issued a Decision within another eight months; and in that eight months, it issued a DPS and carried out further interviews. So we say the duration of the civil case doesn't call for explanation. It is a manifestly reasonable period and if the Tribunal does think the period calls for explanation, we have explained it.

If we were wrong about any of that, the question is: what is the impact on FPM's case? This takes us to the end of their note from yesterday. If I can ask you to take out tab 85, which I think is hearing bundle 3, page 1606.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: There is a legal issue about how one gets from the application of a statutory cap in the year of the actual Decision, which is a matter of statutory interpretation, to the taking of a different year's cap for the purposes of FPM's remedy on delay. I think the Tribunal have seen the way they put it, they take an earlier year's turnover and say, "In that year, the cap would have been this."

We pressed FPM to say what its case on delay is and one can see now why it has been reluctant to tell us what the punchline is because FPM -- looking at the numbers in the right-hand column on the table on page 1606, Sir, I think we started to talk about this yesterday.

MR JUSTICE MORGAN: We started.

MR WILLIAMS: To talk about this yesterday.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: In order to make this argument work, they are driven to say the Decision has to be made by December 2016 and that is everything; criminal, civil, everything. The reason for that is obvious: as soon as you hit 1 January 2017, we move to a position where the fine is in the same ballpark as the fine which was actually imposed.

It is worth noting that a fine based on the turnover for 2017 dips and by an extraordinary coincidence, FPM has two alternatives cases. The first case is that the Decision ought to have been made in a year such that the cap would have been £16 million as per the figure for 2015, if you are with me. Their alternative case by a happy coincidence skips over the higher number in 2016 and hence this would be where the number drops again.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: It couldn't really be clearer that the case is being reverse engineered to achieve a result, rather than based on what the evidence actually tells us. Really what this does is support my introductory point that the penalty should be set at a particular level for principled reasons, rather than by picking a year which happens to give a favourable outcome. One can see from these numbers, the year is happenstance and the principles underpinning the actual penalty decision are not happenstance.

In conclusion, FPM has not begun to articulate a case about how the case could have been done and dusted before 1 January 2017. We are really at a level of pure assertion, if I may say so. Once one reaches a point where the penalty is at or about the 2017 level based on 2016 turnover, the argument

that delay has caused a step change in the level of FPM's penalty, it breaks it down -- even if you follow the logic of their case right up to that point.

That is everything I have to say about delay, Sir.

MR JUSTICE MORGAN: I have one or two questions. While we are on step 5 and what Mr O'Donoghue said yesterday, step 5 is applying statutory provision, section 36(8) and a statutory instrument.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: The date of the Decision is a fact. It is not open to us to change the fact and say the Decision on a true analysis was made on a different date; it was made on the date it was made, October 2019. If we apply step 5 to that fact, we get an answer. There is no room for us at step 5 to do anything else.

If we felt something should somehow be done to reflect the passage of time up to October 2019, that something has to be done somewhere else, not step 5. And there seems to us to be two candidates: one is step 4 because you are taking into account proportionality which might -- we will discuss in a moment -- allow you to think about these things. Or you don't do it at step 4, you go all the way through step 5 and then you say, "The answer is £25 million." But that answer is somehow to be seen to be an unfair imposition on FPM and this case calls for an end allowance to be made not contemplated by the guidance but not precluded by the guidance, that sort of matter.

I just say that. I do not think you disagree that step 5 doesn't allow to do --

MR WILLIAMS: We positively submit the point doesn't work as a step 5 point, which is how it has been put.

MR JUSTICE MORGAN: You have been very clear and very helpful of course, but

just trying to see where some of the principles take us. Necessarily we have been discussing here unreasonable delay. It is said that the CMA was unreasonable -- to put it another way, it was at fault, it was culpable -- and the other side is that FPM has been disadvantaged. That is what is being said.

Let us start with a case where there is not really any fault on the part of CMA, but it is a fact that the infringement was years in the past. The process to a decision took considerable time and during that time, the position of the infringer has changed. Let us narrow the example. It has become a much bigger company, it has taken on new lines of business. Its turnover is many times what it had been when it was a more modest company carrying out an infringement.

Certainly step 5, there is no doubt about it, you look at the position at the date of the decision and the thinking seems to be: you are fining the actual entity that will pay the fine and insofar as its size matters, you look at its size when it is asked to pay. But that is a powerful reason for saying that changes between infringement and penalty don't matter because you are where you end up, rather than where you might have been up and down, in the middle. And as your reference to the document shows, the turnover doesn't go like this **(Indicates)** -- the transcript cannot show that. It doesn't grow exponentially, it is peaks and troughs.

MR WILLIAMS: It doesn't grow exponentially, it doesn't even grow steadily.

MR JUSTICE MORGAN: It doesn't grow steadily. It is peaks and troughs, it is erratic and there are drops.

So what I wondered, just at the level of pure theory, if one decides what is a proportionate penalty to reflect everything; deterrence, proportionate to seriousness, proportionate to the size of a company, it is possible you could

say that actually this Decision is being made at a specific point in time. The current position of the company is out of line, it is not really representative of what this company is. It has had some extraordinary activity in the last three months or has had an extraordinary setback in the last three months, this point is just wrong as a way of describing this company. So you could say I am going to look more widely and settle on the size of the company. You can say that, could you not?

MR WILLIAMS: I can go further than that because the Tribunal knows what was done with CPM in this case. For CPM's purposes, its business had ground to a halt at or about the time the penalty was being worked out. The CMA looked at its turnover in the year that ought to apply or the year before the Decision and said, "That year's turnover is not representative."

MR JUSTICE MORGAN: That is -- I think I have --

MR WILLIAMS: I only make the point as an illustration.

MR JUSTICE MORGAN: No, you are helping us because what you are saying is if the point in time produces a totally unrepresentative picture, you could search for a more representative picture. If it is unrepresentative -- and it might be unrepresentatively too high or too low, it could be either way -- well, then, that is not exactly how the case is put here. What is being said is no, the CMA's at fault and FPM should not suffer. That is the tenor of it. Now let us go to fault. The suggestion is that the time taken was unreasonable. The first question is: what test do we apply? It is plainly not as expeditiously as possible because that is unrealistic, it ignores the other work of the body. If this was a contractual dispute, you would have to complete the contract of sale within a reasonable time, you have regard to external matters the parties must be taken to be governed by. That is not really our case either.

Article 6 does apply to this civil investigation. Article 6 has a reference to time and we have case law on Article 6. So if we were to try to judge fault or delay, is Article 6 the right base for us to use, the right set of jurisprudence to use? I think you have shown us the Article 6 cases. I do not have them at the front of my mind, but we did see phrases like "inordinate and inexcusable delay".

MR WILLIAMS: "Inordinate and oppressive", yes.

MR JUSTICE MORGAN: So would you accept that if we were to form a judgment on the CMA's conduct, we should be asking whether it infringed Article 6 in those ways?

MR WILLIAMS: Well, FPM certainly put the case with reference to Article 6.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: To the extent it puts its case on the basis of Article 6 and we say that is the framework for it. We accept Article 6 applies and we accept that jurisprudence applies. What we have contested is, if you like, the outturn remedy, their argument about the outturn remedy at the end of that --

MR JUSTICE MORGAN: Yes, I follow that. But if we are to address --

MR WILLIAMS: (Overspeaking) stage of the framework of analysis --

MR JUSTICE MORGAN: Yes. To analyse it, exactly, what test are we applying. Article 6 is emerging as a possible one, and you have told us your summary of what Article 6 is and we can refresh our memory from the cases.

The next question is: if it is Article 6 or something like Article 6, how do you do it? How does a Court or Tribunal appraise the behaviour and the passage of time in an individual case?

It can be done and it has been done, and the cases we saw have shown that a Court -- an appeal court or the Crown Court as the case may be -- has said, "This is inexcusable delay." My expectation is that there wasn't an order for

disclosure of the criminal investigation filed and the prosecutor was not cross-examined about what he did on this day, what he did on that day, why he took this time and why he didn't -- I think it is inconceivable that the Crown Court would require the prosecutor to give that type of evidence.

So it is done some other way. I daresay it is done because both sides know certain external events/communications: this is when this happened, this is when that happened, here is the interview, here is the charge, here is the adjournment, here is the reason for the adjournment. That was communicated to the Court and the Court then says: is that inexcusable delay? Can you think offhand of any of these Article 6 cases which is just a nice illustration of a process which another court has adopted to answer this question?

MR WILLIAMS: I haven't thought about that question through that lens. We can reflect on that over lunch.

MR JUSTICE MORGAN: If there are any good examples, we might be assisted.

MR WILLIAMS: Yes. Obviously I have read the cases I have taken the Tribunal to, one does see that kind of discussion with reference to milestones in those cases. But we will perhaps look at that and see whether there is one we can recommend to the Tribunal.

MR JUSTICE MORGAN: Of course a Crown Court judge who might be asked to dismiss a case as an abuse of process, he or she will have seen hundreds of criminal cases and will have a feel for how long things should take, how long things should not take. There are comments also in the cases about public bodies and resources and priorities and competing demands, which again we can consider, which strikes me at the moment one can read into this jurisdiction too.

MR WILLIAMS: Yes. Dr Grenfell touched on that.

MR JUSTICE MORGAN: Right. Then if one felt that there was not inexcusable delay, one is back to my earlier stage. There is no fault here, but time did pass and the point in time when the penalty comes, it is that point unrepresentative to the point that it would be unfair to take it, unfair to the infringer or maybe unfair to the public interest because it gives an aberrantly low penalty.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: It strikes me that one is able to ask those questions and give appropriate answers.

MR WILLIAMS: I think there is one more point I would make about the framework you have been outlining. I think part of what you have put to me, Sir, is that the point doesn't work as a step 5 point.

MR JUSTICE MORGAN: No.

MR WILLIAMS: I think you have conceded the point being taken in the round, possibly at the end, possibly at proportionality, and so on. If one goes back to the Notice of Appeal on this, ground 5 is on page 326 of that bundle, tab 2. This is where delay is pleaded and it is ground 5, "Failure to make adequate allowance for mitigation." Ground 5(a): "Erred in law in deciding it was not capable of constituting a mitigating factor", then 5(b) is the challenge on the facts. So that is the pleaded case on this.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Later on, there are references to the cap, and so on, later on under ground 6 and we said, "What are these points about?" They said, "No, no, this is part of the proportionality assessment."

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: But ground 5 is mitigation. We have FPM's note of yesterday

handy, they put the case in two ways now. They have a case which works through steps 1 to 4 and I think on my reading of the note, delay isn't part of that steps 1 to 4 case, it is part of the step 5 case. The question you are putting to me is: is there another way of doing it?

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: The point I wanted to make is if you look at paragraph 6 of this note --

MR JUSTICE MORGAN: Of this note, yes.

MR WILLIAMS: -- they get to step 3 and they get to a number of £35 million.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: And that is after taking into account mitigating factors.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: On the basis of ground 5, that is what you might have expected delay to be coming in. But it doesn't come in there and one does have to ask oneself why. This comes back to an exchange we started to have on Tuesday, which is that at step 3, FPM gets to a number which is in excess of the step 4 number, and in my respectful submission, I think what has happened is that FPM has seen that if delay comes in as a mitigating factor, the risk is it will just be washed out by the reduction which is made for proportionality at step 4. The point takes them nowhere so they have reinvented it as a step 5 point.

MR JUSTICE MORGAN: But it cannot be a step 5 point.

MR WILLIAMS: No, I understand that.

MR JUSTICE MORGAN: There is no explanation as to how we can interpret a statutory provision and a statutory instrument to do anything other than take the year before the Decision.

MR WILLIAMS: What FPM has not done -- it has moved it out of step 3 and it appears to be the case they have moved it out of step 3, which is mitigation, and it appears to us that one reason for them taking it out of step 3 is because it is lost in the wash.

So you asked me what is the framework.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Well, if one looks at it in the framework of the Notice, I think FPM has now -- it is now reversing out of a position where it risks its delay point coming to nothing and just being overtaken --

MR JUSTICE MORGAN: It looks like they are bringing it in as step 4 because if you go to paragraph 14 of this note, it is said that the CMA failed to strike a proportionate balance. And then it said the turnover trebled -- we have the figures, you have showed us £8.5 million and £25.5 million, so they seem to be bringing it in there.

MR WILLIAMS: The point I am making, Sir, is that the point was put in one way in the Notice and now because the numbers don't turn out very happily, the point has been --

MR JUSTICE MORGAN: Yes. Well, that is right. Although if Mr O'Donoghue later today says that the point is a good one on the merits as to fairness and appropriateness, it has to be put somewhere, and he can choose either step 4 or an end allowance. We are going to hear him on that, we will have to deal with that submission if he makes it.

MR WILLIAMS: I have a bit to say about the note which -- we will see how we go.

MR JUSTICE MORGAN: Right. I was wondering at step 4 in the actual Decision -- let me go to that. I had it open all ready to ask a question and now I have closed it. Go to the Decision bundle 1, tab 1. It is a little while since I paid

attention to the detail, but if you go to 6.73, we have FPM and step 4.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Let me just remind myself of what you say in 6.73 and 6.76. I suppose 6.76 is the better one because that is the £28 million calculated. 6.76(a):

"The figure [£28 million] is 11 per cent of the worldwide turnover for the year ending 31 December and 12 per cent of the average ..."

I see. Because the average is smaller than December 2018, the percentage is higher. Right, yes, I see.

MR WILLIAMS: That is right. But it is not very much, Sir.

MR JUSTICE MORGAN: It is not very much, it is not very much. The average is what, three years, is it?

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: So looking at the document you showed us at bundle 3, tab 85, 6.76(a) means that £28 million is 11 per cent of £254 million and is 12 per cent of the average of the three years.

MR WILLIAMS: Which is another way of putting my point, Sir, that actually when you look at the real numbers, the idea that the lapse of time has led to the numbers just stacking up in a totally different way is just not right, Sir.

MR JUSTICE MORGAN: When you did stage 4 in this case, you didn't confine yourself to the point in time or the year before the point in time, namely the year to December 2018: you also looked at three years.

MR WILLIAMS: Yes. So there is that very important point --

MR JUSTICE MORGAN: Yes, that is an important point.

MR WILLIAMS: Yes. The second point, and this is part of what we wanted to say about but we got there a bit early, the point we made about the cap is that it is

one measure, it is one metric, and the cap is based on one metric. But step 4 is not based just on one metric, so the cap is a binary rule, it is a binary thing, but this is a more rounded assessment which takes into account other metrics.

MR JUSTICE MORGAN: I think I understand then what I needed to understand. Thank you. I have intervened, do you want to then take it from there where you want to go next.

MR WILLIAMS: First of all, I am going to pick up these bundle documents. I wanted to go to grounds 1 and 3 and I am going to start with -- Mr O'Donoghue took these together and in a sense he put them all under the broad heading of implementation event, so they bled into one another. I am going to spend a little time on it but less than I had planned to in the circumstances.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: I mentioned in opening, and I think you have the point, that the target of ground 1 is implementation in a specific sense; that is customer facing implementation as opposed to other forms of implementation. It is clear from what you said yesterday, Sir, that you have that point, and that is why you have this question of implementation in relation to ground 1.

Which of the findings challenged are findings of the type to which FPM ought to object? We say actually very few when you look at it. This is an object case and the evidence in the Decision goes to the question of whether there was an anti-competitive agreement. It is of course true that some of that evidence related to the agreement operating in a practical context. But the focus of the finding is on the existence and nature of the agreement, not on what happened in terms of implementation.

The findings which are challenged include certain findings relating to conduct internal

to FPM, such as the giving of instructions to sales staff in relation to customer facing conduct, and the Tribunal heard from Mr Williams about that. That is in one sense to implementation and evidence of such internal arrangements which clearly corroborate the fact there was an agreement to explain how it worked.

On the other hand, it is not evidence about what actually happened at customer level in itself. So again, it is important to be clear about what the findings go to in assessing whether they are supported by the evidence. Amongst the findings which are challenged, there are a small number of findings which are examples of actual implementation at customer level and we defend those findings on the merits. What we disagree with is the approach FPM seems to have taken to this, which is to read findings of a different nature as though they are findings purporting to find actual implementation. That is the shape of ground 1 really in outline.

Ground 1(a) has gone so I don't need to spend time on whether there are differences between the SO and the Decision for the purposes of ground 1. This issue does however pop up again in other grounds. It popped up in compliance and I dealt with that the other day, the argument that FPM was misled by the SO and I dealt with that in broad terms. It also comes up in ground 7 where it is said that there is a material change as between the SO and the DPS on the one hand and the Decision, and that should have led to a reduction in penalty. I am not sure I will have time to take you to the SO; if not I will give you some references.

In our skeleton, we have referred to the CMA's legal findings in relation to implementation which we say is really very important context for this issue. I am going to just show you those. It is the Decision at tab 1 starting at

paragraph 5.14, which is page 180 of the bundle pagination.

MR JUSTICE MORGAN: Thank you.

MR WILLIAMS: This is the section about agreements and concerted practices. The structure of this is legal principles followed by application of principles. Just to pick up a couple of points, 5.23 is a point about concerted practices. In this case, the CMA found an agreement or a concerted practice in the alternative. This is the point that where an undertaking participating in a concerted practice remains active in the market, there is a presumption they take into account of the information, and the burden is on the parties to adduce evidence to rebut this presumption. That is a point which we will come back to.

FPM has said this is a point about object and we don't dispute object. That is not quite the right way to look at the point, this is a point going to whether there is concerted practice. So if you think about the test in terms of the broad elements, you have collusion, that is to say agreement or concerted practice, and then you have object or effect, which is harm to competition. This point is in the agreement or concerted practice bucket rather than the object bucket, and what it goes to whether there was conduct on the market, not the impact of the conduct on competition.

It may be that Mr O'Donoghue just meant that goes to whether there was an infringement, but I just thought it was useful to unpack that because it goes to the first question rather than the second question.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Moving on. There is a heading on page 185 5.28 "Participation and Implementation". Broadly speaking, this deals with, first of all, public distancing, so that is participation: can a party say they didn't participate in the infringement by, for example, remaining quiet at meetings or not doing

anything afterwards and they said you have to distance yourself.

Then it moves on at 5.31 and 5.32 to implementation and cheating, and this is all in the context of whether there is an agreement. The point made, broadly speaking, is the question of whether there was implementation or not or cheating or not doesn't affect whether there is an agreement.

These principles are then applied on the facts at 5.46 and following. Given the time, I won't read that out, but that goes to make good the point I was making that really participation and implementation in the legal assessment is looked at in terms of whether it undermines the finding of an agreement or not.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: We are going to come back to what the CMA found about effects later on; so it is implementation on the one hand, effects on the other. The relevance of implementation in this discussion goes to whether there is an agreement or whether conversely non-implementation shows there is no agreement. That is the framework in which the facts were analysed. It doesn't tell you what the factual findings are, but it is the context of the findings, which is relevant to how you read the findings.

I am going to give you some examples of this because I do not think it is a good use of time to take this in detail. I have to deal with Mr Williams's evidence and I want to deal with another point about target prices because I think that is relevant to other issues the Tribunal has to look at.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: If you could turn to 4.78, Sir. I am taking this point because it actually uses the word "implement", so I want to explain what we say about this. It is a good acid test.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Just to give you the context for this, this section is all about meetings. The discussion of the meeting starts quite a lot earlier, around 4.53, I think. Yes, "Regular secret meetings". Then 4.75, this section is called "Timing attendance roles", which is on page 86.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: So we are in a section about timing attendance rolls and if you could read 4.78. **(Pause)**.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: The reason this paragraph is in focus is because of the words "instrumental" and "implementing" in the middle of the paragraph there. What we say about this paragraph is this is saying that certain people went to the meetings to set the strategy, certain people went to the meetings because they were responsible for pricing at ground level.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Mr Cooper and Mr McCann were amongst those people, so this is saying why they went to the meetings or, more accurately, why from Michael Stacey's perspective they went to the meetings.

So this is a finding about attendance and roles, which is what the heading says. It shows that Mr Stacey thought they had the right people at the cartel to put in place a cartel. It is not an open-ended finding that the agreement was actually implemented or generally implemented by all of the people mentioned in this paragraph.

That is not a sensible way to read the paragraph, but it actually cannot be read in that way when you look at it in the context of the Decision. Because if you just wind back a couple of paragraphs to 4.56, which is within this section about the meetings, there is a long discussion starting there about cheating

and the monitoring of cheating.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: One can see at 4.58, there is an example of CPM complaining to FPM about cheating, monitoring in that direction. And at 4.60, there is an example of Andrew Cooper talking about his monitoring of the other prices -- monitoring in the other direction -- and none of that is challenged. So we have cheating and monitoring.

The idea that when one gets to 4.78 this is saying, "Oh well, these people, this is a finding of implementation or general finding of implementation," you just cannot read it in that way. As I say, the important point is that in the context, it is clear: this is about have they got the right people at the meetings to achieve what they want to achieve? So it is all about making sense of all of this, identifying a body of evidence that there was a cartel.

While we are there, 4.79(d) is basically the same point, but that is from Paul Turner. That is one example of this debate and how we put it.

We say it is clear on a fair reading of these paragraphs what they are saying. If FPM was in any doubt, we have made clear what we say those paragraphs are about. I mean, in a way, they have refused to take yes for an answer, but anyway, this is an example of a point where there is not really any dispute about what the evidence shows, the dispute is about interpretation.

Given that the issue has not gone away, the Tribunal is going to have to rule on this and various similar points. But we hope the Tribunal's task is more straightforward than it might be because as I said, we are not arguing about what the evidence shows, we are arguing about what it is supposed to mean or what it is saying.

If I can move on to -- I hope it is helpful to give you a worked example because this

ground is a bit elusive in some ways and I thought it might be helpful to explain that. If I can move on to 4.109, the reason for showing you this is a bit different. This section, 4.108 and 4109, this is an overall finding. You can see the heading at 4.108 "Aspirational target prices".

This is an overall finding that the list price is operated as targets not minimum prices in practice. 4.108 is the evidence in support of that and you can see at 4.108(d) what Mr Cooper said. He said the parties discussed aspirational prices.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: That is the context of this. The issue relating to FPM is at 4.124, this is price negotiations at FPM, and 4.124 sets the issue up:

"Within FPM, sales staff were instructed to provide quotations by reference to the agreed spot market price lists with discounts above a certain amount being referred to senior management."

And 4.125 says:

"The CMA accept sales staff may not have been aware of the cartel."

Two points are being made here. The first is that prices in the market were below the agreed minimum prices but that didn't undermine the agreement because in practice the minimums were still used as targets. That is the key point.

The second point is although there was discounting against the list prices, there were controls within FPM to keep the level of the discount within bands, which meant that they were within a tolerance of the price lists, they were within a tolerance of the agreed targets. The way this is explained in 4.126 is that this is about the framework, the price negotiations took place within the framework and I can't really improve on that.

We tried to improve on it in the Defence, where we used the word "mechanism", but

this is really all about how the power of the sales staff to discount was compatible with there being an agreement around the list prices. So this is not about instructing staff to charge cartel prices, it is about instructing staff about how they were supposed to price, whether or not they knew about the cartel.

As we understand it, there is no dispute that the price lists were agreed. There is no dispute about how pricing worked within FPM. What is the dispute? FPM says the CMA has not shown that FPM implemented the agreed price lists internally, and we say that misses the point of the CMA's finding completely. The CMA found that the parties had agreed price lists and it was understood that the price lists would operate as targets within the parties' organisations. So that is the mischief and of course the FPM personnel, Mr Francis McCann and Mr Cooper, they went to the cartel meetings and then they were responsible for pricing within FPM. So it is the same people at both stages.

I will show you Mr Cooper's evidence on this, if I may, just to bring the point to light a little bit. It is tab 150, if you could look at page 3061.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: There is a section which starts, "We did discuss prices", and I am just giving you some references. Over the page:

"Was there one common spot market, this is the price you have to go in at?

"No, there was discussion on prices and/or aspiration of prices."

So that is one reference to that. 114 comes back to this in the middle of the page:

"You refer to those aspiration prices.

"Yes, there was prices discussed in the market where people felt the prices should be."

Over again, 118, halfway down the page:

"You are giving them your aspirational prices?

"Yes, but you know that you will not -- we don't sell on that. You will not find any examples of our sales guys selling at our aspiration price. They have full autonomy to take the work at whatever price, within reason."

Then finally at internal page -- it's page 150 of the transcript, 3100. In the middle of the page:

"There is an aspirational price, there is a target to achieve in the market."

That is the evidence which is taken in the Decision at 4.108 (break in transmission) is wrong, the parties have agreed target prices.

So that is the factual perspective and there is also the legal answer, which I think I have already alluded to, which is that as part of a concerted practice, FPM is presumed to have taken information into account. Our Defence at paragraph 89 unfortunately refers to a *Dole* case, but I think it refers to the General Court, not the Court of Justice. It was meant to refer the other way round, so you I will give you another reference on this point. It's *T-Mobile*, tab 96, page 5786.

MR JUSTICE MORGAN: Let me just mark up your Defence. Where in the Defence is this?

MR WILLIAMS: Paragraph 89. This is one of those things where you leave the cross-referencing to the last minute.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: We have inserted the reference to the *Dole* case as the one instance, but we have other authorities with the same proposition.

MR JUSTICE MORGAN: Right, so it is *T-Mobile*.

MR WILLIAMS: *T-Mobile*, which is actually a Court of Justice case. Tab 96, page 5786, paragraphs 44 to 53. I won't take up time on it, it is an elementary

principle.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Even if the CMA had needed to make a finding that FPM did something with the agreed price lists (Background noise) used the information and it has not produced any evidence. When I say evidence, I don't mean Dr Chowdhury's report, I mean evidence from Mr Cooper and Mr McCann about how they set prices and (Background noise) the CMA has rebutted that presumption.

There is one more point I have to deal with here, which is that in Decision 4.143 to 4.145 -- it is probably helpful to just look at this. If I can explain what is going on here: this is an example of the issue we have just been talking about. 4.143 compiles various pieces of information from different notes of a cartel meeting on 6 November 2012 about what people took away from that meeting.

MR JUSTICE MORGAN: Just to be clear where we are. We are in the Decision --

MR WILLIAMS: Page 112.

MR JUSTICE MORGAN: Page 112, yes. It is 4143.

MR WILLIAMS: Yes, I am so sorry. There is a table, that table compiles bits of information which are in the notes of various people's notes at the cartel meeting. Effectively what this shows is people recorded different outputs for different products and what Decision 4.144 says:

"Given the similar content of these notes and the dates, the CMA considers this information was discussed and the price increases were agreed at this meeting and that is not challenged."

What the paragraph goes on to say is that the price lists issued by parties, including FPM, indicate that they were in fact reflected in their actual price list. So this

is the point where FPM says, "We have not proven generally", this is a worked example of the point. Obviously this example only proves the example and it doesn't prove what happened at customer level. But it is this issue around translating the agreement into the price lists in a concrete setting.

I am going to give you some references and tell you about calculation. This is just as an illustration. If you go back to the table at 4.143, the first column is Francis McCann's notes.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Those are at tab 94. Without too much work, we will be able to see that they record a 2.5 per cent increase for pipes up to 600. But we can go to this if you think it would be helpful for me to point out because it is a bit fiddly. Would you like me to do that?

MR JUSTICE MORGAN: Explain the point you want to make.

MR WILLIAMS: FPM doesn't admit this example, it says, "We put you to strict proof". But they don't actually say anything beyond that, they do not make any counter-submissions or representations, they have not submitted any evidence. They have just said, "We put you to proof." The evidence is all here. It is in the bundle and my concern was the Tribunal would go away from the hearing and not be able to navigate the material --

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: -- on a specific point which does have an aspect of implementation to it, and obviously we say the finding is completely well-founded. I think I will just show you three documents. If you take out tab 94, which is in folder 3.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I said it was reasonably clear when you get there. The middle of the page says, "Pipes up to 600 plus 2.5 per cent." This is Francis McCann's

notes of the meeting on 6 November 2012. Then slightly to the right and below that, "Gullies 5 per cent."

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Turn over to 96, and I am just going to tell you where the numbers are which are quoted in 4.145 of the Decision. I think this is why I needed to show you this because it is a bit of a needle in a haystack. What these documents show is if you look just to the right of the hole-punch, it says "List" in the top of the table. Do you see that, Sir? It goes --

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: That is the list price and if you go three down, you see 2640.

MR JUSTICE MORGAN: No.

MR WILLIAMS: Under list 1775.

MR JUSTICE MORGAN: 1775?

MR WILLIAMS: Are we in tab 96?

MR JUSTICE MORGAN: 96, yes. Tab 1785 is the first page.

MR WILLIAMS: Exactly, yes. If I look at the columns, they cascade down in terms of numbers, then we have "Pipe". Are you with me? "Pipe" is right below the hole-punch in my copy.

MR JUSTICE MORGAN: Yes, I see "pipe". Right, thank you.

MR WILLIAMS: Then down below that, three down is 450, so that is the size of the pipe.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: On the right of that, you have 26.40, which is a list price. So the numbers on the left are percentage discounts against the list price.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: If you go back to minus 10, you will see 23.76, put a ring around

that. That is a number one sees in paragraph 4.145/A3. I could show you the gullies example as well -- I won't, I will show you how that then works through.

If you then look at 102, it looks the same. You need to go three down again to 450 and the minus 10 column, 24.35, and that is the other number in that paragraph, 4.145/A3. That is 2.48 per cent, which corresponds to the 2.5 per cent I showed you in the notice of meeting.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Pipes up to 600, 2.5 per cent. This is for a 450 pipe, 2.5 per cent -- 2.48 per cent.

The reason why the FPM has put us to proof and not said anything else about it is because the point is completely unanswerable, Sir. I could have done that for gullies as well, but we only have so much time.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: That is another side of it, that is the pricing side of implementation. I will move on to Mr Williams now.

The issue in relation to Mr Williams is about no poaching of term deals. For your note, term deals are discussed and explained in the Decision at paragraphs 2.16 and following, that is the context. They are fixed price deals for a fixed term with end customers and the key point is that prices are materially below spot prices. That was the point, or at least generally they should have been in the competitive market.

The issue in relation to Mr Williams's evidence, the substantive issue was that he said he was instructed not to poach. His evidence is in a section of the Decision which says:

"There are various strands of evidence which are consistent with there being a no poaching deal."

Of course at a time when FPM said there wasn't a no poaching deal, but now he admits there was a no poaching agreement, which obviously puts a bit of a different complexion on all this.

Dealing with Mr Williams: the Tribunal heard his evidence. On the question of whether he and others were instructed not to poach, he was completely clear about this and, in my submission, no inroads were made to his evidence at all. He spoke from his own experience, he had been instructed by Eoin McCann and Andy Cooper not to poach and he was very clear that others in the organisation told him that they had the same instruction. He presumed that came from their superiors in the same way it came from his superiors.

That was credible evidence and I invite the Tribunal to accept it, and of course it is more credible now and inherently more likely now that it is admitted that there was such an agreement. So the plausibility of the evidence is now even higher than when it was included in the Decision.

It has been suggested that Mr Williams could not tell the difference between a belief and a fact and an assumption and what he knew and what he didn't know. In my submission, he was actually remarkably clear and precise about that and it is not at all a fair criticism. It can be said that some of what he says in his statement is assumption and supposition but he clearly recognised that. He did not purport to say the things he assumed were facts, he said, "No, it is assumption". But on the question of whether he was instructed, that was evidence from his own knowledge.

The Tribunal heard about the contemporaneous e-mail exchange with Mr Cooper, so that is evidence which corroborates his evidence that he had been told not to poach because he was seeking guidance from Mr Cooper.

It was suggested that he contradicts his account because he wouldn't have been

asking for guidance if he had instruction. But he gave a credible explanation for that, which was that his understanding was the instruction related to other products and other agreements, and this this was a new product which was not covered by the term deals.

What the CMA took from that e-mail in the Decision at 4.179 to 4.183 was that first of all, the e-mail was contemporaneous evidence of someone within FPM recording his understanding that there was a no poaching agreement and that is no longer disputed. Secondly, in his e-mail, Mr Cooper didn't say there wasn't such an agreement. He just said, "We're not interested in this work."

If one reads those paragraphs of the Decision, what Mr Cooper said at the time was this was all nonsense and there was no agreement. But FPM doesn't say that any more, so we do not really know why we are arguing about this.

Cross-examination was largely focused on Mr Williams's credibility, based on the episode with a customer in Solihull and I don't need to say very much about this, I do not think. It is clear Mr Williams recognises he made a mistake, he was straightforward about it. He was candid in talking about the event. His witness statement did go into all of the detail which was explored in cross-examination, but when it was probed he was able to explain what had happened and why the position was nowhere near the position that was put to him about this being a fraud on the company and all the rest of it.

His explanation was he feared he would get into trouble for something that really was not his fault. Obviously he handled it in a way that was mistaken but the suggestion that as a result of all that he has an axe to grind against the McCanns and that is what is driving all his evidence is not plausible, in my submission.

Just to be clear, the passage which is quoted in the Decision, which is to say 4.169,

does not say that Mr Williams acted on instruction whether generally or in any specific instance, only that he was given instruction. So that is another illustration of the point we make that this evidence is really directed at corroborating the agreement rather than trying to prove implementation at customer level which was not the focus.

There is a specific example of actual implementation in relation to term deals in the Decision at paragraphs 4.185 and 4.189, 4.198 and 4.199. We have dealt with those in our Defence and in our skeleton and I will not take up time. But when I said there are some specific examples, those are the examples --

MR JUSTICE MORGAN: Just so I have them all together, 4.185 -- what are the other ones?

MR WILLIAMS: It is one example. It is the A453 job and it's 4.198 and 4.199, and Mr Cooper's confirmation that he wouldn't bid on the latter point is at 4.199(b).

I think in that context, I would also ask the Tribunal to note footnote 644, which again goes to the point that one reads these paragraphs as evidence of the agreement rather than as evidence that that is implementation. The point is that the CMA was interested in it because it was evidence of the agreement because it focuses on the fact there is no distancing, and so on.

So that is everything I wanted to say about ground 1 and that is probably a convenient moment to break, Sir.

MR JUSTICE MORGAN: Right. In terms of your timing, we said we would keep that under review to see whether we should insist you finish at 3.00 pm. Do you want to mention anything or shall we see where we are at 1.00 rather than at this point?

MR WILLIAMS: I think that is a good point.

MR JUSTICE MORGAN: We will do that.

MR WILLIAMS: I am making reasonable progress.

MR JUSTICE MORGAN: Good, thank you. We will have five minutes.

(11.35 am)

(A short break)

(11.44 am)

MR WILLIAMS: (Mic on mute) the effects of the cartel to the penalty and our position in short is that having made an object finding, the CMA was entitled to rely on the potential effects of the infringement in deciding what penalty to impose and it was under no obligation to investigate the actual complaints of the cartel.

FPM submitted evidence that the cartel had no effect on its own prices. But taking that evidence at its highest, the CMA found that the evidence didn't show an absence of effects and didn't justify a reduction in penalty. There is a preliminary observation to make about this ground. In its skeleton, FPM has reversed grounds 3(a) and (b) and asked the Tribunal to decide the factual issue first. It says that is because the CMA has shown not to counter the evidence of Dr Chowdhury, so it says the factual question is not in issue.

That is not an accurate characterisation of the position. I think as the Tribunal will appreciate, there is a prior issue under ground 3 about whether the CMA was obliged to examine the issue of effects or about whether it was required to go further than it did in dealing with effects. We say the CMA was not so required and our position is that the Tribunal shouldn't make new findings of fact on issues the CMA didn't decide unless the CMA was wrong not to decide those points. We say the CMA was not wrong in the approach it took to the facts.

So we have not conceded that Dr Chowdhury's evidence is proof of the facts related

to which it is put forward. We say it doesn't go to an issue which needs to be determined in order to make a decision as to penalty and it is not capable of affecting the decision as to penalty.

There is one further contextual point about this. Effect is obviously an issue which could have importance beyond this appeal: there could be claims for damages against the cartelists and against FPM by customers who purchased the relevant products. Those claims may be based on FPM's prices, they may be based on the prices of others because it is generally accepted that civil liability for a cartel is joint and several.

The CMA has not decided whether there is a basis for any such claims either on the basis of FPM's prices or the prices of anyone else. It has not investigated those issues, so it would be wrong for the Tribunal to prejudge that. Of course FPM may have its own reasons for pressing for the Tribunal to decide that question, but they are not matters which fall within the scope of the Decision and on our case, they are not matters which fall for determination on this appeal.

So the legal issue in ground 3(a) breaks down into two issues: whether the CMA was required to investigate effects and the extent to which findings or evidence of effects may impact on penalty in an object case. These are obviously related issues because if the CMA isn't required to investigate effects, as a practical matter, that will affect the extent to which effects may impact on a penalty, may affect a penalty, and I want to unpack the relationship between the two questions.

MR JUSTICE MORGAN: I wrote down the first one, "Whether required to investigate effects", and then the second I think you said something which was the second question. Can you state that again?

MR WILLIAMS: Yes. The extent to which findings or evidence of effects impact upon penalty in an object case. I was saying they are related issues because if the CMA isn't required to investigate, that is going to affect the --

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: The first point is that this was an object infringement and there was no obligation on the CMA to investigate the effects to find liability. That is a very important feature of the rules because it means the CMA can proceed to make an infringement finding without an onerous and extensive investigation of the effect of the conduct, having found that it is inherently anti-competitive.

And this is the point Mr Doran referred to yesterday as the drains up exercise, and that is a key point to this part of the case. If I can show you the Decision on this, 5.63 is "The test of an object infringement" as per the leading case of *Cartes Bancaires*.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: You can see at the end revealed in itself a sufficient degree of harm to competition, so there is no need to examine its effects. I don't mean to go absolutely back to basics. When it comes to the penalty assessment, that is carried forward, and the CMA looks at the issue in terms of the likelihood of harm to competition. This is paragraphs 6.30 and 6.31.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Towards the end of 6.30, it says:

"It is well-established that such conduct amounts to the most serious type of infringement which is very likely by its nature to cause harm to competition."

And 6.31:

"High likelihood of harm to competition."

None of that is in issue.

MR JUSTICE MORGAN: But you are dealing with seriousness here and I think Mr O'Donoghue dealt with implementation and effects at step 4.

MR WILLIAMS: No, I don't think so.

MR JUSTICE MORGAN: In his note yesterday, I mean. Let me see if I am wrong about that. All I was going to say is that we certainly have to think about it as in step 1 because it is dealt with as a question going to seriousness and here you are dealing with seriousness.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: So we will need to look and see what, if anything, you said about effects -- and I am just reviewing the Decision again.

MR WILLIAMS: I will give you the reference.

MR JUSTICE MORGAN: Seriousness is quite a short -- it is not a criticism -- it is quite a short passage starting at 6.25 and going up to 6.34. That is where we are going to find whether you said, "Our penalty is influenced by our finding that this was implemented and had effect", or whether you didn't say that. It is in those paragraphs, I would expect.

MR WILLIAMS: I was going to come on to this a bit -- the point I was making there was CMA's Decision based upon the likelihood of harm to competition. Rather than look at actual effects on competition, the CMA has focused on likelihood of harm to competition, given the nature of the conduct. I can give you the rest of the references actually now --

MR JUSTICE MORGAN: These are references to what, precisely?

MR WILLIAMS: These are references to the bits of the Decision which deal broadly speaking with effects and the way it fed through or didn't feed through, as the case may be.

MR JUSTICE MORGAN: Yes. Do that, please.

MR WILLIAMS: 6.30, if you look at footnote 1082, you see, "FPM's representations about no implementation/no effects." The CMA says:

"For reasons set out elsewhere, we are not persuaded. We think it is very serious ..."

MR JUSTICE MORGAN: Right.

MR WILLIAMS: The other references I wanted to give you -- there is a bit of jumping around here, but if you go forward to page 232 of the bundle, paragraph 6.40, this goes to intentionality. You have representations there that FPM's (break in transmission) of the arrangement wasn't implemented by FPM. So this is in dealing with aggravating and mitigating factors and you can see then a reference to the *Polimeri* case which we will be looking at in due course.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: You saw seriousness, this is mitigation. Effects don't come in again at proportionality, it is just not relevant to that issue. If it comes into FPM's Notice, therefore, these are the points in the penalty assessment where it has been dealt with.

MR DORAN: Is step 1 below?

MR WILLIAMS: There is a question about whether it does go to seriousness, that is the way ground 3 is principally put: the infringement is less serious because it didn't have effects. The argument has also been put in the Notice as a mitigating circumstance. We say it is not a mitigating circumstance, certainly the evidence doesn't establish a mitigating circumstance for reasons I will come to develop. This is the way it has been put, but actually we say that those cases around mitigating circumstances, they are illuminating on the

question of seriousness as well because there are different ways of looking at the same issue, which is: is the conduct less serious than it would otherwise be because there were no effects?

MR JUSTICE MORGAN: On seriousness, the primary material is 6.25 to 6.34 and we will have to read that and interpret it. You are saying -- you refer again and again to a serious infringement by object and you refer to the likelihood of harm. That is what your Decision was based on.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: I will give you the final -- well, there are then findings in section 5 which relate to FPM's economic evidence. I think it is better I show you those later because I want to go through those. That is paragraphs 5.99 and following.

MR JUSTICE MORGAN: Between 6.25 and 6.34, are there any specific sentences or passages you want to rely on?

MR WILLIAMS: Yes. I will be making the submission that the seriousness of the infringement relates to the nature of the conduct rather than the behaviour of any one party, and therefore evidence of effect on one cartelist's prices doesn't make it less serious because one is focused on the nature of the conduct. And in looking at the nature of the conduct, one is locking at the potential harm to competition. That is one point.

The point which comes through in the discussion of mitigation in 6.40 and that footnote is that it is not a mitigating circumstance to show that you priced below the level of the cartel or below the level of agreed prices because cheating on the cartel is also a distortion competition. In my submission, that joins up with the first point because it is a reason why the infringement doesn't

become less serious because you submit evidence that your prices were lower than they might have been, because that is still distortive of competition. The points, they are articulated on different legal bases, but it is all the same question, really, which is: to what extent should you focus on nature of the conduct and the potential harm to competition and to what extent can you extricate yourself on that by submitting evidence of the impact on your own prices and only on your own prices?

Does that help, Sir?

MR JUSTICE MORGAN: I understand all those points, yes, certainly.

MR WILLIAMS: Okay. Going back to where I was, I think I need to take the guidance out at Authorities 1, tab 21.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: If I could just pick it up at paragraph 2.4.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: This is seriousness:

"The CMA will apply a starting point to reflect the seriousness ..."

And then it says:

"... and ultimately the extent and likelihood of actual or potential harm."

I think there is an argument about how one reads all of this. Our position is that this is saying you can look at the actual or the potential harm, and by implication it is sufficient to look at the potential harm. I will go on to develop that point.

So this is really --

MR JUSTICE MORGAN: You can fine saying it is an infringement by object, it is a serious infringement, it is the top end of the range in terms of seriousness as an infringement by object, it is likely to have caused harm -- when the action was taken, when the conduct occurred, it was likely there would be

harm. We don't make specific findings about the extent of any harm, we will choose our penalty without making those findings. That seems to be permissible.

If you want to go further and say we are able to make findings about the extent of the harm, there was limited harm, that doesn't detract from the seriousness of it being restriction by object. That would be permissible. Or you could say we are able to make findings about harm, we find there is very grave harm, we find the harm went even further than could have been expected, but we take it into account and we increase our penalty on account of that. That is the --

MR WILLIAMS: Yes, that is true --

MR JUSTICE MORGAN: I mean, I think what is being said is that you did increase the penalty because you concluded there was harm.

MR WILLIAMS: No.

MR JUSTICE MORGAN: It is then said you didn't have a proper evidential basis for concluding there was harm.

MR WILLIAMS: I don't know whether it said actually that we did increase the penalty. I think --

MR JUSTICE MORGAN: It said you took into account a finding of harm when you selected the penalty and it is to be inferred that is higher than it would have been if you had not done that.

MR WILLIAMS: I haven't myself thought the case was being put in that way. I thought the case was being put in this way, which is to say that inherently effects are relevant to seriousness and therefore if we submit evidence to the CMA, if FPM submits evidence to the CMA that the infringement had no impact on our prices, then that means that is evidence which goes to whether the fine ought to be reduced.

MR JUSTICE MORGAN: It is the duty of the CMA to make a finding of no effect and then to say that, "We now reflect that fact of no effect in our decision."

MR WILLIAMS: Or on FPM's case, the CMA is then bound to litigate. We are not litigating to deal with those representations and to make findings of effect in the face of that evidence, and our point is that that comes to an obligation to investigate effects --

MR JUSTICE MORGAN: You say what you did is you stayed away from making a finding about effects.

MR WILLIAMS: Yes, correct.

MR JUSTICE MORGAN: You said you have had evidence from FP McCann and even if we were to accept that evidence, it wouldn't tell you there was no effect. There would still be an issue as to whether there is no effect, and that is not an issue you are going to explore any further because you don't regard that as material when you select the penalty.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Is that more accurate?

MR WILLIAMS: That is right.

MR JUSTICE MORGAN: I see, right.

MR WILLIAMS: The point one takes from the guidance is that the CMA will or may base the penalty on the likelihood of actual or potential harm. If one looks through paragraph 2.6:

"The CMA will consider the likelihood that the type of infringement will by its nature cause harm to competition. There is no pre-set tariff ..."

One thing which follows from this is that the CMA is looking at the conduct, it is not looking at the conduct of any one party pursuant to the infringement, it is looking at the nature of the anti-competitive conduct. So that is one reason

why you don't get into effects as part of the seriousness because you are here dealing with the seriousness of the anti-competitive conduct.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: At 2.6, the first bullet, language again, "Most likely by their very nature to harm competition". And again at 2.8:

"The CMA will consider whether it is appropriate to adjust it to take account of particular circumstances that might be relevant to the extent and likelihood of competition."

So all of the emphasis here is on the likelihood of harm to competition, or to put it another way, the potential effects of the conduct rather than the actual conduct. So when in paragraph 2.8 it says, "The CMA will consider the relevant circumstances of the case," that doesn't mean any circumstance which FPM says is relevant. It means relevant in the context of the principles we have just outlined. There is really no support there, in my submission, for the view that the CMA itself has accepted that the actual effects will be material to the seriousness. That is just not the right way to read these paragraphs.

MR JUSTICE MORGAN: No, this is drafted to deal with infringements and there are basically two types of infringement. This is infringement by effect; plainly where it is an infringement by effect, you will take account of the effect --

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: -- because that is the infringement, it turns on there being an infringement.

MR WILLIAMS: Exactly, exactly.

MR JUSTICE MORGAN: But then there is infringement by object where you do not have to establish (Inaudible) effect, but you have to establish seriousness of

the object and that takes you to the likelihood of an effect. I think you would urge us to think that this guidance has been very carefully considered so as to ensure that in an object case, the CMA does not have to go into effects. It can stop short of it if it feels that is the appropriate response.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: You say that is what they have done here; that they have chosen not to make findings about effects, they don't need to make those findings. The guidance doesn't require it, nothing else requires it.

MR WILLIAMS: Yes. Later on in 2.24, there is a reference to the impact on competition and FPM says, "Here you say you will look at the impact on competition". But in my submission, that again has to be read in the context of the guidance as a whole. It is clear that doesn't incorporate an effect -- after all that careful drafting you have referred to, Sir, that is not intended to incorporate an effect assessment at the back end of proportionality. That is in the context of the same framework we have just been looking at.

MR JUSTICE MORGAN: 2.24 says you are to have regard to these things, and if you say, "We are not going to increase the penalty because we think this had a very grave impact, we will fine by reference to a serious restriction by object with likely effects" --

MR WILLIAMS: I was going to come to the question --

MR JUSTICE MORGAN: You will have gone wrong if you did increase the penalty on the basis that there was a serious effect and you had no material on which to base that conclusion.

MR WILLIAMS: Exactly, that is right. Yes, so that is very helpful to set the framework.

MR JUSTICE MORGAN: All right.

MR WILLIAMS: FPM seems to say the *Kier* case suggests a different framework -- I won't go back to it. When the Tribunal looks at it, tab 49, paragraph 133, it's the same language (Inaudible). So it is the same disputed interpretation about whether actual or potential means you should be looking at actual. We say it doesn't.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: That is the position of the published guidance. For the second point, then we get to Mr Doran's point, really, which is the position under the guidance is for good reason. Where an object infringement occurs, it is an important feature of the rules that the CMA can proceed to taken enforcement action and impose a penalty without having to take steps that would be needed for an effects case. There would be an obvious impediment to the enforcement of the competition rules if that was the way it worked.

I think that was what was being put to Mr O'Donoghue yesterday, and that is very much our submission. I am going to play that out a little bit, but can we look at the authorities on the point first.

MR JUSTICE MORGAN: Yes, please.

MR WILLIAMS: The first is *Barrett*.

MR JUSTICE MORGAN: Let me clear the desk.

MR WILLIAMS: It is tab 53.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Sir, you can see the issue for our purposes. This is one of the construction appeals cases, paragraph 85, which is on bundle page 3434.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: No evidence in the Decision that the participation had an adverse impact, so there is no evidence of adverse impact. It is that way round.

86:

"A penalty should be lower where the actual impact cannot be demonstrated."

The Tribunal's decision is at 88, which I would just invite you to read.

MR JUSTICE MORGAN: Thank you. **(Pause)**.

The guidance was differently drafted then, wasn't it?

MR WILLIAMS: It was. In a way, this case demonstrates the strength of the point because this is not about reading the guidance, this is the point of principle, which is about the nature of an object infringement. In the middle of the paragraph:

"This does not mean the OFT is required to determine the actual effects of an infringement when assessing penalties."

What FPM relies on, the last point, they say:

"The absence of evidence of actual effect is not in our view a mitigating factor."

They said that was a case in which there was no evidence, whereas in this case there is evidence of no effect. We say that is the wrong way to read the paragraph. The whole sense of the paragraph is: this is an object case, you don't need to get into this.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: There is another similar example in the *Sepia Logistics* case, which I think is in Authorities 3, tab 42. You see the argument again at paragraph 28.

MR JUSTICE MORGAN: Did you say 28?

MR WILLIAMS: Yes, 217, my Lord -- it is 29, I am sorry. 29 is the same point, really.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: This is dealt with at 83 to 86.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: This is very clear and very strong authority again.

FPM tries to explain this case on the basis -- they said that was a case where the OFT intervened very quickly and there wasn't any effect, so it was all a different thing. We say it was decided on the principle, as you can see in those paragraphs.

MR JUSTICE MORGAN: Let us just read through that. **(Pause)**. Right.

MR WILLIAMS: There is a slightly different perspective on the point, but it is actually helpful to look at it in this way in *Eden Brown*, which is A5, tab 52. *Eden Brown* is construction recruitment, rather than construction, and it is paragraph 80 at 3377.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I just invite you to read that. **(Pause)**.

So the other way I put the point, which is that you look at the nature of the conduct in determining seriousness. You have two different perspectives on the same issue: one is no obligation to investigate effects in an object case, and that position must apply equally to penalty assessment where one is undermining the object jurisdiction. The second perspective is you are not actually looking at the effects of any one part, you are looking at the nature of the conduct as a whole.

So that is the framework. FPM now says: well, look, that doesn't mean that if we put evidence to you which shows that there is no effect, you don't have to deal with that, to which we say: how does that fit with the principle that we shouldn't be drawn into that investigation in the penalty context, which one has seen in the cases. Their answer is to say: well, you can do a sort of light touch job, which is the point you started to explore with my learned friend

yesterday, and you, Sir, talked about a broad-brush finding.

Here I want to distinguish between two different things. One is a broad-brush or a broad consideration of the evidence submitted to identify what it does and doesn't show and the CMA did do this, as I will show you. That is to be distinguished from a broad-brush finding of actual effects which doesn't actually engage with the detail of the evidence.

I think FPM has in mind the latter because the emphasis of their case is on actual effects and there are obvious difficulties with that suggestion.

When you put all of this to Mr O'Donoghue, he made the point well, we looked at every single product in the range and we found no impact on any of them. So although he is talking about some sort of light touch job, what FPM actually has in mind is that the CMA rebuts this study which it is said is comprehensive across every product that FPM sells, and unless the CMA is able to disprove that, rebut it, then they have proven no effects and the penalty has to come down. I think that is the case.

But actually it went one stage further in exchanges with Mr O'Donoghue because you said, "Okay, but this is just price, what about market share and customer choice?" He said, "No, actually our evidence tends to show that there won't have been any impact on market share either because if people were being charged higher prices, then obviously this is competition on the merits," and so on. They are essentially saying that at that point, the CMA is drawn into making findings about effects on all those issues, and you have seen no doubt Dr Chowdhury's report. This is by its nature complex, technical material. It is not clear what kind of shortcut it is said the CMA can take through this evidence, it is certainly not clear what sort of shortcut that FPM can take issue with. It is very, very hard to see where any kind of line could

be drawn without this issue being litigated on the merits.

There is a further point which I want to just show you in the context of the *Anic* case, which is tab 86, which I have at folder A7.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I am going to paragraphs 79 and 80 of that case -- it is 86. This is a discussion of personal responsibility and the extent to which liability for a competition law infringement and a similar continuous infringement is collective responsibility, and I think 79 and 80 are self-explanatory. Effectively it is a sort of competition law application, the principle of joint and several liability.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I think I sometimes use the words "joint and several liability" as though I was talking about English law civil liability. I do not mean that, I mean this, so I mean competition law joint and several liability.

If one is going to lift the lid on effects, why doesn't one get into all the parties, given that FPM is responsible for what the other parties have done? Indeed, you have probably seen in their skeleton that is where they have ultimately gone with this. They have said once we have submitted evidence --

MR JUSTICE MORGAN: The burden is on the CMA --

MR WILLIAMS: It is over to you to prove the (Overspeaking) the other parties.

MR JUSTICE MORGAN: You are entitled to say: we are not going there, we are fining you as a restriction by object. We don't need to know for that purpose anything beyond the likely effects. We don't need to know the actual effects. We are not aggravating the penalty by saying that there were serious effects. Right.

MR WILLIAMS: One can see there is a Pandora's box aspect to this and we say

once that is open for the purposes of a full analysis or this idea of a broad-brush exercise, one can see the CMA will find itself embroiled in an onerous investigation dealing with the sorts of material which parties like FPM will bring forward. In my submission, that would completely undermine the basis for the clear line of authority I have shown you which says the CMA doesn't need to get into this, which is the approach reflected in the guidance. This is really, in my submission, an attempt to achieve by the backdoor what FPM cannot achieve by the front door.

This is clearly a slippery slope into the drains up exercise, if I can put it that way -- I have probably mixed my metaphors. But this is not the territory of an object, this is not nature of an object inquiry at all. It is a separate question not directly material to this case whether the CMA can increase the penalty in a case where it does have evidence of actual adverse effects. Because there the question is not whether the party or the CMA is obliged to investigate effects or to meet a party's economic case, it is whether the CMA can choose to deal with that issue.

You have already given the obvious reason why that might come to pass, which is that the case may be a case by object and effect. Recent decisions have not been of that nature, but there have been such decisions, and that is an obvious example of a situation where the CMA may have a case which is an object case not at the top of the range, but where there is evidence of actual effects.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: There are other ways which could come to pass. The CMA may have evidence from a complainant, so we say there are good reasons and they are ultimately policy reasons why the CMA should be able to increase

the fine if it has such evidence without it following that the CMA has to be drawn into an investigation of effects because a party submits economic evidence.

We say the issue is not symmetric in that way. That issue in this case doesn't turn on that issue, I am just outlining the framework and I will give you some references for that framework, if I may. It is not a point I need to take up particular time on because I am going to move on to a point which is material to this case.

Mr O'Donoghue showed you *Kier*, paragraph 88 at tab 49. He said this shows effects on relevant penalty. What it actually says is that positive evidence of actual effects may lead to an increased penalty, it doesn't say the reverse. That is also, in my submission, what one takes from the European cases, including *Prym* which is at tab 94, paragraphs 74 to 76 and 81. You are taking that up are you, Sir?

MR JUSTICE MORGAN: Did you say divider 96?

MR WILLIAMS: 94.

MR JUSTICE MORGAN: Right. *Prym*?

MR WILLIAMS: Yes. Paragraphs 74 to 76 which are right at the back of my folder, more or less, starting at page 5745.

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

I see.

MR WILLIAMS: I am just giving you the framework, Sir, because this is not a case where the fine was increased.

That is one of our points I wanted to raise on symmetry. There is actually a shorter answer to this case, which is that the evidence FPM submitted wasn't evidence of no effects, it was evidence of no effects on its own prices. There

are clear reasons of principle why that should not be enough to give rise to a reduction.

I have made the point about joint and several liability and the point about the fact that one is looking at the conduct as a whole. The other point, I have already alluded to it, is evidence of an absence of an impact on FPM's prices doesn't mean no effect or that competition has not been distorted even as far as FPM concerned. What it means on the face of it is that FPM didn't adhere to the cartel, having learned what its competitors would do, but it then used the information to its own advantage in any event. It used information to inform its strategy. So that is a different distortion of competition, but it is still cartelised behaviour.

To be clear, I am not saying it is proven on the evidence in this case that FPM charged low prices. Clearly there was evidence of cheating on the cartel, that is discussed in the Decision. But the CMA didn't make a finding of fact about that, it didn't make a finding of effect at all. I am submitting that FPM's own evidence does not show the infringement created no distortive effect or that FPM's participation was benign. It is a striking thing that although this point has been at the heart of our position in relation to this debate, this is not a point which I think Mr O'Donoghue touched on yesterday, he didn't answer this point.

This is the line of reasoning in *Polimeri* which I showed you in that footnote, Sir. This is tab 98, which I have in A8.

If you can read paragraphs 306 and 307, we have quoted paragraph 307 extensively, but this is important stuff, I just point to the case.

MR JUSTICE MORGAN: Right. **(Pause)**. There is a criticism in this passage and indeed the reasoning is a little confused perhaps. The criticism is that if you

disrupt the cartel, then from that time onwards, you are no longer a party to the infringement. So from that time onwards, you ought not to pay a penalty; and therefore from that time onwards, you shouldn't be talking about -- that goes to mitigation of the penalty. I think that's --

MR WILLIAMS: That point is made, Sir, yes. So if I can explain the answer to it.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: The focus of this paragraph is on disrupting the results and implementation of the cartel. So if you want to argue that you didn't implement, then what is said is you have to disrupt implementation, which is obviously related to but different from the test for public distancing, which is participated in the meetings in a different spirit, and so on.

The focus is if you see:

"An undertaking that does not distance itself from the results of the meeting in which it was present retains full responsibility, the Commission is not required to recognise mitigating circumstances unless it is able to show that it clearly and substantially opposed the implementation of the cartel. It would be too easy to adduce the risk of being required to pay a heavy fine on the grounds they have played only a limited role in implementing involvement."

So it is a symmetry really: if you are trying to extricate yourself from liability, you need say we distanced ourselves from the spirit of the agreement; and if you are trying to seek a reduction in fine on the grounds of non-implementation, you need to show that you distanced yourselves or disrupted the implementation.

I am not saying that that is not a high test in the same way that public distancing is a high test. It clearly is a high test, but it is a high test for very good reasons. Because if not, a party that has attended cartel meetings and been able to

take account of the information of those meetings and able to exploit, is able to then come to the competition authority when they are caught and say, "But actually, you know, if you look at what I did, I am entitled to a reduction."

What this is saying is you have to go much further than that. You have effectively got to do in the implementation context something which is similar to but not exactly the same as distancing yourself. So it is a high test, but it is a high test for good reason. So it is not intellectually confused in the way my learned friend says, it is focused on implementation and results.

When it comes to the same thing, he might say that. But it is not the same test, it is a narrower test -- it is a narrow but still very high test. That is the answer to the point that it is confused. I think the criticism that it is confused actually boils down to the point that this test is very narrow indeed. It is narrow and, in my submission, rightly so.

The other points made about *Polimeri* are that it is a case about mitigation, not seriousness. What we say about that is -- I have already explained this. This is just another perspective on the whole question of gravity: are matters less serious because a party submitted this evidence? In my submission, the answer is no, and the logic applies to seriousness in the same way that it would apply to the question of whether there is a mitigating circumstance.

MR JUSTICE MORGAN: The reasoning in this case at the end of 307 is really just by collective responsibility, isn't it? It is saying that if your conduct encourages other undertakings to harm competition, you are liable for that and it is not a mitigation that you didn't do much by way of implementation beyond that. Because the harm is done, you have participated in the cartel for which you are collectively responsible.

MR WILLIAMS: Yes, it ties into the point I showed you earlier --

MR JUSTICE MORGAN: That is entirely orthodox reasoning. Right.

MR WILLIAMS: Yes. There is that point and there is the point about it would be all too easy to take advantage of the cartel as well. So there are two points, but I entirely take the point you make, Sir.

I think I have dealt with the two bullet points made about *Polimeri*; the distancing point and then the mitigation not seriousness point.

The third point is this has been superseded by other cases, but actually there is no other case which contradicts this. What my learned friend takes you to is the *Allianz Hungária* case which says effects can only be relevant to penalty. We recognise the effects can only be relevant to penalty, but that doesn't tell you the question of how and in what respect they are relevant to penalty, that is the point I have been developing. That case is simply saying this debate about effects doesn't affect infringement.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: FPM has taken inspiration from cases in other contexts which in our submission are not on point. There is a case which I think might be a Polish case, it is almost unpronounceable. It is no vowels --

MR JUSTICE MORGAN: Perhaps we can be shown it.

MR WILLIAMS: I was not going to take you to it --

MR JUSTICE MORGAN: Tell us which tab it is at.

MR WILLIAMS: Maybe Mr Jones can help. This is a case about how the Commission should analyse the effects in an effects case. It is not a case about analysing the effects in an object case, so it is a completely different question.

FPM also cites the *Merthyr Collieries* case, which is a case about statutory compensation and about whether compensation should be assessed taking

into account events post-dating the notice of claim. That is an even more remote question and it just isn't dealing with the issues we are dealing with.

Where one gets to is that once one actually reads the authorities in the way I have taken you through, there really isn't any authority to support the view that a penalty may be reduced because a party submits evidence of no effects, particularly no effects on its own prices. There are very strong reasons of principle why FPM's stance should be rejected. *Krka* is tab 126 -- it is FPM's case --

MR DORAN: I recognise the name from another occasion.

MR JUSTICE MORGAN: It is K-R-K-A, that one?

MR WILLIAMS: Yes. I am sorry, it is --

MR JUSTICE MORGAN: Just so I can write on the cover what paragraphs might be material. What is said to be material?

MR WILLIAMS: I think one would have to take that from FPM's skeleton.

MR JUSTICE MORGAN: All right.

MR WILLIAMS: 360. We will not get into the Welsh case, that is a million miles away.

MR JUSTICE MORGAN: No.

MR WILLIAMS: *Krka* was Slovenian, I think, not Polish. I am sorry for that mistake. That is ground (3)(a), that is the law. If we are right about that, ground 3(b) doesn't arise, the CMA is entitled to decide the case on the basis of potential effects.

If we are wrong about that, the question is whether FPM proved facts which would justify a reduction in the fine. We say it didn't and this does overlap with the submissions I have just been making. Again the context, FPM's evidence, impact on its own prices. This is where I want to look at Decision 5.99 and

following.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: This is in the infringement section, it is not dealing with it in the issue specifically of penalty. But I think you saw the footnote a bit later on which refers back to the discussion in sections 4 and 5 in general terms.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: 5.99 and 5.100: we don't need to go to effects. Then 5.101:

"The CMA does not consider that FPM has demonstrated there was no effect on the market. Even if its analysis were correct, it is not known whether prices in the market or margins may have been lower in the absence of the arrangement, nor does the analysis consider the prices charged by SB or CPM."

The point we would really take from this is that one doesn't know whether there was an effect on the market as a whole, in particular the prices of the others may have been affected. Then there is a point that you actually picked up in exchanges with Mr O'Donoghue yesterday. The way you put it was in terms of customer choice, I think. Here it is expressed in terms of market shares, but it is broadly the same point.

Then it goes on and talks about reduction in uncertainty. Just to unpack some of these points -- I won't repeat the points back to you, I think you have that point, the evidence doesn't show no distortion even as far as FPM is concerned.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I made my submissions about FPM's own efforts to justify its conduct and we looked at that in the compliance issue.

So again, this is not the CMA making findings of no effects and cheating, it is just saying "Your evidence doesn't show anything", so it is not compatible with

that, which would be a different distortion.

Not knowing whether the market shares would have been different in the absence of the arrangement, just to give you some references on that. The Decision made a finding that market shares were stable from 2010 onwards. That is Decision 2.75 and 4.332. FPM has sort of made swipes at those findings at various points, but they have not actually appealed those findings, there is no challenge to them.

I have already touched on this point: faced with the difficulty with these, this evidence only goes to its own prices, this is where it says there is an evidential burden on the CMA to examine. It is not good enough for you to wave our evidence away on the basis that it only goes to our own prices because this should trigger an obligation on you to look at CPM and Stanton Bonna's prices. There are obvious prices with that argument.

First of all, FPM's own reasons for keeping prices low really don't say anything about whether anyone else did so. We do not submit the premise that the evidential burden shifts to the CMA because FPM submitted evidence which goes to something else.

Secondly, the CMA is not obliged to investigate the prices of other cartelists for the principled reasons I have developed. That being the case, it doesn't make sense that the CMA should have to investigate to see if FPM was cheating on the cartel. It is not for the CMA to carry out an investigation to prove things FPM would like to prove because FPM would like to advance that case.

There are then two further strands to this. There is a faint attempt in paragraph 56 of Mr O'Donoghue's skeleton argument to argue that the CMA should have concluded that there was no impact on CPM and Stanton Bonna's cases on the basis of some tidbits of evidence points made here and there and that

issue was plainly not before the Tribunal. If FPM wants to prove that a seven-year cartel had no effect on anyone's price, it is going to have to do more than hint at points which could point in that direction. We don't accept the premise of the points made, the material simply is nowhere near there.

One of the points made in this context is that CPM and Stanton Bonna priced below the minimum prices and in fact Mr O'Donoghue spent a lot of time on this yesterday. He took the Tribunal to all that material which CPM said it had available about non-adherence to minimum prices. I think it was tabs 90 and 60 he took you to.

It is a complete non-point, Sir. The analysis there was advanced by the parties saying that they priced below the price lists. But I took you to the findings earlier on in the context of ground 1, paragraphs 4.108 and 4.109 that the CMA found:

"The prices operated as targets, not minimum prices, so there was a reduction in uncertainty and a distortion of competition even though the parties did not adhere to the minimum prices."

So this point is based on a simple sort of misreading of what the Decision actually says and finds. You looked at 5.102, the point I have just been making ties into 5.102, which a point about reduction and uncertainty.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Just to pull the strands together on that. You said yesterday, Sir, that you might -- you talked in broad terms about a broad-brush consideration of effects in the Decision. This is not a broad-brush finding, I stress that, and I have made my submissions about the difficulties with making some sort of light touch finding of effects on the face of that granular evidence. But it is a broad treatment of FPM's evidence and why it fails to prove that the

infringement had no effects, or that the infringement was less serious for that reason.

Whether or not that is what you had in mind yesterday, Sir, it is enough to dispose of the FPM case on ground 3(b).

MR JUSTICE MORGAN: Right, thank you.

MR WILLIAMS: Moving on then. I am now before the break hopefully going to sweep up a few grounds and deal with the cap after lunch. Mr O'Donoghue then recapped on his other grounds and did a pre-reply on some of his other grounds. Ground 4, I do not have to say more about that, which is relevant turnover.

But Mr O'Donoghue said I steered clear of his point on duration. Well, I didn't deal with it because I thought it had been accepted that the point made no difference and, in any event, it does make no difference. That is the 5.63 point, which is just another go at a relevant turnover argument.

MR JUSTICE MORGAN: If he is right about the wrong year was taken and we will take a year or an average -- if he is right it is the wrong year we will not continue with the wrong year and then mathematically cancel the effect of the first error. (Overspeaking) you can do it, but you wouldn't correct an error that way.

MR WILLIAMS: I wasn't sure I needed to say what I have just said, but I have said it anyway. I did not steer clear of it, I think the point has been dealt with.

MR JUSTICE MORGAN: He is either right or wrong about the choice of the year.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: He has another new point that it shouldn't be 6.75, it should be 6.4.

MR WILLIAMS: That is the ground 7 point. I will deal with that.

MR JUSTICE MORGAN: Right. Is it in the Notice of Appeal?

MR WILLIAMS: 6.4 is not in the Notice of Appeal, no. 6.4 is not in the Notice of Appeal.

MR JUSTICE MORGAN: No.

MR WILLIAMS: I was going to deal with that on the grounds, sorry.

MR JUSTICE MORGAN: I see, it is ground 7.

MR WILLIAMS: I think the argument, I think the way it is put or the basis for the 6.4 is in the Notice. The number 6.4 wasn't in the Notice.

MR JUSTICE MORGAN: Yes, understood.

MR WILLIAMS: So then ground 5(d), which is compliance. I dealt with this comprehensively in opening. The only development since opening has been Mr Mulholland's evidence. Mr Mulholland was a helpful witness, he answered the questions clearly and directly until the last question, where my learned friend objected to it. That question wasn't really very material to the cross-examination anyway.

The effect of Mr Mulholland's evidence was that any person who completed the FPM training programme and took the points that were taken into FPM's SO response and said the things that certainly the McCanns and Mr Cooper to some extent said in their interview hadn't understood the training.

He said that from the perspective of a businessperson, not from the perspective of a lawyer. He also confirmed that by the time the McCanns had submitted the SO response, they had done the training at least once and I think at least as Eoin McCann is concerned, twice. That is what we mean by a distinction between a paper-based process and a lack of culture shift at the top of the organisation.

We mean there has been a process and it has not had the necessary results in the

real world as far as the directors are concerned. I won't repeat my submissions about this, but broadly speaking the cross-examination of Mr Mulholland fully supports the way I put the case in opening. Francis and Eoin McCann, and to an extent Andy Cooper, have not understood and taken on board the principles of competition law.

MR JUSTICE MORGAN: They may have understood them, but you say they haven't taken them on board. They continue to be non-compliant.

MR WILLIAMS: It is one or the other, Sir: either they have not understood them or they have not accepted them.

MR DORAN: (Away from mic) he did answer the question. He seems to know --

MR WILLIAMS: Can I deal with that. I fully understand, this is really what this comes to now, I think: we have established our headline proposition and my learned friend now says even if we don't get 10 per cent because it didn't go all the way to the top, what about --

MR JUSTICE MORGAN: Something in between 0 and 10.

MR WILLIAMS: What about half of the glass that is full, and that is a very rose-tinted way of looking at the issue, in my submission, which is to say two things, really. First of all, the extent of the problem was highlighted by the fact that Mr O'Donoghue is driven to make a submission that there are systems within FPM which create a failsafe in case the directors don't comply. He actually said that, and that is the gravity really, that is the problem he has to grapple with. Because the directors are at the top of the organisation and it is on the evidence that their behaviour above anyone else's which needs to be reformed. And as I say, it is not good enough against that background for FPM to say the junior staff members need to know to do the right thing.

The McCanns themselves (background noise) until the problem is fixed as far as

they are concerned, then there is a clear basis for not making a compliance discount. Mr O'Donoghue made a submission, and it was a telling submission, that FPM would have been better off saving the cost of legal training because it didn't get the discount. That exposes the problem, if I may say so. FPM has treated this discount as though it is a sort of return on investment rather than a cultural change that needs to happen in its organisation. They are aggravated that they have brought in Pinsent Masons and paid for this training for junior staff members and that that has not triggered their 10 per cent.

But the basis for the CMA's decision is clear from the Decision and the evidence the Tribunal has seen completely supports that finding. As I say, the problem was at the top of the office and the evidence suggests that the problem was not fixed at the top of the office, at least at the point when the CMA made its Decision.

So that is the issue on ground 5(d). There is a very small leftover point, which is footnote 1105, and I think the Tribunal might want to look at this. I am only going to explain, this is not a discrete issue.

MR JUSTICE MORGAN: Before you go to that, just reading footnote 33 to the guidance because compliance itself is in a quite detailed way and there is a clear burden placed on the infringer to satisfy the CMA that there has been a culture change from the top down. That is the guidance, we are applying the guidance --

MR WILLIAMS: Yes, yes, Sir.

MR JUSTICE MORGAN: -- we have regard to the guidance. The way it is put is that some compliance won't do. It has to be real and full compliance. If you fall short of full compliance other than *de minimis*, you don't merit this

discount. Another way of looking at it, you might merit -- if you have partial compliance, you get a partial 10 -- part of 10 per cent. But we will have to review whether that is the right way to read it.

MR WILLIAMS: I think I would make this point: I think it is clear that the change needs to be from the top down.

MR JUSTICE MORGAN: Yes. It says that, certainly.

MR WILLIAMS: It says that. But I am not inviting you to read it like a statute, I am making the submission that the problem was at the top.

MR JUSTICE MORGAN: Yes. The problem started at the top and you say that problem has not been eradicated at the top. All right. Sorry I interrupted you, you were about to move to another point.

MR WILLIAMS: Yes, I am going finish this ground off. It's footnote 1105 on bundle page 238.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: This is just to explain where this fits in. If you look at 6.57, it says this is the point about the significance of problems at the top. It says:

"Particularly given that FPM has stated that 'the company's directors monitor business and compliance risks through direct active involvement in the management of the company which it considers to be appropriate to the size of FPM'."

This is saying this is a particular problem given the responsibility the directors have for compliance. It is basically saying, "we think this is proportionate for an organisation of our size."

I think 1105 is just more context around the arrangements that FPM does and doesn't have. It is not intended to be a free-standing criticism, that is why we have not focused on it in this hearing.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: My Lord, I have ground 5(c) to deal with, which is the oral hearing point which is quite short and the caveat. I am optimistic we will be there or thereabouts. There is then the question --

MR JUSTICE MORGAN: The hearing point, we have detailed written submissions on that. We understand the point. We have to form a view about it.

MR WILLIAMS: I might say a few sentences about it.

MR JUSTICE MORGAN: Say a few sentences.

MR WILLIAMS: Yes. Then there is the question of FPM's note of yesterday. Shall we see where we are at 2.00?

MR JUSTICE MORGAN: You would like to break at this point and come -- are you going to have your few sentences on --

MR WILLIAMS: I will break to see if I can reduce my sentences.

MR JUSTICE MORGAN: Right. It strikes me that you will be finished at or around 3.00.

MR WILLIAMS: I will in my submissions on the grounds. The issue is really the note of yesterday, which is in some respects a sort of new case or new way of putting the case.

Can we see how we go for time? I would like to say something about it and I am a bit -- I don't think it will be particularly helpful for the Tribunal if we say what we have to say about that until the post-hearing notes because then there will be --

MR JUSTICE MORGAN: No. It is best to hear when everyone is here to listen to it. We will see how you get on up to 3.00 and we will be fair to both sides as I have promised you.

MR WILLIAMS: I am grateful.

MR JUSTICE MORGAN: I want to take something with me, give me a moment to find it. **(Pause)**.

We could sit at 1.45, but you may welcome the full hour, do you?

MR WILLIAMS: I think 1.45 would be okay.

MR JUSTICE MORGAN: We will come back at a 1.45 and that will help, I hope.

(1.00 pm)

(The short adjournment)

(1.46 pm)

MR WILLIAMS: Sir, I want to pick up one issue we touched on this morning as we went through our discussion at the end of my submissions on delay. We had an exchange in relation to your questions about the different points at which the delay issue or the issue of FPM's size could be factored into the penalty methodology. I answered your Lordship's question, obviously you will appreciate I was engaging in that discussion without prejudice to all of the principal points we make in relation to delay and whether it will ever bite in terms of the impact on the penalty.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: One point we touched on was about CPM and how -- you said to me would the CMA ever take account of the undertakings' financial position at the point of the Decision, which might be different from its position in previous years. I want to give you the reference for that point in relation to CPM in our Defence. It is hearing bundle 1, tab 5, page 512. The context for this issue was that the CMA used CPM's turnover in the previous business year in calculating the cap.

MR JUSTICE MORGAN: Yes, I recall.

MR WILLIAMS: FPM criticised us for that and said that was an error of law and we

couldn't do that because the cap is prescribed by statute. What this paragraph does is explain our position in relation to that issue, it is paragraph (iv) on that page. That refers to footnote 1142 of the Decision, which I was not going to get out now.

MR JUSTICE MORGAN: I see. So that is perhaps -- it can be fitted into the kind of framework I was putting to you, but it actually does change the year at step 5.

MR WILLIAMS: Yes, and that is the point I wanted to return to because there is a difference between -- there is reference here to the *Britannia Alloys* case and a specific scenario in which at least as a matter of European law it is possible to use a different year's turnover, and a specific point is that the preceding year may represent normal business activity. Obviously it is taken as significance as far as --

MR JUSTICE MORGAN: In this case, did the choice of the earlier year serve to increase the penalty to push the cap up to a higher point?

MR WILLIAMS: Yes, that was certainly its effect as far as CPM --

MR JUSTICE MORGAN: Because the year mandated by the statutory instrument was a wholly atypical year and although it would have provided a quite modest cap at a low level, that was not really how the provision should function. So you chose an earlier year and you ended up saying the cap is at a higher point. Is this how it works for CPM?

MR WILLIAMS: That is for CPM. Of course FPM has argued that was unlawful and we have said, well, we disagree, but --

MR JUSTICE MORGAN: Your legal position remains as stated there, so it would work the other way: if FPM, repenting of its earlier legal submission, was to submit to us that at step 5 you can for special reasons change the year, we would have to listen to that argument and decide whether to change the year

from 2018 to another year.

MR WILLIAMS: I see the way you put it to me, Sir. I think the point we make is that we rely on a specific authority, albeit in European law, and put the view that as the domestic statute, we were able to do that. But it wasn't a general discretion to vary the cap in order to do just this with reference to, for example, complaints on different legal issues. It was specifically about making sure that the business unit represented normal business activity.

MR JUSTICE MORGAN: Well, it can operate two ways. With CPM, you didn't give them the benefit of the cap literally in accordance with the statute. You gave them the benefit of a less generous cap at a higher level. It is not for us to decide, unless we have to do this under equality of treatment, whether you are right or wrong about that. Speaking for myself, I don't really see a difficulty.

Say the cap is £25 million and you don't change that, it is £25 million, there is nothing you can do about that. But that £25 million is based upon a year which is inappropriately unfavourable to FPM for some reason. I do not see why you cannot make an end allowance to bring the penalty below the cap if you feel that fairness makes that appropriate. I do not see why you cannot make an end allowance.

MR WILLIAMS: I think this is where we draw the distinction between jurisdiction and principles, Sir.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: You have a broad jurisdiction in relation to penalties. What I have really been submitting to the Tribunal yesterday and today is that within that jurisdiction, one has to arrive at the correct principled approach to an issue of delay and whether it can ever play out in terms of a reduction --

MR JUSTICE MORGAN: Absolutely.

MR WILLIAMS: That is one strand of the discussion. In terms of this piece of the discussion, the point I am making is that the CMA brought itself within a specific line of authority and a specific principle, which is to do with preceding year not representing normal activity. In my submission, that is different from an argument which I have been --

MR JUSTICE MORGAN: If you give me 30 seconds, I will just read footnote 1142 in the Decision so I see how the numbers worked for CPM**. (Pause)**. Right.

MR WILLIAMS: We say that is -- I just wanted to explain that specific principle, which I think I have already engaged with some of the points you put to me about what happens if the final year isn't representative. That is that principle. The idea of flexing the cap to deal with delay is a different thing, and Mr Jones reminds me that we looked at paragraph 6.76 this morning --

MR JUSTICE MORGAN: We did.

MR WILLIAMS: -- and we identified the turnover over three years and was taken into account as part of the proportionality assessment. As Mr Jones points out, it is immediately following that that the complaints about delay is dealt with, so it is as part of that picture.

MR JUSTICE MORGAN: Thank you.

MR WILLIAMS: Okay. A few sentences on ground 5(c). They are not the shortest sentences I have ever drafted, but it is a few sentences.

MR JUSTICE MORGAN: This is co-operation.

MR WILLIAMS: Co-operation, a short point. The guidance provides that the CMA may reduce a penalty on account of co-operation. It's guidance 2.19 and footnote 35 and the reference is to co-operation which allows the investigation to be carried out more speedily

and more effectively.

FPM did get a co-operation discount of 5 per cent and really the question is: is this point, does it register; and if it registers, is it worth another 2.5 per cent, which is how it is put now? I think at the pre-appeal stage, it was said to be a 5 per cent point, now it is said to be a 2.5 per cent point. The dispute is narrow and that is the point.

I thought it was correct --

MR JUSTICE MORGAN: It is 2.5 per cent between you at this stage.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Assuming Mr O'Donoghue's note is what he is contending for. Right, I don't --

MR WILLIAMS: I thought I had mis-recalled that. Our case boils down as follows: the saving of an oral hearing is a minor matter from the CMA's perspective. It didn't know it was being treated as co-operation because the saving is much more material for the party under investigation than for the CMA. The oral hearing is the party's opportunity to present to the CMA, and we have given the references in our Defence and to the guidance which explains that. But ultimately, that isn't really the issue for the Tribunal. The issue is: is this a point which justifies FPM going up a bracket for co-operation or going up half a bracket?

In relation to that, we say the question -- it is now put in terms of speedily, and we say speedily is a question of degree. In evidence, Dr Grenfell said it made a difference of weeks, but he didn't accept six to eight weeks. So the question is: what does weeks mean? Let's say it saves, two/three/four weeks out of 28 months, that is a limited saving in time overall and it is not even clear it would have affected the overall timeline if other things are happening in that period.

So not every saving of time is material enough to be treated as co-operation. There is really no comparison between this point and something like streamlined access to the file which imposes very significant burdens on the CMA and which involves weeks and months of resource preparing the file, redacting documents, making sure they be provided to third parties, and so on.

So we really say there is a question here: what sort of conduct assists the CMA if there is no reason to incentivise? The CMA's view is that deferring your right to an oral hearing does not meet that test. But in any event, FPM did get a discount for co-operation and the Tribunal has to decide whether this is a point which merits a higher discount. We say this doesn't take FPM up a bracket or half a bracket if it is a minor matter.

I hope that was a few sentences.

MR JUSTICE MORGAN: It might be perhaps it is one of those points that the CMA is far more likely to be right in exercising a matter of judgment than this Tribunal because the CMA knows what are the practical consequences for it of something of this kind. So without delegating our decision to the CMA, it is a matter we might consider. They are very likely to judge better than we can judge.

MR WILLIAMS: The CMA does not have any incentive to withhold discounts for co-operation. It has an incentive to make this part of the regime work directly in its own interests.

MR JUSTICE MORGAN: Understood.

MR WILLIAMS: Ground 2. I think as really you drew out in exchanges with Mr O'Donoghue yesterday, ground 2 comes down to a short question of statutory construction.

MR JUSTICE MORGAN: It is a very important question, but ultimately it is what is

the function of the statutory provision because its function will indicate what effect we give to it.

MR WILLIAMS: Exactly.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Our submission in short is that the statutory maximum is there to cap the amount the parties have to pay by way of penalty, not to establish the top of a range of seriousness. There are differences between the cap based on a percentage turnover and an absent maximum sentence or fine in the criminal context. When one looks at the provision in its broader context, as you were suggesting yesterday, Sir, the point becomes clearer still.

Our argument reflects what this Tribunal has said is the purpose of the cap. In an authority where the point wasn't directly in issue, but it was an important authority, it reflects what the Court of Justice has said is the purpose of the equivalent cap under EU law, and it reflects the inherent nature of the cap which is set (break in transmission) ...

MR JUSTICE MORGAN: ... on the statute which I am taking out.

Do we get any (break in transmission) on the statutory provisions: how they are expressed, the way in which they were enacted and then amended? I was puzzling about section 36(7)(a) because that wasn't there originally -- let's see when did it come in? It came in the 2013 Act. So initially on penalties, the original 36 didn't say anything about the amount of the penalty, apart from 36(8).

MR WILLIAMS: That is true, but I think the point you made (break in transmission) 38 I believe was always there.

MR JUSTICE MORGAN: Yes, that was always there.

MR WILLIAMS: And the heading has always been "The appropriate level of

penalty".

MR JUSTICE MORGAN: It has been amended, but presumably it said the OFT, the director, rather than the CMA.

MR WILLIAMS: It must have said that at one stage.

MR JUSTICE MORGAN: So that was the amendment to that.

MR WILLIAMS: Really to follow your train of thought -- I do not mean to interrupt.

MR JUSTICE MORGAN: No, please.

MR WILLIAMS: If one looks at it in that way, 38 was always there and 36(7)(a) tipped into 38. So it provides content to 38 because the CMA has to publish guidance and the guidance will give effect to the principles in (7)(a).

MR JUSTICE MORGAN: If I was doing the drafting of the amendment, I would have put (7)(a) in section 38, but they did what they did. There is no magic in the fact that (7)(a) comes before (8).

MR WILLIAMS: I do not think so because we read these provisions together --

MR JUSTICE MORGAN: You can't really say that. Mr O'Donoghue's argument is that (8) is the first step and then as a subsequent step, you consider (7)(a). You know the maximum is the maximum for the most serious and you move downwards. But it would be too mechanical to say (7)(a) has to be done before (8).

MR WILLIAMS: No, I do not say that. I don't make that --

MR JUSTICE MORGAN: No, I think you are very wise. Right.

MR WILLIAMS: Yes, I think you have our points: the statute prescribes the purposes of the penalty in (7)(a), the cap is a percentage of turnover. It is inherently focused on the level of the resources available to the undertaking. Yesterday for the sake of argument, you said if all you had was 36(8), then you would perhaps appear to be in the territory of the criminal cases and we say

actually, no --

MR JUSTICE MORGAN: Not even there.

MR WILLIAMS: The fact that it is framed with reference to the resources of the undertaking tells you something about its purposes.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: You have it at tab 7, we don't need to go to it. The position is that it is the year before decision, and that accords with our interpretation because the fact that it is up to date financial information tells you that this is about the means of the undertaking at the point of the decision.

I appreciate that comes from a subsequent statutory instrument, but you are entitled to construe the regime as a whole. You have seen the authorities under ground 4 which link the notion of seriousness that impact is linked to turnover at the time of the infringement, not turnover at the time of the decision.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: You have our points on 38. It is very interesting that the section about the level is really about the guidance and it tells you the level is going to be principally determined by the guidance, subject of course to the statutory cap.

We do say that that framework is materially more difficult to square with FPM's position that the level is principally a function of the cap and a range leading up to the cap, rather than being a function of the guidance. The statute vests the CMA with discretion has to give effect to the objectives of the penalty, and the guidance reflects its chosen approach.

The CMA of course has to take account of seriousness under the statute and its guidance does that, not using a simple linear scale from 1 to 10, but in a more rounded way, in my submission. So steps 1 and 2 broadly take account of a

number of parameters of seriousness or gravity or impact; that is the size of the undertaking's business, the relevant turnover, the length of the infringement, there is a seriousness multiplier. That core calculation is then adjusted for aggravation and mitigation which may reflect other factors going to seriousness, part of the same discussion we have been having this morning.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Step 1 is seriousness of the conduct, step 3 may include other factors going to seriousness, for example, as far as the individual undertaking is concerned.

These considerations are all relevant to the statutory objectives and on the face of it, the CMA's methodology is a rational and indeed, I would submit, an appropriate and effective way of taking account of them.

FPM is driven to say that the statue prohibits this approach, it prohibits the CMA from building up its penalty from relevant turnover rather than a percentage of global turnover. Even if the CMA ultimately complies with the cap, we say there really isn't anything in the guidance which takes you to that extreme conclusion, and it is inconsistent with the discretion which the Act prevents in the CMA.

If one instead starts from the proposition that the CMA is not prohibited from basing its prima facie penalty on the factors considered at steps 1 and 2, then one can see straight away why for good reasons the CMA may calculate the prima facie penalty in excess of the cap. For example, there is the relationship between turnover in the relevant market and the global turnover. The higher the proportion of relevant global turnover, the more likely it is that the step 1 number will be in excess of the cap.

But that simply reflects the fact that the undertaking may be participating in a very serious infringement where the impact, broadly speaking, is entirely higher than the level of the cap might suggest. Of course, as soon as one brings in multi-hearing infringement, that is another reason why the step 1 and 2 number may be driven up.

So that is one reason why the statutory purposes may lead to a penalty in excess of the cap on a principled basis. Another is deterrence: the CMA may take the view that to deter an undertaking, it really needs to be fined more than the cap. If I can give this example: take a case in which an undertaking has previously paid a fine at the level of a cap and it is a repeat offender. In a case like that, it is completely plausible, completely logical, to say that deterrence requires a penalty in excess the cap, even if the CMA cannot ultimately impose that penalty.

So once again, one sees the potential tensions between the objectives of the penalty and the operation of the cap. Proportionality, the CMA may take the view that an undertaking can afford to pay more than the cap. This is an issue I have touched on in ground 6: the cap is a single measure of the undertaking's resources. In a business with a very high profit margin, 10 per cent of turnover may be relatively low (break in transmission)

Given the way proportionality works under the CMA's guidance, there is nothing illogical or unprincipled about that and that may suggest a prima facie penalty in excess of the cap. So these are all sound reasons why the statutory objectives and the principled approach taken by the CMA may derive penalty at steps 1 to 4 which is in excess of the cap and why it is appropriate for the cap to bite after those matters are taken into consideration. There is nothing *ultra vires* about guidance which ensures that the cap is respected after those

other considerations are taken into account.

MR JUSTICE MORGAN: If you read it as a cap, then in some cases the cap will not be relevant because the fine won't go as high as the cap.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: The cap will only be relevant where otherwise the fine would be higher.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: So when Parliament said there shall be a cap, it must have foreseen that there would be some cases, otherwise it was wasting its time. There would be some cases where the fine would otherwise be above the cap, so there was a purpose for the cap to bring the higher fine down to the level of the cap. It doesn't strike me -- if it is a cap, there is nothing at all remarkable about a state of affairs where before you apply the cap, you are at a higher level.

MR WILLIAMS: No.

MR JUSTICE MORGAN: That is the only time you need a cap or that there is a statutory purpose in imposing a cap. It all goes back to what is the function of --

MR WILLIAMS: It absolutely does, but I think the points I have been trying to make to you are points about why in the context of the provisions read as a whole, we say -- which supports the interpretation -- it is a cap in the sense you have just described it, Sir, and I suppose what I was just doing is broadening the horizon a bit further to take into account how these statutory objectives play out and what their implications may be. If you take that slightly wider horizon, I think you will come to the same conclusion, Sir.

MR JUSTICE MORGAN: On the function of the cap, really what you are saying is

that so as far as the statute goes, the amount of the penalty is unlimited, but then there is a cap by reference to affordability. The guidelines or the guidance is meant to guide one, but there is no statutory upper limit --

MR WILLIAMS: There is a statutory upper limit.

MR JUSTICE MORGAN: -- subject to the cap, but the cap is there for the purpose of ensuring affordability.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: It is just as if the offence of causing death by dangerous driving, they might say the maximum penalty is five years and then in another section say, "In any event, if a monetary penalty is imposed, it ought not to exceed 50 per cent of one year's earnings of the defendant." Both of those would be perfectly sensible provisions which would combine together. So too here: you have no statutory upper limit, but you do have a cap by reference to the single concept of affordability.

MR WILLIAMS: Yes. I think this is what you are saying: there is no statutory upper limit as a tool for giving effect to the statutory purposes, there is a statutory upper limit for a different purpose.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I am going to talk about four authorities, but I do not think I need to take you back to *Dansk* because I think you know what that says. *Dansk* is the --

MR JUSTICE MORGAN: Well, I think I have made a note of the four European cases. I think they are all in your -- I think you referred to three of them.

MR WILLIAMS: I think you went to *Dansk* with Mr O'Donoghue a bit.

MR JUSTICE MORGAN: I did.

MR WILLIAMS: You had a direct exchange where he said this is what the CMA

says, and we say it is wrong. The main point of *Dansk* is it goes through the, if you like, the intellectual steps I have just been describing and it says it is perfectly principled to have a penalty that goes up above the cap and comes back down and that is our point. So obviously --

MR JUSTICE MORGAN: Show us what you think we need from the --

MR WILLIAMS: I was going to show you *Eden Brown* at tab 52 first. This is not authority where the point was -- the real point, I do not think, but it is just interesting that the -- it is paragraph --

MR JUSTICE MORGAN: As far as one can tell, no-one has previously argued Mr O'Donoghue's point, but that didn't stop members of the Tribunal describing how they understood --

MR WILLIAMS: Exactly. So the issue in *Eden Brown* is at 39.

MR JUSTICE MORGAN: Thank you.

MR WILLIAMS: The point is this is a recruitment business and in choosing relevant turnover, the OFT used gross turnover including the wages costs, not just the agency's margin on top of the workers' costs. Do you see the point?

MR JUSTICE MORGAN: I see that, yes.

MR WILLIAMS: It is a recruitment business and the turnover includes the cost of the staff. But their real business was farming the staff out rather than employing the staff. If you looked at the gross income, it wasn't really representing the scale of business, I suppose. I am putting my own gloss on that.

MR JUSTICE MORGAN: I understand.

MR WILLIAMS: Then at 57, the Tribunal says what it says.

MR JUSTICE MORGAN: Right. I will go there. **(Pause)**. Right, I see that.

MR WILLIAMS: It is the President's view that the point wasn't argued in the way it

has been argued here, it is not an outlandish(?) proposition.

So that reflects EU law -- I say reflects, it is consistent with the position in EU law. I am going to take this reasonably quickly, if I can.

It is not disputed that the UK regime is modelled on the EU regime and it is therefore consistent with the statutory intent for the UK regime to work in the same way. We have referred in our skeleton at paragraph 65 to the *Prince of Hannover* case just for the authority that -- as authority that a view that these statutes should be construed in its broader context, which would include the fact that the UK was enacting a parallel regime.

MR JUSTICE MORGAN: Just on the parallel regime: the Competition Act is 1998 --

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: -- we have been given the 2003 Regulation. Do we have the earlier one which was in existence in 1998 when the Competition Act was passed?

MR WILLIAMS: Mr Howell tells me it is the bundle.

MR JUSTICE MORGAN: There is a 1962 one, is that it? It is the 1962 one. We have both, I think I saw there was 1975 and 1976 or something.

MR WILLIAMS: The point we make in our Defence is that whether or not one had the *Dansk* case, one did have the EU's guidelines at the time and the EU's guidelines articulated the same broad framework: that is to say you do the calculation in the way the CMA does it now.

MR JUSTICE MORGAN: So in 1998, you had the Regulation number 17/1962, see divider 75; is that right?

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: And you had the EU guidelines.

MR WILLIAMS: Which were January 1998.

MR JUSTICE MORGAN: Do we have those in the --

MR WILLIAMS: I think we do. I am sorry, I do not have them open.

MR JUSTICE MORGAN: If you think we do, then we will find them. We are told it is in the 2003 Regulation, it is Article 23(2).

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Can you help where it is in the 1962 Regulation?

MR WILLIAMS: I don't have it at my fingertips.

MR JUSTICE MORGAN: But it is there, so we ought to be able to ... it looks like Article 15/Article 2.

MR WILLIAMS: The guidelines are at tab 78, Sir.

MR JUSTICE MORGAN: Yes. It is Article 15. Under tab 78 are the guidelines. They are dated you said -- 14 January 1998. Yes.

MR WILLIAMS: The Competition Act was March, so ...

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: But actually I think we would make the submission, it might seem like a bit of a lawyer's submission, but if one is trying to divine the intention of Parliament, one has to proceed on the basis that Parliament (break in transmission) construed, and even if one finds out after the event what the EU regime correctly construed means, that is part of the matrix. This is not really a sort of looking inside the minds of a legislator's point, it is a point of subjective construction. Because you have the guidelines, I do not think one needs to play those intellectual gymnastics.

MR JUSTICE MORGAN: I am not sure I agree with that proposition, but as you say, we have guidelines. So that is the statutory background to the provision.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: You have seen *Dansk* and we say, and I think it is agreed, it is bang on point. Section 60 applies and even if it doesn't apply, we would say it is persuasive authority about why a coherent regime should operate in this way.

I wanted to just take out three other cases, two *Flat Glass* and the *W Hing* case. The first is *Pilkington*, which is at tab 119. The reason I am taking these out, Sir, is that they all contain slightly different ways of characterising the purpose of the provision and I thought it would be useful for you to see them.

MR JUSTICE MORGAN: Yes. We will certainly read all the cases referred to, but if you take us to the passages, so much the better.

MR WILLIAMS: 119, *Pilkington*. The issue in *Pilkington* is at paragraph 25.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: You can see from paragraph 26 that this is a case in which it was an issue because of currency exchange rates. So this is the context in which they were worrying about how the cap ought to work. The relevant paragraphs are 36 and 37.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: 36 is very much *Dansk*. 37, whether or not you think it is a different way of articulating the point, but they talk about a quantifiable and absolute ceiling with the result that the maximum amount can be imposed, can be determined in advance. So there is a kind of legal certainty aspect to that as well.

If you turn back to tab 117, there is another flat glass appeal called *Guardian Industries*.

MR JUSTICE MORGAN: Right, I am not sure. Can you just explain that to us, Mr Williams? (Inaudible) is not required ...

MR WILLIAMS: You mean me?

MR JUSTICE MORGAN: I do mean you, yes as you are on your feet and it is your authority.

MR WILLIAMS: I would be happy for Mr O'Donoghue to take --

MR JUSTICE MORGAN: What do you get out of it?

MR O'DONOGHUE: In my submission, this is a rather stark difference between the European regime on penalties and the domestic regime. This is the antithesis of the position on penalties as the CMA has articulated in this case.

MR JUSTICE MORGAN: All right. There is reference to *Dansk* for further elucidation. Is that all we need, do you say, from *Pilkington*?

MR WILLIAMS: Yes. Then there is a marginally different --

MR JUSTICE MORGAN: 117?

MR WILLIAMS: Yes. Marginally different formulation at 54 and 55 of *Guardian Industries*, which talks about ... maybe it is not actually different. It talks about quantifiable and alternative ceiling. It wouldn't be surprising if this was the same because it is a judgment handed down in respect of the same cartel.

MR JUSTICE MORGAN: We will read it. **(Pause)**.

MR WILLIAMS: I think what has happened here is I had my notes related to these two cases because they are both flat glass cases and I think my notes refer to the wrong cases.

The point I wanted to take -- and you don't need to go back to it -- 119 in *Pilkington* refers to it being foreseeable that the undertakings would be unable to pay and it would be on a rough and ready basis. It is the point I have made about this being a rough measure of affordability, but also it is the emphasis on foreseeability as a matter going to legal certainty. I think I transposed my notes in relation to those two authorities.

MR JUSTICE MORGAN: We won't take time now, but it looks like there are more paragraphs in both of these decisions which we will need to read. There is quite a lot of discussion about different approaches to fixing ingredients of the penalty. All right, we have the cases.

MR WILLIAMS: The last case I want to refer to is the *W Hing* construction case. This is a common law jurisdiction, tab 130. It is an interesting and very carefully reasoned judgment, in my respectful submission.

I am not playing battle of the authorities my learned friend has authorities from Spain and Austria, and so on, but the particular significance of this is that this is a common law jurisdiction and they actually deal with my learned friend's argument about the criminal common law authorities. I say common law, he says it is a matter of statutory interpretation and I am not disagreeing with that, but one sees reference to the same criminal authorities. It is at paragraph 60 where discussion starts, through to 67.

MR JUSTICE MORGAN: Thank you. We will read that quickly to ourselves. **(Pause)**. Right, I think we have read to 67.

MR WILLIAMS: In my respectful submission, that is an illuminating discussion of the issues. There is a difference of terminology because what they call ultimate backstop -- what we called the true maximum, they call it something else, so one has to get the terminology straight. But I think it will be clear what they are saying and how it accords with what we are saying.

To pick up on paragraph 66, we think this is an illuminating point because of course my learned friend says this is all about seriousness and the point made there is when you are really focusing on seriousness looking at total turnover rather than relevant turnover, one might expect the focus to be on relevant turnover. We have made --

MR JUSTICE MORGAN: You mean at the time of the infringement rather than ...

MR WILLIAMS: Or the turnover in the product market affected by the infringement rather than the total turnover of the undertaking.

MR JUSTICE MORGAN: Just reflecting on that: the turnover at the time of the infringement, the authorities say helps you decide how serious the infringement is.

MR WILLIAMS: In a very broad sense.

MR JUSTICE MORGAN: True. But they do use it to an extent for that purpose. That turnover was in this case six years before the decision, in some cases 10 years before the decision. But this statutory cap which is allegedly for the most serious cases doesn't use turnover at the time of the infringement, it uses turnover at a completely different time, which may reflect -- first of all, the infringement will have ceased; and secondly because of the passage of time, there will be quite different forces at play generating that turnover.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: It is not a very good way of assessing the seriousness of the infringement to take turnover when there is no infringement.

MR WILLIAMS: Yes, and it is total turnover, not turnover in the market --

MR JUSTICE MORGAN: I understand that.

MR WILLIAMS: There is discussion of this in our skeleton, I won't go into it now. But the point we make is that in explaining penalties generated on his interpretation, my learned friend ends up relying heavily on the principle of deterrence, and of course we say that deterrence is a very important part of the penalty. But he starts out with an argument which is riding on the seriousness horse and the halfway through he jumps on to the deterrence horse.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: We do not think -- that is another reason why he is not really on all fours with the criminal cases.

So that is that. I am going to deal very briefly with section 60 now. I don't want to take up time on it because we don't think our case depends on section 60 and on this Tribunal being bound by the European authorities for all the reasons I have developed so far. But the point did take on a high profile yesterday and the submission is that section 60 we accept has limits, but we have said that this particular case is a section 60 case, to the extent the Tribunal needs to get to that point, because this is a case in which there is a corresponding question under the UK legislation and under Regulation 1/2003, which the Tribunal has at Authorities 76 page 4707. Section 60 is at tab 4, page 41, and I am going to make a few brief points about it, if you have page 41.

MR JUSTICE MORGAN: Thank you. Yes.

MR WILLIAMS: I think my learned friend's big point is in relation to competition in section 61 and our submission about that is if you read it as a whole, it says:

"Questions arising under this Part in relation to competition within the United Kingdom [so we would say you read that as composite phrase] are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the European Union."

So there are two jurisdictions.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Section 60(2) is the operative provision, it applies to corresponding questions. So as you said yesterday, Sir, the question is: is there a corresponding question, particularly a corresponding question at least relating to the interpretation of the Act, the questions arising under this Part?

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: You were shown the *Pernod* case. That is a case which didn't relate to the substantive prohibitions.

MR JUSTICE MORGAN: I am not sure *Pernod* really helps very much. These are not difficult statutory words. They are not difficult to apply on the face of it.

MR WILLIAMS: I am glad you think so, Sir.

MR JUSTICE MORGAN: I do think so. We will come back to subsection (1). Subsection (2), we have a question arising under this part, which is: what is the purpose and effect of 36(8)? We cannot see any argument against that, and the *Dansk* line of authority appears to be something which lays down a principle laid down by the European Court, it is a relevant decision of that Court.

It is applicable at the present time, at that time, and the question is whether the cases on Article 23(2) of the 2003 Regulation are a corresponding question. We have not heard a submission based on the text of the provisions to say it is not a corresponding question. So *prima facie*, subsection (2) applies.

But it is said that subsection (1) lays down an additional condition that even though it is a question arising under this Part and even though the European decision is a corresponding question, we have to ask a further question: is the question in relation to competition within the United Kingdom? Maybe that is a further step, but the question arising under Part 1 of the Competition Act 1998 is almost by definition a question relating to competition within the United Kingdom.

It is not a procedural question, it is not about English administrative law: it is about a section of the Competition Act dealing with competition in the United Kingdom. It is about a penalty for an infringement of competition law

within the United Kingdom -- I cannot see why it is not competition within the United Kingdom.

MR WILLIAMS: The point we make is that this is the purpose of the section, it is not articulated as a sort of gateway.

MR JUSTICE MORGAN: Yes, exactly. But even if it is a gateway, it is not anything other than clear. What really concerns me is that you are soft pedalling this point, rather than saying it is clear and there is no real scope for a contrary argument.

MR WILLIAMS: I am only soft pedalling it because I think I am already right, if you see what I mean, Sir.

MR JUSTICE MORGAN: This is an easier way to be right.

MR WILLIAMS: Well, it seems to be ...

MR JUSTICE MORGAN: Anyway, you don't need it, you say, so you soft pedal it, but if you do need it, you give it a full throttle, if that's the opposite.

MR WILLIAMS: The point will arise for the Tribunal at the point at which it arises and our statute is clear: on an interpretation of our statute, if you reach the conclusion that the Court of Justice has reached in the European cases, then you don't need to be guided by the interpretive aids as long as you are satisfied you have reached a decision which is consistent with the (Inaudible). I think that is the --

MR JUSTICE MORGAN: It is not so much an interpretive aid, it is a mandatory duty.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: People(?) must act.

MR WILLIAMS: Can I put it like this: if you reach the view as a matter of straightforward interpretation, our statute has same meaning and effect which

the Court of Justice says the cap in European law has, then you don't need to worry about either whether section 60 forces you to that conclusion, or whether you are in breach of section 60.

MR JUSTICE MORGAN: All right. It may be a matter of taste whether you take 60 first and the other consideration second. Right, very good. You were going to tell us about authorities. I do not think you need to take time on *Pernod*.

MR WILLIAMS: No. All I was going to say is that is a case in which section 60 was applied in relation to an issue which doesn't concern substantive prohibitions. But I was going to make the point that the answer is to be found in the construction of the section and if the court thinks there is a corresponding question, and so on. Mr O'Donoghue referred to a range of other authorities about section 60 and I won't open them.

MR JUSTICE MORGAN: Just remind us what they are.

MR WILLIAMS: I have most of them, I think there may be one which is not on my list. *Gibson*, section 60 doesn't apply to private damages, *Quarmby* says you don't read the limitation period. *Gallaher* says you need a question of statute, not administrative law. *G F Tomlinson* says the CMA's guidance doesn't need to be aligned with that of the earlier Commission. We don't say that section 60 achieves a harmonisation of the penalty regimes, you have heard quite a lot of argument about the domestic penalty regime. Those are all different cases, so that is our positive case.

A cap ensures that a party does not have to pay too great a proportion of its resources as a Competition Act fine. That is literally what it does and that is also the purpose objectively analysed. Beyond that, the level of the fine is a matter for the CMA taking account for statutory purposes; and on that basis the cap can be applied after other considerations.

Just to deal briefly with the counter-argument insofar as I have not met it already. FPM says this is a matter of statutory interpretation, but in fact its argument is not really a matter of interpretation. It simply takes the position that one has to read in the principles in the criminal cases because it is a maximum sentence, if I can put it that way. We say it is a fundamentally different context to the idea that you would automatically read into those principles is wrong. One has to look at the statute first and foremost. The cap is different in nature, it is different in nature from a cap which establishes an absolute scale, and FPM also overlooks the role of the CMA under the statutory framework in establishing the approach to be taken.

FPM has taken the point that the principles on which it relies apply to criminal fines. Our Defence did refer to imprisonment, that wasn't intended to say we draw the line at imprisonment. The point they make about criminal fines is a fair one, that is the difference between us.

FPM has relied on Hansard, but for the reasons we give at paragraph 68 of our skeleton actually on analysis, the extract on which it relies doesn't support its case because what --

MR JUSTICE MORGAN: It was Ms Margaret Beckett, was it, saying the most serious offenders will pay 10 per cent?

MR WILLIAMS: It doesn't say that, it says --

MR JUSTICE MORGAN: Whatever ...

MR WILLIAMS: We say --

MR JUSTICE MORGAN: Nobody can pay more than 10 per cent, so the most serious offender will pay 10 per cent. Some people will pay less than 10 per cent, nobody can pay more.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: The people who pay more will be the most serious offenders because they will not be the most lenient offenders.

MR WILLIAMS: We say the statute is not ambiguous and even if it was, for the reasons we give at paragraph 68, actually when you read it carefully, that statement is not really FPM's case.

I am not going to deal with the other jurisdictions that have been referred to by Mr O'Donoghue in his skeleton argument. Other domestic courts and national courts construe their own statutes and reach their own conclusions.

FPM makes the point that leniency and settlement and hardship are at step 6 after the cap. That doesn't tell you anything, with respect. First of all, they are all reductions, so you have applied the cap, but you are always coming down from that and never going back up. Secondly, there are obvious policy reasons why those discounts should be applied at the end.

Settlement and leniency discounts have an incentive aspect to them. Undertakings have an incentive to co-operate, and the approach to step 6 ensures that the discount is a true discount after the cap, it is not washed out by the cap. And obviously if hardship is going to provide protection over and above the implicit protection of the cap, obviously it has to come afterwards. That is our case on the law.

I come now to the question of relief which I think may be less of a tricky issue than you might have anticipated, Sir. If I could explain what we say about it.

MR JUSTICE MORGAN: Yes, I have Mr O'Donoghue's note.

MR WILLIAMS: We have had a bit more of a think about this and this is where we have got to. I want to make three points.

The first is it is common ground that where the principles applicable in the criminal cases are concerned, the maximum penalty is not reserved for the most

serious case imaginable. It applies in cases of the utmost gravity, that is *Bright* case. We have said this is such a case and I won't repeat those points.

The next question is if the guidance is *ultra vires*, does the Tribunal have a power to impose the penalty? We think it would have a power to impose a penalty because it is not obvious to us that the Tribunal's power depends on there being guidance in force. We see what FPM says about the Tribunal's obligation to have regard to guidance in force, but there is an interesting question there about the relationship between jurisdiction and the conditions in accordance with the way in which the discretion is exercised.

The third question is: if the Tribunal has a discretion in a world where there is *ultra vires* guidance, would it wish to exercise that discretion? That is a matter for the Tribunal once it decided this ground and the other grounds. It may or may not wish to exercise its powers, it will have a view once it has decided the grounds. We have obviously argued all of the issues of substance, but I am not going to try and persuade the Tribunal now that if it reaches the end of the process and it doesn't want to decide the issue in the absence of *intra vires* guidance that the Tribunal should exercise its discretion. That situation is a matter for the Tribunal.

Is that clear, Sir?

MR JUSTICE MORGAN: Yes. I understand you say we have power. We have to have regard to guidance. If there is no guidance, there is nothing to have regard to, but we still have power. If we have power, we can look at the facts of this case and decide what to do. That would involve us identifying the right approach, which is really a matter for the CMA and Secretary of State and the consultation process, so we might decide that we wouldn't want to give what would be *de facto* guidance as a matter of preference. We would not want it

and we might then not do it.

If we said we are not going to fix a penalty in this case because there has to be guidance first from another place, the question would then be: do we decide the case on the assumption we are wrong about that, wrong in the sense that we reject Mr O'Donoghue's submission, the guidance is *intra vires*, and we deal with the points that are argued and although they don't affect the result, they at least give our *obiter* decision and we would have to decide that?

Of course, if the guidance is *intra vires*, then we have an appeal to deal with.

MR WILLIAMS: Yes, yes. I think there is a risk of the sort of submission I am about to sound. The submission I am about to make will sound like heads I win, tails Mr O'Donoghue loses. But that is not what I am saying. I think being realistic about it, the situation in which the Tribunal might wish to exercise its jurisdiction in the absence of guidance is if the Tribunal has heard all of the arguments on all the grounds and it thinks that essentially the CMA knew what all these issues (Inaudible). There is no issue about effect, no problem with proportionality, and so on. Therefore, although the CMA have proceeded on the basis of its guidance, effectively its overall assessment of the case was sound.

So that is the situation in which the Tribunal wouldn't be floating free in terms of the way it would be doing things. If on the other hand, if you were to conclude that the guidance is *ultra vires* and you think at that stage effectively the matters are at large, then I think the position is as you have described it, Sir. But it is a matter for your discretion, I am not trying to persuade --

MR JUSTICE MORGAN: I think the big thing we would have to change is if we said that 10 per cent is the maximum penalty for the most serious type of case and then we would decide how serious is this case, we wouldn't really be able to

use the 30 per cent or the 20 per cent any more because they are giving us an answer in the wrong order of magnitude. We would have to decide how much do we bring the penalty down from 10 per cent, £25 million, to reflect the argument that it is not the most serious case.

If we said it is amongst the most serious cases, then we are back at £25 million. But then we have to do other things, like mitigation and aggravation.

MR WILLIAMS: Yes, although you --

MR JUSTICE MORGAN: We can never get above £25 million --

MR WILLIAMS: But in deciding you were at £25 million, you would have already taken into account that there are uncontested issues around intentionality --

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: But I think these issues will be clearer to the Tribunal in concrete rather than the abstract.

MR JUSTICE MORGAN: I agree.

MR WILLIAMS: That is ground 2. Sir, I have two things left to cover, it is 2.55. One is ground 7, which I am going to deal with very briefly, and then there is my learned friend's note. I think ground 7 won't take very long. It will probably take me about 15 minutes to say what I want to say about his note.

MR JUSTICE MORGAN: Right. That would take you to about 3.10.

MR WILLIAMS: I think my learned friend can have an hour and a half before Sir Iain has to leave.

MR JUSTICE MORGAN: I think we will hear you rather than guillotine you.

MR WILLIAMS: I am grateful, Sir. I am really not trying to cut my learned friend off, but --

MR JUSTICE MORGAN: You proceed with all proper speed.

MR WILLIAMS: I am going to make some points about his bottom line. I think he

needs to hear those before he closes the case.

MR JUSTICE MORGAN: Okay.

MR WILLIAMS: Ground 7, you have the pleading, I just want to say a couple of things about two of the issues. Generally speaking, we say ground 7 looks at the issue the wrong way. It tries to benchmark the Decision against the SO and the DPS rather than using the guidance of sensible approach.

One point which is made is that it says the CMA has in the Decision found that one tenet, the second tenet, started after the first tenet and the third tenet was completed on the second tenet. It says two out of three tenets started afterwards. We say the infringement was on foot, it is uncontested the infringement was on foot from the start date of July 2006.

There is no basis under the guidance to reduce the duration of the infringement because bits of it, if I can put it that way, started a bit later (Inaudible). Put at its highest, we are talking about 6.75 (Inaudible) 6.4, absolutely marginal periods of different periods of time. We do say it is a curiosity of this ground that FPM wanted to reduce the length of the third tenet to the length of the second tenet, but actually there is no specific finding to align with what the Decision says at paragraph 4.153 is at least 2007. So it is trying to anchor itself with this point in time.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: The second change is the change in the implementation case, the SO. This was going to be addressed under ground 1(a), it has fallen away now. We have addressed it in our Defence at paragraphs 59 to 68 and in our skeleton paragraphs 26 and 27. Our short point is that there was never a general implementation case even in the SO. We have made the point that even the very paragraphs which FPM relies on to say there is some general

finding of implementation are actually talking about cheating on the cartels. So the point just doesn't work and this really just comes back to the point that these were never intended to be binding for (Inaudible) evidence. It is all broadly speaking evidence of the agreement.

There is a third point, but you can take that from the pleading, I think.

MR JUSTICE MORGAN: It was said in the SO or the DPS -- I can't remember which -- you said there was a need to have general deterrence in the construction industry --

MR WILLIAMS: It is that specific point.

MR JUSTICE MORGAN: You don't repeat that?

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: That means you now accept there is no need for general deterrence in the construction industry. Just summarise your stance on that point.

MR WILLIAMS: Yes. Take our Defence at paragraphs 326 and 327, what we say is there is no significant difference between the DPS and the Decision in terms of general deterrence. Both say as a starting point at step 1 30 per cent is appropriate for the purposes of general deterrence. But the fact that this point drops out doesn't mean that the whole calculus as far as general deterrence changes. It was only one which went to general deterrence and the need for general deterrence was itself only a further reason over and above the assessment of inherent seriousness.

The point is an extra over-point on top of an extra over-point. The basic reasons for setting the seriousness multiplier at 30 per cent is a bit more standard.

MR JUSTICE MORGAN: Yes, right. I don't --

MR WILLIAMS: This sort of mentality of comparing it with the SO to see whether

a Decision is right on the merits. I mean, it is not the right way to do it.

MR JUSTICE MORGAN: Understood, right.

MR WILLIAMS: Yes. My learned friend's note.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: To give you some headlines, what we see here are two alternative cases. There is a case which goes through steps 1 to 4 and the various grounds including delay, but I think delay is taken in to a broader point about the size and scale of the business. Then there is a case which is based on delay only I think, which is the step 5 case. I have addressed the way it is put on the alternative case about delay so I won't say anything more about that, the submission I made about page 1606.

The headlines were I think that even on FPM's case, there is no way one gets down to the £60 million penalty, and the £20 million penalty is the opportunistic sweet spot where they managed to have ended up between the two years with the higher turnover based on the (Inaudible) case.

The reason there are two cases is because the first way of putting it takes FPM to a lower number than the number we see in -- it is actually a range in paragraph 19. The top of that range is significantly lower than the parameters one sees at paragraph 20.

I have already made this point, but as to steps 1 to 4, we see from paragraph 6 that actually the complaints about steps 1, 2, 3 don't take FPM below the level of £28/£25 million. So that is a point we really foreshadowed on Monday. I think you, Sir, already had the point, which is that unless they get somewhere on ground 6, that is all academic, really.

In my submission, the points which are made in this note on proportionality are not sustainable points. So the bottom line is that after all its grounds, FPM, now it

has been forced to actually crystallise how it puts its penalty calculation, it doesn't make any inroads into the end penalty, the justice of the end penalty.

Just going to the note at a reasonable pace. Step 1 at paragraph 4, this takes in three points which we have addressed. Ground 4, relevant turnover: the relevance of implementation and effects is ground 3 where FPM takes 30 per cent, 25 per cent and the general deterrence point which we just covered.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: In terms of the specific turnover number, I said at the end of yesterday that I could not say straight away whether there is any issue about that number. I do not think there is an issue about that number, but we have not been able to completely bottom that out overnight. It does appear to be the rebates based number, but I think what we would like to do is just to cross-check that again and if there is any point to make about it, we will contact FPM. I am not foreshadowing a dispute, but we have not quite crunched the numbers.

MR JUSTICE MORGAN: Understood.

MR WILLIAMS: Moving to step 2: there are two durations here, I am not going to say any more about 5.63.

6.4, I think that is meant to reflect the first point I addressed under ground 1. We don't understand how FPM gets to 6.4. We have tried to work it out, but we cannot. That number is not pleaded and I cannot say anything more about it, but you know what we say about the substantive point.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: The bottom line is that the infringement started when it started and the multiplier on that basis is 6.75.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Step 3, we covered the two issues raised by this step, which are co-operation and compliance. I did make the point earlier on that FPM has moved its delay complaint out of this ground for, it seems to us, strategic reasons.

Then we move on to step 4, which is really what the note was -- what FPM was invited to address. The question you asked Mr O'Donoghue was: what is your proposed approach to proportionality? Ground 6 arose out of ground 6(a) principally and criticism is made of the CMA making use of the financial metrics and the idea that the CMA's approach plucked figures out of the air. So we have been waiting with interest to see what this note would say.

Actually one gets to that after a bit of a long run-up further into the note. But before one gets to the answer to that question, one has quite a lot of scene setting and substantive points, some of which are unpleaded points which we have heard about in the hearing to a degree, some of them are points we have not even heard about in the hearing. I will deal with those in a minute.

The point made in paragraph 7 is that -- this is a response to my submission that FPM has not contested ground 6 on the merits, it simply challenged the reasons and not put forward a positive case. What this says is if you read paragraph 144 of the Notice of Appeal, they use the word "irrational" in passing. That is not an answer to the point, Sir, because actually an allegation that the Decision was irrational in the absence of a positive case is no different from an allegation that the Decision was inadequately reasoned in the absence of a positive case. So there is no pleaded contrary case on ground 6 and that is why what one sees in the rest of this note is a sort of new case which brings in points from here and there, but it is a new case.

Another thing which is interesting about this is that of course the criticisms which are made of discussion in those paragraphs around proportionality and Decision all proceed on the basis that the CMA has plucked numbers out of the air and it has all come from nowhere and it is incomprehensible. But when FPM is asked by the Tribunal to say what its positive position is, it obviously felt under pressure to articulate something with reference to its pleaded. And what we find is that the numbers which on Monday were said to have been plucked out of the air provide an anchor point for the penalty assessment.

So we say this really doesn't cohere with the way ground 6 was pleaded at all.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Moving on to paragraph 10. This says in the second sentence:

"A proportionate penalty is one which is fixed at a level which is no more than necessary or the lowest penalty that could reasonably be justified."

The Tribunal has heard about what the CMA did at step 6. In considering proportionality it applied its guidance, it applied the framework set out in its guidance and had regard to the financial metrics and so on. This seems to define a test for proportionality which has no relationship to the guidance and it seems to be a legal point which we have not heard about at any point in the case. It is not pleaded, I do not think it's in my learned friend's skeleton, it has just cropped up in this note.

But as a minimum, this is a new and unpleaded case about -- it's unpleaded in the sense it is not the case in the Notice about what proportionality is and ought to be and based on a legal authority that is not been mentioned at the point where FPM has ostensibly closed the case. This should be rejected as a framework for deciding the case.

Actually, for completeness, we do not think if one looks at this decision in *Argos* that

these words are a legal test and the guidance has moved on since *Argos* anyway. But, anyway, we do say that whatever this is, it is too late.

Paragraph 11 is effects, it is a feature of this note that points are cycled and recycled at different stages and we do accept that the guide looks at matters in the round, but FPM on its methodology has already -- on its own methodology, has applied a 25 per cent number and then as I say points just come back and have a second lease of life.

Paragraph 12 is a footnote 1130 and this has now morphed into a specific error, so it was at one stage referred to as an indication that the CMA had taken into account group level turnover and we said that is not right, it is actually a means of taking into account FPM turnover across a three-year period. This turnover was FPM's if one looks at the three-year period. What it undoubtedly is not is a pleaded allegation of error, and here it is given that status.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I should be more specific, what they say is that the numbers, the percentages calculated in the Decision should in fact have been different percentages.

MR JUSTICE MORGAN: Yes, they do, yes.

MR WILLIAMS: Then at the end of paragraph 12 it says the CMA did not reject FPM's submission that there would be a real and immediate impact on its business. FPM made those representations by way of opposition to the proportionality assessment and the CMA came to the same conclusion. This point had not even been mentioned in the appeal.

This is an example of what I said I feared on Tuesday, when I said FPM seemed very likely that in order to make a proportionality case it was going to have revive points that it had given up on.

We then move on to 13, which is a cross-reference to financial metrics for other undertakings. I explained on Tuesday that there is clear authority that one cannot blindly draw comparisons with calculations for other parties, that is *G F Tomlinson* cited in *Balmoral*, and I explained why a comparison with the calculation in Stanton Bonna doesn't work, it was just a completely different situation. I dealt in detail with the comparison between CPM and FPM.

FPM picks up turnover, doesn't deal with all of the other metrics. We made it clear we look at this in the round, so this is cherry picking and we have already answered this case.

Paragraph 14 is the general point about FPM's growing business, which we have cause to look at in various different contexts. I have made my submissions about that and why the CMA's penalty methodology is forward looking and so on. Toward the end of that paragraph, there is another point about CPM, another comparison to CPM. So it is another point like the point in paragraph 13.

Paragraph 15 is trying to use the compliance point in a proportionality context. We don't understand that, it is all double counting.

16 says that the Tribunal should have regard to the fact that the penalty calculation is above the level of the cap. And this is the ground 2 issue, I don't need to say any more about that. The Tribunal can note that but one still has to go through the stages and if we are right about ground 2 then the fact that the penalty is prima facie --

MR JUSTICE MORGAN: I think it is a slightly different point, but I see the point.

MR WILLIAMS: Paragraph --

MR JUSTICE MORGAN: Even if the cap is not the statutory maximum, you still have regard to it in some way.

MR WILLIAMS: Yes, but I mean if you are looking at the rest of the points in a principled way then you can note it, but you are still --

MR JUSTICE MORGAN: You say we will get to the cap when we get to it. The right figure for proportionality is the following figure, and if the right figure is above or below the cap, so be it.

MR WILLIAMS: Exactly. You don't temper your Decision on the other points because the cap comes in at the end.

Paragraph 17 is another point about FPM's turnover coming from other markets, we have covered that.

Then we come to FPM's approach in 18 and 19. This is the answer to the question and we do emphasise this is meant to be a substitute for what you saw in paragraphs 6.76 and around there. What you say at 18.1 is that you should take inspiration I think from the treatment of CPM, by which they mean the Marshalls turnover point. This is acquisitions and turnover outside the markets. Yet again we have argued ground 6(b), there is nothing in it and if there is nothing in it, then this point goes nowhere.

We don't actually understand how this point is meant to present a sort of coherent proportionality analysis in the context of the guidance, the metrics and all the rest of it.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: 18.2 is a comparison with SBC again, so we have explained why that is not a valid comparison.

At 18.3 they come back to turnover outside the markets and back to this point again. The approach seems to be that you take 50 per cent out and they don't explain why. It looks totally arbitrary to us. I mean we have already had the discussion about why you focus on total turnover and we do find it a bit ironic

that the solution to supposedly plucking numbers out of the air is to pluck other numbers out of the air.

Paragraph 19 the upshot is one gets to a range. My understanding of that range is that they get their 2 per cent because that is the bottom end of Stanton Bonna's range and they get their 5 per cent because that is 50 per cent of the 10 per cent, 50 per cent of the cap. I think that is what they are saying. I told I am not correct, but I can only read what is on the page.

What you end up with is really quite a big range. Our overarching submission is that this is an assessment of proportionality, it purports to be an assessment of proportionality with reference to a series of points that are completely disconnected from the guidance, they are completely disconnected from the actual question, which is whether the penalty is proportionate having regard to the size and financial position of FPM. That is what is meant to be replacing, it doesn't deal with that at all.

What it is really is a series of flawed equal treatment points, points which are pleaded as part of a reasons case, which have now morphed into equal treatment points. But whatever they are, they are not a proportionality assessment that we recognise.

Our submission really is that for all the fact that FPM has criticised the proportionality assessment for FPM, this rather goes to show that actually they do not have a positive position about what that ought to look like.

Those are my submissions.

MR JUSTICE MORGAN: Right. Thank you very much.

We will have a reply should we have a very short break. If we do break now. That is what I thought. We will have five minutes, but no more to give Mr O'Donoghue a bit of time.

(3.18 pm)

(A short break)

(3.25 pm)

Reply closing submissions by MR O'DONOGHUE:

MR JUSTICE MORGAN: Yes, Mr O'Donoghue.

MR O'DONOGHUE: My Lord, Members of the Tribunal, can I start with two short points.

First, compliance. At its root, Mr Williams did not contest that the compliance system, in particular the system of contact reporting of contacts with competitors, is being effectively implemented in practice. As I said yesterday, he didn't even cross-examine on that point. This system in particular, as we saw, is being implemented for multiple years after the infringement ended by Eoin and Francis McCann and Andrew Cooper in particular. There is undoubtedly effective implementation and practice across a range of markets and products. To that extent, there really can be no serious doubt that the overarching test in the guidance: is effective compliance being ensured in practice? Is met.

There is no doubt about that. Effectively what Mr Williams's case now boils down to is that Eoin and Francis McCann and Andrew Cooper, particularly Eoin and Francis McCann, in interviews with the CMA were unwilling to admit this particular infringement of competition law.

There are two points in relation to that.

First of all, one has to think about these things in the real world in the context of actual human beings. At the point these individuals were interviewed they were facing a potential decision on the civil side, significant penalties, and

director disqualification proceedings. It would in my submission be extremely harsh, and actually unfair, to hold against these individuals that they were not at that stage fully accepting liability. I say this in particular because we know that they were actively engaged in compliance activities in every other respect.

The second point why this point goes nowhere is the CMA glosses over entirely the position taken on implementation. If we can just quickly turn to the Decision, Volume I, page 189 --

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: -- 5.46.

Mr Williams took you to this, so this is the part of the Decision dealing with the existence of an agreement and we saw this. As part of this they are dealing with participation and implementation and there are various allegations there in relation to that.

The fundamental problem therefore for Mr Williams is that when Eoin and Francis McCann were firmly denying implementation and effects, that was in the context of them at this stage denying the existence of the agreement.

Therefore, one is compelled -- it is a point Mr Doran adverted to on the first day, the CMA's case in fact now comes very, very close to saying that if you persist in denying an infringement up to the point at which the Decision is adopted, you are *ipso facto* precluded from the company ever obtaining compliance discount. That, in my submission, is an extreme proposition which goes much too far. Much has been made of the fact that FP McCann did deny the infringement for a period, but of course things move on and things change. By the time the Decision was adopted it was clear there was a leniency applicant that the settlements had been finalised and, on advice, the company

took a view that certain aspects of the infringement had to be accepted and the scope of this appeal was more limited in that respect.

That is the long and short of this and there has been a lot of huffing and puffing about what happened beforehand, but the company was perfectly entitled to defend itself, it had seen in the statement of objections the original case on implementation and it was saying at that stage we don't think your case on implementation is a good one and that is it. That is compliance (inaudible).

Then on implementation and effects. Mr Williams was very keen to gloss over the fact that as a matter of evidence, the Oxera report now stands entirely unchallenged and there is now an uncontroverted fact before this court that the infringement had no impact on FPM's prices.

One of the points Mr Williams suggested is that the CMA had not made any findings in relation to an effect on prices in the case of FPM. That isn't correct. If we go back to the Decision at 5.101. It says at 5.101:

"Moreover, the CMA does not consider that FPM has demonstrated that there was no effect on the market as a result of the arrangement. In particular, even if FPM's analysis of any effect on spot market prices during the Relevant Period were correct, it is not known whether prices in the market or margins may have been lower in the absence of the arrangement."

With respect, that is the whole point of the Oxera report. We do know now that that counterfactual point, which was a finding made in the Decision, is wrong in the Decision. That is the finding we challenge. It is part of liability and it necessarily follows, as it must now, that if that evidence has been accepted the Decision is wrong and there is a knock-on effect on penalty.

MR JUSTICE MORGAN: Your evidence is that FPM's prices would not have been lower?

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: This is not confined to FPM?

MR O'DONOGHUE: It is at least finding that FPM's prices were not effective compared to the absence of the, the Oxera report, which they accept now, found the opposite. That is a clear error in the Decision which in my submission at the very least has to be factored into penalty. We do make other points in relation to CPM's prices, and you have my point about the impossibility burden. You have my point that they were handed on a plate evidence from CPM in relation to an econometric study which they refused to take up.

I am not going to go back into all that, but at the very least there is a concrete finding in the Decision under the object infringement of a lack of effect in a counterfactual situation of FPM's prices and we have shown beyond controversy that that finding is wrong and has to be reflected now in penalty.

MR WILLIAMS: Just in case it affects my learned friend's submissions, we have not conceded that there was no effect on FPM's prices. I thought I was at pains to say that, we simply said we have not made a decision about it and I know my learned friend says that because we have not put in expert evidence --

MR O'DONOGHUE: That is not what I am saying, the point I have made is as a matter of the law of evidence, if our report has not been challenged then it stands uncontroverted.

MR JUSTICE MORGAN: Assume you are right about that, then you draw attention to what is said here?

MR O'DONOGHUE: Yes, there is a finding there we have knocked over on the counterfactual and that must have implications on penalty. That is the first point.

In any event, if one goes back to the Decision at page 226.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: One can perfectly see irrespective of that first point, the question of a lack of effect is plainly relevant under the CMA's own guidance.

The mistake in my submission Mr Williams makes is that there are two stages under the guidance, the first is a general one. You see that at 6.26, which is taking account at a general level of the nature of the infringement. Then at 6.27, at a second stage CMA will consider whether it is appropriate to adjust the starting point upwards or downwards to take account of the specific circumstance of the case. Then you see straight away extent and likelihood of harm to competition, ultimately consumers. Then, over at 6.31, there is a finding that there is a high likelihood of harm to competition and ultimately consumers and that is used in particular to justify a conclusion that the starting point should be at the high end of the range you see.

Then over the page, at 6.32, it says, "Nevertheless the CMA considers that the potential for harm to competition is high and in particular pricing".

Then you see in the footnote at 1087 they say, the bottom third, "The CMA is not persuaded by these arguments and considers ... which is very likely by its nature to cause harm to competition ..." and it says, "... which was intended to increase prices".

We say even within the four walls of the guidance there is ample scope for taking into account a lack of implementation and/or lack of actual effect.

With respect, Mr Williams's point goes much too far. It may well be that in the context of object you could look at an actual effect, but it is a *non sequitur* to say that if there is overwhelming evidence of a lack of actual effect, that that is of no moment when it comes to calibrating the question of effects or impact

overall.

My submission is one has to take both into account, it is not a binary thing.

With respect, I think he attaches far too much importance to the use of the words "actual or potential effect". In my submission, in an appropriate case, it may well be both and they may be competing considerations which are relevant to the calibration of seriousness at their starting point and so on.

In terms of the case law I am not going to go back to all the cases in detail, I think the fairest thing, my Lord, which could be said is that there are as many cases saying that effects are relevant as there are that effects are irrelevant. In my submission, one doesn't get an unambiguous answer from the case law.

What can certainly be said is on my side of the ledger *Kier*, *Allianz Hungária* and the *Krka* case, they do suggest in the context of penalty that actual effects may be relevant.

MR JUSTICE MORGAN: It is not so much whether effects are relevant or not relevant, it is whether the CMA can determine a penalty in an objects case without doing an analysis of effects ... there is a likelihood of harm, we have not tried to measure it, we are not basing ourselves on specific findings as to actual harm, we will find this case as a serious restriction by object with a likelihood of harm.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: There are cases suggesting that is permissible as an approach. It is not saying it is relevant -- it is relevant, if you have a finding as to effects you can take it into account, you are not required to leave it out of account, it is relevant.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: But you don't have to do the exercise of measuring it,

even in a broad-brush way. You can say, "I acknowledge I don't know". Which I think is what some of the Decision says. We do not know.

MR O'DONOGHUE: My Lord, one thing is clear, there is no positive obligation on the CMA to go out and prove a positive case of actual effect. I entirely accept that, but the *non sequitur* in Mr Williams's submissions is that therefore actual effects are entirely irrelevant.

One can see this from what I showed you in the Decision.

MR JUSTICE MORGAN: He is not saying they are irrelevant. He is saying you can do the exercise without knowing what the effect was.

MR O'DONOGHUE: That may also be true, but the point he really needs to meet is that in a situation where I have shown you in the Decision, they say in multiple places it was very likely to have a material potential effect. Why is it open to the undertaking to say, "You say very likely and you use that to calibrate your starting point in terms of the specific analysis but, in fact, it is extremely unlikely". Why is that not a relevant consideration?

MR JUSTICE MORGAN: Well, very likely to have is looking at the time of the cartel, the agreement is made which is very likely to have effects down the track.

You are turning that into a different probability: whether it is likely that it did have effects. You are not being penalised on the basis that on the balance of probabilities it had effect, you are being penalised on the basis you entered into agreements which in prospect were likely to have adverse effects, as I understand it.

MR O'DONOGHUE: Yes, yes.

MR JUSTICE MORGAN: Right, whereas what you are talking about is backward looking: how likely is it that this cartel did have an adverse effect? You are not being penalised by reference to that consideration.

MR O'DONOGHUE: My Lord, one can get hung up on the semantics as to whether this is a mitigation.

MR JUSTICE MORGAN: We are lawyers and they matter.

MR O'DONOGHUE: Yes, but I have shown you the authorities on Monday, where a number of courts have said that it is all very well talking about potential effect on a sort of forward-looking basis, but if you have a clear record that shows in fact there was no actual effect or a reduced actual effect, that has to be brought into the balance to temper this potential effect. One cannot leave it entirely out of account, because it is turning your eyes away from the reality staring you in the face. That is all we are saying. It is not a binary thing. It is a relevant consideration. It is, for want of a better phrase, a form of mitigation, it affects the seriousness. That is all we are saying.

No obligation to go out and do an econometric study, they can do the broad-brush if they want. You have my point from yesterday that they have said that they can demonstrate actual effects as an aggravation. Yet the absence of any actual effect counts for nothing. That does strike me as a bit unfair, but anyway.

That is all on implementation and effects.

MR JUSTICE MORGAN: Understood, that is very clear. Thank you.

MR O'DONOGHUE: On delay, a small point. Mr Williams, having changed his mind from the Defence, has now urged on you that you should decide the issue of law under ground 5(a) before the issue of fact. That seems to be hopeless, because if there is to be an appeal in this case of course the facts have to be established, we cannot have an appeal in the air.

MR JUSTICE MORGAN: No, but I suppose what one has to do in order to ask was there unreasonable delay, one has to ask: what is the test for unreasonable

delay? In what way would it influence the penalty decision.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Once one has identified the test, one can then say now on the facts is that test satisfied? You can put it all first.

MR O'DONOGHUE: Yes, I make the pragmatic point.

MR JUSTICE MORGAN: You want the Tribunal to answer this.

MR O'DONOGHUE: Yes, my Lord.

MR JUSTICE MORGAN: Not shy away from it or rest on the easy pillow of convenient findings of fact.

MR O'DONOGHUE: I have the sneaking feeling Mr Williams wouldn't mind an appeal in the Court of Appeal purely on a point of law before the facts, but anyway ...

MR JUSTICE MORGAN: I assume all barristers would like appeals in the Court of Appeal, that is what they do.

MR O'DONOGHUE: I make the pragmatic point that both questions need to be decided, and the --

MR JUSTICE MORGAN: We seem to be on that track.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: A couple of points to reply on the law and the facts.

Mr Williams argued that there were principled reasons why delay shouldn't read to any reduction in FPM's penalty, but the principle he relied on was difficult to discern and the inescapable logic of his argument is the CMA could delay for an indefinitely long period, leading to vastly inflated fines for undertakings such as FPM. That seems to me strange and anomalous and not principled. In particular, the point he has completely avoided is that in the absence of

a domestic limitation period, a subject perhaps to some of the extremities of judicial review, there would be no constraint on the amount of delay that the CMA could engage in, seemingly regardless of the impact on the undertaking's turnover. The absence of a limitation period is an important difference from the European regime.

Just to pick up your Lordship's point. On the remedy, we are not saying that the year of the Decision under step 5 gets to be moved. You are stuck with the statutory material. Just to pick up on the CPM point, because in my submission there are two mistakes which are made by the CMA. On CPM if we can just look at our skeleton quickly at 197. My Lord, that is where we set out why what they did in relation to CPM was clearly wrong, and all Mr Williams has is his *Britannia Alloys* case, so that is a clear mistake.

In relation to FPM, it is your Lordship's point. We say the prejudice is felt at step 5 as a result of the delay, so that is a natural place to consider how to remedy the prejudice. The Tribunal can then make an end allowance following step 5, as we have suggested. It is not, of course, bound by the guidance you have to have some regard to it but it is not binding.

MR JUSTICE MORGAN: Just on the *Britannia* point. You don't say at step 5 that we can take the statutory instrument and substitute another year for the year mandated by the statutory instrument. We cannot do that, we cannot do a *Britannia* ...

MR O'DONOGHUE: Or a CPM, yes.

MR JUSTICE MORGAN: All right. But on the other hand, what we can do is we can -- this all assumes that the proportionate penalty is above the cap. Then we apply the cap. Then we find the cap is £25.5 million, but we say that there is an inappropriate high figure for the cap, because of delay in the turnover

year and our ultimate task is to produce an appropriate penalty. If there is something that calls out for adjustment and has not yet been done, this is the time to adjust it --

MR O'DONOGHUE: Indeed.

MR JUSTICE MORGAN: -- an end allowance, right.

I understand.

MR O'DONOGHUE: The idea that *Britannia Alloys* is a get-out-of-jail card on a piece of domestic legislation, it just does not wash. The legislation could not be clearer --

MR JUSTICE MORGAN: I must say, I have not read *Britannia*, but it didn't occur to me that sitting in a domestic court that one would be able to do anything about the clear wording of the statutory instrument.

MR O'DONOGHUE: No.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: It comes in as an end allowance, but it can also come in under step 4.

MR JUSTICE MORGAN: It can, yes. Of course, your step 4 is lower than your step 5.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: In fact, on your approach the cap doesn't actually matter any more if you win on step 4.

MR O'DONOGHUE: Yes.

In relation to step 4, one of the points made against me is well because the average of three years was used it doesn't get me anywhere to knock out one year, because other years were taken into account. That, with respect, is a mistake because if I succeed on my delay point, then say for the sake of argument the

delay is a year, then by definition 2018 must go and the average we would be applying would be for the previous three years, as opposed to including 2018.

I have done the figures, and if we took that approach for example it would have represented 14 per cent of FPM's worldwide turnover, rather than the 12 per cent we see in Decision 6.78. It is a bit back of the fag packet, but that leads to an excess of £5 million in penalty. The fact that under step 4 in the Decision the CMA looked at the three previous years it did is not an answer to my point if I succeed in knocking out, say, a year. So the averaging does not get Mr Williams to the same position as the Decision.

A small handful of legal points. *Bolloré* has rather fizzled, because Mr Williams had to accept the Tribunal is not bound by *Bolloré*, he said that expressly in his submissions. In any event, it is a bit of a nothing case because *Bolloré* was a case about mere delay, it was not a case where the undertaking said, "Had you proceeded in a lawful manner in terms of timing I would have been fined less". So it is nothing to do with this case.

Of course, the golden thread running through all these cases at the European level is that at the European dimension the undertaking can sue the institutions for any tortious damage.

One can perfectly see why if you have that nuclear option, getting a reduction for mere delay seems a bit too good to be true. As it happens in *Dutch Beer*, of course equitable reductions of the order of 11 million euros were made.

In relation to *Dutch Beer*, Mr Williams's only point really is that the Tribunal in that case rejected the causal analysis which FPM invites the Tribunal in this case to undertaking. That is simply wrong.

If we go back to 432 of *Dutch Beer*, it is in Authorities 8, tab 104. It is in 6365. It is at the back end at 432.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: 6535, forgive me.

My reading of 432 is what is said is entirely without prejudice to the possibility of a damages action. Indeed, as the Chairman put to Mr Williams and to which he had no answer, surely the case of causation is a stronger case than an equitable reduction? The answer is blindingly obvious, it has cost you millions of pounds and you want compensation for that.

A couple of Article 6 points if I may just to pick up on your Lordship's point about what standard are we applying. I understand that is an important framing question and I don't want to duck it.

One small point. Our submissions are based to a good extent on Article 6, but you will see in 1493 of our skeleton we refer to domestic principles, particularly the *Kerrigan* case as well.

MR JUSTICE MORGAN: You say that there was a duty to comply with Article 6, which refers to a reasonable time or a similar phrase.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: And we have case law as to what that means and how you assess it.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: That will help us, because then we have something to use and apply.

Then at 1493 --

MR O'DONOGHUE: I will just leave that with you.

MR JUSTICE MORGAN: I have turned it up, yes.

MR O'DONOGHUE: Yes.

Mr Williams's first point is a rather bureaucratic or technical point, which is that

Article 6 was not engaged before April 2016 when the civil case was formally opened.

MR JUSTICE MORGAN: Is it bureaucratic and right or bureaucratic and wrong?

MR O'DONOGHUE: It is wrong.

If you could just turn up *Tychko*, it is Authorities 10, tab 129, page 7593 --

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: -- paragraph 63.

You see it has an autonomous and substantive meaning, and it is over the page, "The charge may be defined as the official notification".

So it is one way of defining it, but not the only way. Indeed one can see why this is --

MR JUSTICE MORGAN: What other way can one, for example?

MR O'DONOGHUE: One has to take a pragmatic view. In my submission, the test should be: when is the undertaking substantially affected? That is at the end of this paragraph.

MR JUSTICE MORGAN: By what?

MR O'DONOGHUE: Let us look --

MR JUSTICE MORGAN: It might be substantially affected when it comments an infringement, because it exposes itself to the possibility that an enforcement authority will investigate in due course.

MR O'DONOGHUE: Indeed, that is March 2013.

MR JUSTICE MORGAN: But Article 6 doesn't again then, does it? *Tychko* doesn't support that?

MR O'DONOGHUE: My Lord, it is the bit at the end "substantially affected".

I appreciate --

MR JUSTICE MORGAN: I see, may be defined as the official notification and definition that also corresponds to the test ... so they are saying the same

thing?

MR O'DONOGHUE: I am emphasising "may" and "substantially affected", I appreciate it doesn't answer the question in this case, but what I am saying is it is not exhaustive.

MR JUSTICE MORGAN: When we looked at the two Privy Council cases, the Scottish appeals, the Privy Council appeared to be measuring the time from the date of the charge, in a criminal context it is the date of the charge. They didn't say, "Well, it took you time to investigate before you charged".

There is a logic in saying it is the date of the charge, isn't it? Because you can have investigation which is the subject of administrative law and public law controls, but it is when the individual is made subject to a charge that its Article 6 rights are engaged. It is from that time that there must be a proper sense of expedition or speed, it is at that time. Up to that time all that has happened is that he may have committed an offence, he has exposed himself to the risk of some time later an enforcement authority will move against him.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: You cannot hold that period against the enforcement authority.

MR O'DONOGHUE: My Lord, I think one needs to map this onto a competition case, in this case the undertakings were dawn raided in March 2013.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: I mean, the case we have seen, *Dutch Beer* and these other cases which give equitable reductions. You are looking at the total length of the investigation and one can actually see why -- I understand the criminal context there is the significance of the charging decision, but in the context of a competition law case it has to be the effective start of the investigation.

Because otherwise one has the problem which the CMA has hinted at, which is they can for bureaucratic purposes say we have not technically taken a decision, even though we are effectively investigating you and therefore time has not started to run.

In my submission, by the time they have raided your premises and are up and running, you are in a position where the investigation is substantially affecting your position. Indeed, it would be quite unfair to say that any number of years --

MR JUSTICE MORGAN: Can we look at the words of Article 6? Are they quoted in this case for example? I mean I have a feeling that the words of Article 6 will close down this argument.

MR O'DONOGHUE: 59.

MR JUSTICE MORGAN: It is set out at 59, is it?

Right. It has to be in the determination of a criminal charge against him, so you have to have a criminal charge and then you have to have the period of determination of the charge. Then you say the hearing must be within a reasonable time.

MR O'DONOGHUE: Well, then we have *Dyer*, paragraph 55 --

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: -- where Lord Bingham said that the passage of any considerable period of time before charge may call for an explanation thereafter.

MR JUSTICE MORGAN: No, as I remember, what he said is if you have taken a very long time to get to the charge, it behoves you to be a little bit more expeditious when you have charged, because if you never do a charge, if you investigate and investigate for ten years and never charge then there is

nothing for Article 6 to bite on. There has to be a charge, then it bites.

Per Lord Bingham, if you have taken a long time to get there that might help the court to say how fast you must continue after the charge but no charge, no Article 6. For example, Article 6 does not apply to the criminal investigation in relation to FP McCann, does it, because they were never charged with a crime?

MR O'DONOGHUE: The individuals?

MR JUSTICE MORGAN: The individuals were never charged with a crime.

MR O'DONOGHUE: The CMA in my submission cannot have it both ways, they cannot say that the criminal case and the civil cases are essentially parasitic and then by happening to do a dawn raid covering both, then technically the civil side of things has not started.

MR JUSTICE MORGAN: You call it a bureaucratic point, but what does the law require? It requires proceedings in a reasonable time from a charge. And if that is what the law requires, you cannot say it is a pity it didn't go further.

MR O'DONOGHUE: My Lord, one has to apply this to these particular types of proceedings. The only template we have is that in the European cases delay is calculated from the start of the Commission's investigation.

MR JUSTICE MORGAN: All right, but that is not applying Article 6, that is some other principle.

MR O'DONOGHUE: My Lord --

MR JUSTICE MORGAN: You have addressed us on charge.

MR O'DONOGHUE: -- it would strike me as very odd indeed that the Commission or the CMA could formally start an investigation, spend many, many years investigating, and that until a formal point of charging, or perhaps a statement of objections, the time doesn't even begin to run. That seems it me to put

form over substance.

(Mic on mute)

MR DORAN: ... long before any charge and long before any civil proceedings were formally opened.

You are running one horse about the Article 6 proceedings, which we would normally start at the time of charge, and making that correspond with opening the dawn raid.

MR O'DONOGHUE: Yes, the (mic on mute) covered both investigations, it was the same material.

MR DORAN: But Article 6, as I understand it and I am no expert on Article 6 but the timescale one would look at was from the date of charge. So in the case that you are putting to us, the fact that the both the civil and the criminal cases could be covered by the dawn raid, would start at a time when if anyone from FP McCann had been charged with a criminal offence, that that time would not be susceptible to Article 6 review.

MR O'DONOGHUE: In my submissions, one has to look at this in a composite context, where there are civil and criminal competition investigations. One has to take a view of substance, as opposed to one of form.

MR DORAN: Thank you.

MR JUSTICE MORGAN: I think I will indicate it occurs to us provisionally speaking at present that if Article 6 is what we are applying, it is from the date of the charge. It never did apply to the criminal proceedings against the potential criminal proceedings, because there never were charges in the criminal proceedings.

As far as the civil stage is concerned, Article 6 applies to civil cases as well as criminal cases I think, does it not?

MR O'DONOGHUE: Yes, it is clear that is the latest --

MR JUSTICE MORGAN: And quasi criminal, so a fortiori Article 6 applies. But the Article 6 cases seem to distinguish between a period before charge and the period after charge, Article 6 applying to the second period but not the first. On that basis, the opening of the civil investigation starts Article 6 running. If there is an authority you can find which contradicts that, you will be free to provide it to us.

MR O'DONOGHUE: I think on the civil side it is certainly clear it is not later than April 2016.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: In my submission, it is also wrapped up in the question, given that the CMA could -- in our submission should -- have run these in parallel ... its refusal to do so until April 2016 means that no time starts running until that period.

MR JUSTICE MORGAN: You might have a case on delay, but you cannot bring it within the four corners of Article 6 until the opening of the civil investigation. The reason I was reaching for Article 6 is that Article 6 has a body of case law about what is meant by a reasonable time and we need what help we can be given as to how we approach that and Article 6(2) has a body of practice as to how a court goes about deciding: was this excessive?

If it is Article 6 we do it one way. You say that it is not necessarily Article 6, you can run a delay case based on wider considerations.

MR O'DONOGHUE: Yes, that is our *Kerrigan* point.

MR JUSTICE MORGAN: In which case we do not get the help of Article 6, we have to look afresh for some other principled basis for saying what is a reasonable time and what are the consequences of exceeding a reasonable time?

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: All right.

I think you are saying that it is Article 6, but if Article 6 is too restricted for your purposes, you are not handicapped by that, because we are talking about penalty, we are talking about what is appropriate, we are talking about all the circumstances and the passage of time and the adverse effect of time is a relevant circumstance.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Forget Article 6 at that stage.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: I mean, have I understood that right? Are you adopting that possible way of putting it.

MR O'DONOGHUE: My Lord, yes, it ties in with our *Kerrigan* point.

Just to round off this point, the CMA continues to argue that FPM has suffered no prejudice. As I showed you yesterday prejudice is not strictly necessary, but, to put it bluntly, paying a £25 million fine is much more prejudicial than paying a £15 million fine, even if the company has proportionately higher turnover. He made the point that turnover didn't steadily go up, but that doesn't mean there is no prejudice. The bottom line is the penalty would have been lower in any other year.

He made an analogy with taxes levied on income. That is a bad analogy, turnover is not the same thing as profit and a fine is not a tax.

Turning very quickly to the evidence, I am conscious of the time. Mr Williams first suggested we had put what he called unpleaded points to Dr Grenfell. It is not open to him to say that now, he did not object at the time of questioning.

The fact is the -- this perhaps is back to your Lordship's point, the reason for the

length of the investigation was clearly put in issue by FPM. If we can quickly turn to the CMC judgment in Volume 1, tab 11. Paragraph 61. Page 717. Mr Williams at that stage was basically making a pleading point:

"The Tribunal finds the issue of this ... unreasonable delay carried the investigations ... that issue will be decided by the Tribunal on the merits any documents which go to the resolution are prima facie relevant ... consider whatever evidence is before it and what explanation for delay has been put forward and proven (I do emphasise that) that does not change the nature of the issue."

Now, there has been no appeal against the order in this case, and therefore the CMA, with respect, is stuck with it.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: His pleading point, with respect, was a bad one and what it really in my submission was intended to do is to provide cover for the more or less complete lack of evidence which has come forward on the CMA side.

The fact is the CMA has been given every opportunity to put forward documents and explanation for the delay, but has deliberately it seems chosen not to do so. That is despite the fact that the evidential burden clearly rests on the CMA to explain the period of delay. For the Tribunal's note this is *Dyer*, paragraph 52, Lord Bingham. This is particularly the case in the present case, where the criminal investigation was by some distance the longest ever conducted by the OFT CMA and where the civil investigation, whichever timing one takes, is very substantially in excess of the benchmarks.

Mr Williams invited the Tribunal to make what he called an inference that the OFT had considered that there were good reasons not to run the cases in parallel, but that is speculation not inference, your Lordship very fairly put the point to Dr Grenfell that had there been consideration of the possibility of parallel

investigations, one would expect to see documents from the OFT or earlier CMA period and nothing has come forward. So there really is no basis for this inference and it is a point which should not have been made.

Mr Williams repeatedly sought to rely on difficulties of what he called a general nature in relation to parallel investigations. But the reason he was forced to make these general points is the complete lack of any specificity in what Dr Grenfell said. His evidence, insofar as he offered any explanation for repeated delays, was vague and he had an inability to explain a series of important matters.

Mr Williams made a virtue of the fact that there were no documents on the CMA side in relation to the volte-face, but that, if anything, is surely a point against him. It is simply not good enough for the CMA to row back on a very detailed 20-page paper from the Pipeline Steering Group, setting out in some detail the considerable efficiencies and compelling reasons for parallel investigations and for putting nothing on a decision to reverse that decision and pause the investigation for a year.

Dr Grenfell and Mr Williams conceded that there was at least a head start in the civil case. This, in my submission, is an important point because one is not dealing with a civil case that one can shoehorn within the average, one is dealing with a case that if anything should be appreciably quicker than the average because there has been a significant front loading of the evidence and the work through the criminal investigation. You will recall the phrases in the Pipeline Steering Group paper, the leveraging of resources from the criminal side to the civil side.

An important point raised by your Lordship on more than one occasion, and emphasised by Mr Williams, is that some emphasis was placed on the fact

that it was inevitable that the civil case would have to wait until the end of the criminal case.

There are two responses to that.

The first is our point that in any event the criminal case should itself have been quicker, it should not have been delayed and if that is true then of course even on the CMA's case the civil side of things would have come earlier and FPM's fine would have been lower.

Second, and in any event, in my submission that is a false choice, because the issue is not one of purely sequential nature. The issue I explored in dealing with Dr Grenfell, as you saw in the Pipeline Steering Group document is the recommendation was that because the evidence had been filleted, the drafting of the statement of objections could commence quickly and in parallel with continuation of the criminal investigation. It was not a case of doing them sequentially, the internal work could be done and, in my submission, effectively completed so that when the criminal investigation ended the statement of objections could be ready to send to the parties very, very quickly indeed. We saw the deadline of two to six months identified in the minutes of the board meeting, and in my submission that is a completely realistic deadline. If the work in the space of what we know was a period of one year had been advanced and front loaded as was intended, it is obvious in my submission the statement of objections would have been good to go. That, in practical terms, would have saved a year even if one waited for the criminal investigation to conclude before picking up on the civil investigation.

Finally, just to deal with the *vires* ground. There are a number of points.

First, my Lord, it is in my submission obviously in the first instance a question of statutory construction. We make a series of points. First, in my submission,

the wording of the statute itself is not complicated and is directly and highly analogous to the equivalent wording in other criminal statutes, also imposing maximum penalties.

To that extent, the question in my submission is a very simple one, which is when sees Parliament enacting legislation in the criminal sphere in relation to maximum penalty that is worded in strikingly similar terms, is one to construe that uniquely this piece of legislation has a fundamentally different meaning than all other aspects of criminal legislation imposing similar requirements? That seems to me, as a starting point, inherently unlikely.

Second, your Lordship quite rightly picked up on the amendment to introduce the concepts of seriousness and deterrence. I think it was a question your Lordship put to me yesterday to the effect, well, can we construe from the statute that the objectives of competition penalties are different or more multifaceted than criminal penalties. If I can just hand up on the criminal side, one sees very clearly the rather obvious point that seriousness and deterrence are equally relevant in the criminal sphere.

MR JUSTICE MORGAN: Yes.

(Handed)

MR O'DONOGHUE: My Lord, this is the Criminal Justice Act 2003, you will see the fixing of fines. It is all blindingly obvious, but in the criminal sphere they also consider financial circumstances, seriousness of the offence, and so on.

In a way, there is a certain symmetry between the amendment your Lordship rightly picked up on and the typical things one sees in the criminal context. My central submission is to bolster the first point I made, which is: broadly speaking the objectives are similar.

Mr Williams made a point about repeat offenders. That seems to me a bad point for

two reasons.

First, in the context of competition law, a repeat offender would get an increase in penalty for recidivism. That is difficult to see where that takes him, but in any event in the context of criminal law there is a very developed body of case law to deal with successive infringements of this kind. That seems to me a neutral point at best.

One final point before I move on to section 60. We have seen in the context of penalties that the OFT has long had its own separate fining guidelines and the CMA continues to have separate guidelines today. That is a further argument in my submission pointing to separateness from the European regime.

On section 60, my Lord, just to tee up what in my submission are the relevant questions. There is a question as a threshold matter as to whether there is a question in relation to competition in the UK, that is one condition.

The other condition: is there a relevant difference? These are cumulative criteria.

The third condition is whether the Tribunal ultimately feels it needs to act with a view to achieving consistency or is inclined to take a different view.

MR JUSTICE MORGAN: We must act, but if it is not possible we cannot act. That is how it is put. It is put in the sense of being mandatory, but of course you cannot be made to do something you cannot do.

MR O'DONOGHUE: My Lord, it's the point I picked up yesterday, which Mr Williams said nothing on, which is the actual wording is that the Tribunal should act with a view to achieving consistency. I made the point that if they wanted to make this mandatory, they would have said so. There is room for the Tribunal, in an appropriate case, to exercise its discretion that it is unable to achieve either consistency or full consistency for whatever reason.

MR JUSTICE MORGAN: Right. We have to take action that is compatible with the

Competition Act and the purpose of our action is to secure there is no inconsistency.

MR O'DONOGHUE: To act with a view to ensuring there is no inconsistency.

MR JUSTICE MORGAN: The view is ... that is the intention behind the action.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: With a view doesn't mean you can say, "I have to act, I can do it, but I am not going to".

It doesn't mean that.

MR O'DONOGHUE: No. I mean, as I said yesterday -- which Mr Williams didn't contest -- in my submission a paradigm case where with a view to would bite, would be where we have compelling domestic case law in the criminal sphere which makes crystal clear what would be the correct approach to maximum penalties on the one hand, and then on the other hand we have judgments from the European Court that are elliptical and conclusory and seem to be on a head-on collision with domestic criminal law.

That may be a situation where in its discretion the Tribunal may feel that the chasm is so large that it becomes a binary choice and that the Tribunal is unable to act with a view to achieving consistency in that particular instance.

To put it another way, if the duty is not absolute there must logically be circumstances in which you could act in a way that doesn't achieve consistency. That is what the statute says. If it were absolute, it would have said so.

MR JUSTICE MORGAN: I am not sure I get the force of with a view to. The starting point is you must act, although that is qualified.

MR O'DONOGHUE: It doesn't say you must achieve consistency.

MR JUSTICE MORGAN: You are right, it doesn't say must act to achieve

consistency --

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: -- but there may be different ways of doing it. You may have a choice as to how you secure no inconsistency. Of course, the qualification is that what you do must be compatible with the domestic law. If the domestic law is quite clear and it is inconsistent and it is always going to be inconsistent, you must give effect to it. All right.

I can see that if the whole framework of the domestic provision and the background and the hinterland is so different from what they do in Europe that you may not be able to bring about consistency.

MR O'DONOGHUE: Yes, yes, that is essentially my submission, that we are dealing with a species of criminal law at a legislative level is worded very, very similarly to fundamental principles in relation to maximum penalties across the whole criminal sphere, and in that particular instance it is not possible to achieve consistency because there is a head-on collision with the European cases.

MR JUSTICE MORGAN: Is there a head on? I mean, *Dansk*, et cetera, says that this provision is not about identifying the penalty for the most serious case, it is about something else.

Do they not have in Europe the concept that where there is a maximum penalty in a criminal statute, it is for the most serious case? I would have thought that is a universal rule of criminal law.

MR O'DONOGHUE: My Lord, in the national cases I have shown you apparently not.

MR JUSTICE MORGAN: It is.

MR O'DONOGHUE: Well, the Austrian, German and Spanish cases reject the

European approach and we have had no push back on that.

MR JUSTICE MORGAN: But they reject it because they give effect to what you say is the criminal law approach.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: My proposition is that what we do with criminal statutes and maximum penalties is what Germany, Austria and Spain do and surely Europe does. But Europe is not denying the existence of that general sentencing approach. What it is saying is that Article 23(2) of Regulation 1 of 2003 is not the imposition of a maximum sentence of that kind. It is a different provision with a different purpose and effect.

All right. Well, at the moment -- I am only speaking for myself, but at the moment I find section 60 relatively straightforward, although you European specialists seem to be telling me it is one of the most obscure provisions they have ever had to deal with. Maybe as a beginner it is so crystal clear that I don't even understand the problem.

MR O'DONOGHUE: My Lord, one obviously has to work through the conditions sequentially. The question in relation to competition, that has a particular meaning around differences of wider meaning and "with a view to" in my submission has a particular meaning.

One needs to work through these logically and sequentially.

MR JUSTICE MORGAN: I have all the cases in this country that discuss this section and we will see what we make of them. You can tell the Supreme Court that we failed in however many grounds of appeal you draft.

MR O'DONOGHUE: I hope I am not in that unfortunate position. But, on the case law in a nutshell, *Pernod* has effectively collapsed for practical purposes.

MR JUSTICE MORGAN: Speaking for myself, we are not helped by *Pernod*.

MR O'DONOGHUE: No, we are not. What we are left with is where I started out, which is we have a small handful of cases that on the substantive dimension seek to achieve consistency.

There is nothing outside of that which -- particularly of course in relation to penalties -- gives my learned friend any comfort. That, in my submission, is striking and of course if one looks at the Part 1 of the Act, there is a whole series of provisions that obviously have nothing to do with competition as such. There is one interesting provision at section 57.

MR JUSTICE MORGAN: Do we have that copied?

MR O'DONOGHUE: I am working from the -- it concerns defamation.

MR JUSTICE MORGAN: We all have that.

MR O'DONOGHUE: It says (inaudible) defamation privilege attaches to CMA advice and so on. There are a whole series of questions in Part 1, including of course in *Gibson*, as we saw, relating to collective proceedings. That although in some broad sense they might be related to competition, are obviously not related to competition.

So it has a particular meaning, the case I am advancing particularly based on the statutory material materials is that it is concerned with substantive convergence. I put to you the pragmatic reasons why that is so. Mr Williams has not come up with a single convincing reason why in the sphere of penalties there should be the same consistency. Indeed what we see in *Tomlinson* and *Crest Nicholson* is repeated acknowledgment of the differences between the penalty regime at a European level and at a domestic level.

MR JUSTICE MORGAN: Did you want to give some examples from Part 1 of the Act? You mentioned --

MR O'DONOGHUE: Pre-formation is a good one, but --

MR JUSTICE MORGAN: Which section is it?

MR O'DONOGHUE: It is 57.

Part one is mainly, in fact, preoccupied with procedural issues, questions of misleading the CMA. For example, section 44 deals with destroying documents and so on. In my submission, primarily Part 1 is not concerned with questions to do with competition, even if in a loose sense they arise in the context of competition.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: A couple of final points.

MR JUSTICE MORGAN: Thank you.

MR O'DONOGHUE: Mr Williams took you to the Hong Kong case. In my submission there is an element of bootstraps about that, because they looked of course for inspiration to the common law cases, but of course had they been aware that in this Tribunal there is a direct challenge to the *vires*, that may well have been a relevant consideration. It doesn't really get him very far. In any event, as he candidly admitted, it is one of a number of cases which go in different directions.

Two final points before I sit down.

First, there was some reliance by Mr Williams made on earlier pre-2003 Commission guidance. Just to pick up the point, it is in Authorities 6, tab 78, this is the previous version of the Commission's fining guidelines.

MR JUSTICE MORGAN: Yes. 78, yes.

MR O'DONOGHUE: Towards the back, page 4750.

MR JUSTICE MORGAN: 4750, yes.

MR O'DONOGHUE: You see the heading, my Lord, "General comments", it says:

"It goes without saying the fine amount may not in any case exceed 10 per cent."

In my submission it is a bit of a throwaway remark or a statement of the obvious and it is rather a long way away at this stage from saying that it needs to be construed in a particular manner.

That is why we say there is nothing pre-2003 which really assists the CMA in terms of its (inaudible) handover argument or in terms of trying to argue that the legislative background at the time of the 1998 Act was clear in respect of the treatment of the 10 per cent cap.

My final point.

We saw yesterday in the footnote there was a reference on the same issue the *Musique Diffusion* case, and I have had a look at that overnight.

MR JUSTICE MORGAN: Yes, thank you for doing that.

MR O'DONOGHUE: I will hand that up. **(Handed)**

MR JUSTICE MORGAN: Thank you very much.

MR O'DONOGHUE: It is at paragraph 103. It is a bit of a nothing point. What happened was the Commission's practice had increased fines from 2 to 4 per cent and the appellant was not very happy about that. There was the point about whether it was possible for turnover in the affected market to be taken into account. You see at 121 the Court answers that question.

There is certainly nothing in here which is remotely like what we see in *Dansk*, many years later, about the stage at which the penalty applies.

For the pre-2003 or the pre-1998 appeal period, there really is nothing which gets the CMA close to where it contends the Court of Justice is today.

My Lord, those are our reply submissions unless I can help you further.

MR JUSTICE MORGAN: Thank you very much, that is very clear. We understand what you say and thank you for presenting them so capably in the time made

available.

We will very shortly finish the hearing but let me see if other Members of the Tribunal ...

I think, then, it remains for me to thank -- before I do that, I will hear Mr Williams.

MR WILLIAMS: I am a bitten envious because Mr O'Donoghue got praised for doing his homework and I did mine and I forgot to tell you about it.

MR JUSTICE MORGAN: I want to be even handed in praising counsel.

MR WILLIAMS: You asked me for a point of reference in terms of the way a domestic court has looked at the question of whether there is unreasonable delay.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I think I would refer you to *Dyer v Watson*, tab 35. There is discussion in the speeches of the -- discussion in all the speeches, but there is Lord Bingham at paragraphs 2 to 23 and there is Lord Rodger at paragraphs 163 to 182.

Before I sit down, the CMA has just asked me to remind the Tribunal, although no doubt you don't need reminding, that there are other proceedings waiting behind this appeal and so a resolution of a judgment as soon as possible would be very welcome.

I know, of course, the Tribunal understands that but I just must remind the Tribunal.

MR JUSTICE MORGAN: We will not subject the parties to inordinate and inexcusable delay.

I was proposing to say, I will now say, that the Tribunal is very grateful to everyone who has worked on this case. The case has been presented with enormous skill and industry. It doesn't necessarily make our task easier, but it is entirely right that the parties were represented to such a high standard and we think it

is right to refer to that fact.

We will consider our decision and make it available in the ordinary way.

MR O'DONOGHUE: I would like to thank the Tribunal staff for accommodating us this week, because it has not been straightforward.

MR JUSTICE MORGAN: You are right, the staff sometimes go unmentioned and I am sure everyone in the Tribunal would agree with your comment, thank you.

We will rise.

(4.35 pm)

(The hearing was concluded)