IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1277/1/12/17

Victoria House,
Bloomsbury Place,
London WC1A 2EB

17 July 2017

Before:

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

(Sitting as a Tribunal in England and Wales)

BETWEEN:

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

Appellants

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

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HEARING

A P P E A R AN C E S

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

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

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THE CHAIRMAN: Yes, good afternoon. Who is kicking off? Mr. O'Donoghue.

Opening submissions by MR O'DONOGHUE

MR. O'DONOGHUE: Madam Chairman and Members of the Tribunal, I appear on behalf of the two Balmoral entities, the appellants in this application. I appear with Mr. Sammour to my right. For the CMA we have Mr. Williams and Mr. Bourke.

This appeal is a point of principle for Balmoral. This is a case in which the costs of the investigation of this appeal have substantially outstripped the amount of the fine imposed by the CMA. From Balmoral's perspective it is an aggressive, honest competitor, established in the market. From its perspective there was a seven year cartel in the affected market which had for many, many years ripped off consumers. When Balmoral entered the market in early 2012 it instantly undermined this cartel to such an extent that from the word go significant pressure was placed on Balmoral to join this cartel. That pressure failed and, as the cartels had apprehended, the cartel very quickly demised after the infamous meeting of July 2012.

From Balmoral's perspective it did everything it thought was required; it acted with integrity and it felt it did the right thing.

The reason that it is bringing this appeal is that it feels it has been treated unfairly and wrongly by the CMA. From its perspective, at all material times it created competition, it stopped the adverse effects of the cartel materialising and, as I indicated, it eventually led to its demise.

So this is a very important appeal for Balmoral and it simply does not understand on what basis the CMA found that it restricted competition by object.

In terms of housekeeping, Madam, there is a second supplemental bundle, which is effectively an overspill from the original supplemental bundle. That goes from tabs 16 to 33. I wonder if the Tribunal has received copies of that.

THE CHAIRMAN: Yes.

MR. O'DONOGHUE: There was a further document this morning I think from the CMA which has not found its way into the bundle yet. That will be for tomorrow. I suspect the supplemental bundle may grow over the next day or two. Hopefully there is room.

THE CHAIRMAN: What is it going to grow with?

MR O'DONOGHUE: Mr. Williams, the CMA sent us a document today which I apprehend is for cross-examination tomorrow. We will have to see what that document is. It is from the CMA's case file, it is not a new document in that sense; and we will have to see whether

there is a contextual document that needs to be made available to clarify the contexts of that document.

THE CHAIRMAN: I cannot understand why new documents are coming out at this stage in the proceedings.

MR. O'DONOGHUE: Mr. Williams can --

MR WILLIAMS: This one document is an oversight, Madam, because the entire text of the document is contained in a witness statement and so we had been working from that, but then I realised that the underlying document is not at the back of the bundle.

THE CHAIRMAN: All right, but I am not expecting the supplemental bundle to grow quite a lot during the course of the trial.

MR. O'DONOGHUE: Madam, I understand that. It is simply that we have received this today. We will need to see whether that is the full extent of the context from that document.

THE CHAIRMAN: Yes.

MR. O'DONOGHUE: We simply do not know what it is.

If I can begin very briefly with the affected product. One of the supplemental documents which I think is very useful is a product brochure from Balmoral and that is located in tab 31.

THE CHAIRMAN: Yes.

MR. O'DONOGHUE: What this is is a product brochure with a whole range of firefighting water tanks, including galvanised steel tanks. As one can see from the cover, with the recent tragic events at Grenfell, this is equipment of very high sensitivity and of considerable importance to a whole range of different consumers.

If we can pick this up very quickly on the first full page after the Contents page, "Fire Protection":

> "Automatic fire sprinkler, wet riser and mist system tanks are installed for two main reasons; property protection or life safety."

Then the third paragraph:

> "Property protection systems are often installed at the request of the building occupier's insurer to protect the business by insuring the building and contents are protected against fire."

The fifth paragraph:

> "In both of these cases an essential part of the system is the water supply. This can take the form of a direct supply from the local water service main with or without a

booster pump or, more reliably, having water stored in a tank with a pump or pumps to deliver water to the sprinkler system."

We see on the second half of the page on the right-hand column, under "Balmoral firefighting water storage tanks", the different types of tanks are then set out. We are concerned primarily with the first category, cylindrical galvanised steel or aluminium tanks. This is the most common type of tank used for sprinkler systems. Construction is by galvanised steel or aluminium sheets that are bolted together to form a cylinder, and so on. There is liner and so on.

Then we have the other two types, the GRP panel, which at least for schools end-users competes with CGSTs to some extent.

Over the page, in the middle of the first column we have the LPCB, which is the certification body. There are a whole series of different specifications and approvals for different capacities and types, right up to 1300 cubic metres.

Then about three pages on we have a picture of a CGST in Wales. This is a very large size, this is a 1300 cubic metre tank. Obviously the products we are concerned with in terms of the decision are much smaller, typically around 30 square metres to 135, but this is just to give you a physical representation of what these look like.

Just to read from the description:

"This cylindrical tank installation is one of the largest and most comprehensive of its type in the UK."

To pick up on the liner:

"EDPM liner membrane acts as the main sealant to the tank, which is fixed to the top perimeter angle, and the panel sheet material used is pre-milled galvanised steel with a thickness of 2-millimetre to 4-millimetre."

Then the brochure goes through the other types of tanks sold by Balmoral, which we are not directly concerned with.

There is an important point I wanted to pick up under "Accessories and Ancillaries", which is about two-thirds of the way down. It is on page 25.

We have seen the main tank itself. Then there are up to 20 or so accessories and ancillaries which go with the tank, and they are separate and diverse. We see, for example, the water supply connection, flow testing facility, float or ball valve, electric immersion heater to prevent ice forming, drain valve, ladders, pump suction pipe, rigid roof. On the second column, the vortex inhibitor, which stops the whirlpool effect which you may have seen in the decision. Then there is heating and lagging for exposed pipes, overfill pipe and so on.

The point is that the bid, in terms of the customer specification, will include the physical cylinder and a whole range of ancillaries that go with that.

One of the points we will be making in due course is each one of these ancillaries or accessories is something which is in principle separate and which, in our submission, has or may have a material bearing on the end price for the bid. So it is not simply about the tank. There is a whole range of accessories that have significant availability in price, depending on whether or not they are specified.

Finally before we close the brochure, the penultimate page, a little bit, if I may, about Balmoral.

THE CHAIRMAN: The cylinder sits there with all this water in it, and does the same water sit in it for years, assuming there is not a fire, or is the water sort of flowing through it?

MR. O'DONOGHUE: It is connected to the mains. I will check to see if it is refreshed. (Pause) The water quality and so on will be checked from time to time under regular testing, and if it is in an acceptable state it will not be replenished or replaced, and if it is, it will remain as is.

One thing which is in the brochure but I will not trouble you with, of course when the fire brigade comes they can connect, in some cases, directly to the tank itself and top up the water level if that is required.

THE CHAIRMAN: The tank provides the water not only for the sprinkler system but also directly for the firemens' hoses?

MR. O'DONOGHUE: It may do, or it may be the other way round, which is that there is a deficit in the tank and it needs topping up and it can be connected to the fire truck; so I think it works both ways.

The penultimate page has a couple of words on the company. The company has been in existence since 1980. It is a leading European engineering design and manufacturing company. An important point, and in contrast to some of the other addressees of the decision, is that the CGSTs is one of a large number of different types of tanks and other products that Balmoral does, whereas by contrast one of the companies, Franklin Hodge, where Mr. Snee is employed, for them 90% of their business, at least at the time, was galvanised steel tanks. So there is an important difference.

Just to pick this up in the brochure, you will see on the second column: they have a significant business in GRP sectional water tanks, they have a significant business in what is called rotationally molded tanks and in hot pressed steel tanks. So the cylindrical tanks is

one of a number of different products, and of course, as I mentioned, there are a number of different specifications.

To put this in context, and you may have picked this up from our skeleton and other documents, at the time of the meeting in question, CGSTs of the two types that we are concerned with, the school tanks and the supermarket tanks, were around 6 or 7% of Balmoral sales, so a pretty small product for the company, certainly at the time. Just to put this in absolute numbers, at the relevant time, we are talking about from August 2011 to August 2013, Balmoral had sold 10 school tanks and 4 supermarket tanks, all to one customer, Compco.

THE CHAIRMAN: When you say supermarket tanks, you mean the 135?

MR. O'DONOGHUE: My Lady, yes. There is a danger of oversimplification because, for example, for schools tanks there is not simply one fixed size, there is a range of say 25 to something of the order of 30. But yes, I mean as a label 135 and 30 metres squared seems to be something which is reasonably accurate.

THE CHAIRMAN: You said 10 school tanks and ...

MR. O'DONOGHUE: Four supermarket, over a two year period to one customer, Compco.

I am going to move on next if I may, subject to any questions, to the two decisions. Obviously we are primarily concerned with the second decision. The cartel decision, it is important to see this in context because it sets the stage in many ways. This is in the core bundle at tab 9.

Just to set out the main players in this decision: we have CST Industries, who was the successful immunity applicant; then you have a company called Kondea, which was not itself a manufacturer of tanks but was CST's sole distributor and installer of CGSTs, so this was Clive Dean's company; then you have Franklin Hodge, which is Mr. Snee's company and an entity called Carter Thermal, found to be part of the same undertaking; and then the final company for the purposes of the cartel decision is Galglass, which is Mr. Stringer's company, and again there were two subsidiaries in that undertaking found to be a part -- to whom the decision was addressed.

CST, as I indicated, on 2 May 2012 approached the CMA seeking immunity. We can pick this up at paragraph 2.101 of the decision. You will see in the next paragraph that then just under a year later Franklin Hodge separately applied for leniency.

I am sorry, this is tab 9 of the core bundle.

THE CHAIRMAN: Yes, which page?

MR. O'DONOGHUE: It is internal page 33. The immunity application and the leniency application, they are both located in the bundles. They are obviously confidential and I do not propose to turn them up just yet, but I would make the observation at this stage that neither application made any reference or any suggestion to the possibility that there was a separate, distinct information sharing infringement compared to the cartel.

The lawyers who looked at this at the time and advised their clients did not apply or even suggest that there would be an application for a separate information sharing infringement. It was all to do with the cartel and nothing else, and we say that is telling and that that was correct.

We can then move into the nuts and bolts of the cartel, which is in section 3 of the decision on page 37.

If we can pick this up at the top of page 38, which is the end of paragraph 3.5, this is the origins of the cartel. The origin of the cartel in a nutshell was a phenomenon called the last bite of the cherry, and we see this described by Mr. Snee at the top of page 38. He says:

> "At this time the market had been particularly fierce, with manufacturers cutting each others throats on price to win work with various contractors. A contractor would send out a bid request for a specific contract to two or more manufacturers. Once the bids had been received, the contractor would then play one manufacturer off against the other, forcing the bid price down to a level where one of the manufacturers pulled out, leaving the lowest bidder to take the work. This meant in our case that for a manufacturer to win a contract their sales margins would be down in single figures."

Essentially, the arrangement was that it seems that the customers had a preferred supplier, and then the second or third supplier were essentially being used as a stalking horse or as a stick to beat down the preferred supplier. That is what I mean by "the last bite of the cherry". The cartel, in a nutshell, was an attempt to stop the last bite of the cherry having effect. That is what it was all about.

We see the manifestations of the cartel, it had two separate but related components; the first component involving customer allocation, and the second integral component involving price fixing.

I can take this very quickly. We pick up the customer allocation component at paragraph 3.14, page 41. About three lines down:

> "The ultimate objective was to divide the market so that each manufacturer had an equal share of the market, and to achieve this the parties in the main cartel first

identified how much the sector was worth, looking at market turnover and who each customer most favoured ..."

This is the preferred supplier.

"... so as to divide the market accordingly."

Mr. Dixon says:

"I cannot recall by whom but it was suggested during the meeting that we could arrange prices in the market place by way of sharing customers. However, this could only be achieved if we all agreed to share the information on our various customers."

Over the page, the first complete sentence:

"By sharing information of each other's list we could determine the size of the market and attempt to work out an equal share for contractors of each manufacturer."

Then you see at 3.16, actual customer allocation lists began to be circulated.

Then at 3.26 we see movement and customer allocation lists over time. For example, at the bottom of page 46, the second bullet, in May 2006 Compco is allocated solely to Franklin Hodge; so from that date forward Compco was Franklin Hodge's customer, at least within the cartel.

Then we see at paragraph 3.30 essentially the antidote to the last bite of the cherry, which is, and this is the last sentence:

"So they would be told to step back from a later order once one of their gold or preferred customers ..."

Essentially, there would be the appearance of competition but in reality there was a preferential complete allocation of customers. That is the first component.

The second component of the price fixing, we can pick this up at paragraph 3.33, and there the CMA says:

"The customer allocation arrangements described above ... the parties also entered into arrangements to fix the prices for the supply of CGSTs."

As Mr. Dixon says over the page:

"After the customer allocation list had been agreed, the focus turned to fixing prices."

At 3.36, it initially led to what Mr. Snee said was a gentlemen's agreement not to discount heavily, to prevent customers from playing the competitors "off against each other". So again the last bite of the cherry.

Over the page at 3.38 we see that at least in its initial form the price fixing took the form of an agreement on permitted discounts.

Then at 3.39, it evolved over time to include an agreement on price lists. Mr. Snee explains the reason for this in paragraph 3.40.

You saw at 3.38 this agreement on permitted discounts, and he says:

> "This initial agreement was doomed to failure as we did not know what each other's production costs were. Therefore, although to my knowledge we kept to the agreed discount percentage, the end sales figures being quoted were different."

So at least for the cartel there needed to be a more rigid system of price fixing; agreements on price discounting simply would not work.

You see at 3.41 this became known as "target pricing".

At 3.42:

> "The parties to the main cartel were then able to use the price list to ensure that discounts given on quotes were from a known and agreed price, irrespective of costs of each undertaking."

That is the two main components of the cartel, which I emphasise worked in tandem.

To continue to the question of implementation, this is at paragraph 3.52 on page 57, again this is not surprising:

> "Franklin Hodge, because of customer allocation and rigid price fixing, would be almost guaranteed to win all the work put out to bid from their A list contractor while ensuring that Galglass or Kondea provided bids that would not."

So from the customer's perspective they understood, wrongly, that the last bite of the cherry was still very much in operation, whereas in reality there was a real bid which was uncompetitive, and effectively a dummy bid or fake bid which was even more uncompetitive. So they had by this stage killed off the last bite of the cherry through this mechanism.

Then at 3.65 just a couple more points about implementation. There is a further description of the price list mechanism. This is from a Mr. Dwyer and he says:

> "The bench mark price effectively fixed the end price to be quoted of any given size of sprinkler tank."

THE CHAIRMAN: I have got his name surrounded in red but are these not confidential any more?

MR. WILLIAMS: The red markings indicate material that was not in the published version of the decision, but at the PTR we indicated that we were only going to treat the blue markings as confidential, so that is commercial confidential information as opposed to personal information.

THE CHAIRMAN: Yes. Yes.

MR. O'DONOGHUE: Then, again just to complete the picture on implementation, at 3.83, which is page 68, there was also evidence of bilateral contacts between the parties of the main cartel to discuss specific bids and to further the arrangements. Mr. Snee explains that initially the parties to the main cartel would phone each other frequently to check the prices they were quoting.

We then see in section F the entry of Balmoral, and I will take this very quickly. You will see on page 71 Balmoral delivers the first certified CGST in February 2012. Then at 3.86 on page 71, Galglass was concerned about irrationally low prices from Balmoral and so on, and this had the potential to cause things to revert to the pre-LPS1276 level, so the pre-cartel prices.

Then 3.87, these discussions led the club, the cartel, to recognise there was no point in fighting Balmoral, and that it would be better to try to encourage them to attend the meetings and become members.

Then at 3.88 it was decided to attempt to persuade Balmoral Tanks to join the longstanding cartel arrangements, and Mr. Snee explained the strategy for getting Balmoral on board as follows ...

In the middle of what Mr. Snee says, over the page:

> "The idea was to try and convince Balmoral (Mr. Joyce) that Balmoral should raise its prices to meet ours in exchange for an equal share of the steel tank market."

That was the strategy formulated and agreed among the cartelists.

Then in section G we have the meeting. I am going to come back to that in submissions and in the second decision. The only point I want to note at this stage is the point at paragraph 3.96, which is common ground, and 3.97, at page 75:

> "The CMA has concluded that Balmoral was not party to the main cartel infringement, refusing to join the cartel despite significant pressure from the other parties to do so."

That is the meeting.

In terms of the post-meeting findings, we see at paragraph 3.99 the evidence is mixed as to the cartel's operation following the meeting of 11 July. Then at 3.100, the evidence shows that despite Balmoral's refusal to join, the main cartel continued to operate as between its members until the OFT's inspections in November 2012.

Then at 3.102 over the page, this in our submission is a very important point, the CMA says:

"That the arrangement continued to be implemented, albeit in a slightly different form, is supported by Franklin Hodge, who explains that the gold and silver lists and the price list, albeit with reduced margins [and I note the reduced margins], remained in operation and that Mr. Snee informed him of the way in which the parties to the main cartel would respond if they were bidding against Balmoral Tanks."

They say in the middle of the quote:

"If competing against Balmoral they would drop their prices to whatever level they thought realistic to win the contract."

Then we see, just to complete that point, at 3.104:

"There is some evidence from customers that prices decreased following the entry of Balmoral Tanks."

Pausing there. If, after the meeting, the cartel had collectively understood that they would continue not to compete among themselves but if they were confronted by Balmoral in a bid situation they would have to drop their prices to whatever level they thought realistic to win the contract, in our submission that is an admission of some significance, because in the immediate aftermath of the meeting it was understood that in contradistinction to themselves, they had to continue to compete vigorously with Balmoral. We say that is an unambiguous indicator that at least as respects Balmoral no restriction of competition was arrived at at the July meeting.

We can pick up in the supplemental bundle some evidence on this point. Two quick emails, if I may. Sorry, the first supplemental bundle.

The first email is at tab 7, in November 2012.

THE CHAIRMAN: I have not got anything in that.

MS. DALY: No, tab 7 is empty.

THE CHAIRMAN: I do not have anything at tab 8.

MR. O'DONOGHUE: It is an email from Nigel Snee to Steve MacLaren. Tab 8.

THE CHAIRMAN: Tab 9 I have got something, but apart from that they are all empty.

MR. O'DONOGHUE: Tab 7. Does the Tribunal have that?

THE CHAIRMAN: Yes.

MR. O'DONOGHUE: A very quick point. This is an email from November 2012, so before the dawn raids, from Mr. Snee to Mr. MacLaren of CST Vulcan:

"Nothing much to report save that Balmoral are still storming the market."

Then the next tab, at tab 8, something even more proximate to the meeting, it is an email of 26 July 2012 to Mr. Snee and various other individuals and Franklin Hodge. He says:

"Nigel.

"As mentioned to you earlier this week, Mike had to offer £150 for a contents gauge on a schools job for Hall and Kay because Balmoral were quoting £132 ..." and so on.

What we see from the cartelists' own admission and from a number of contemporaneous documents is that Balmoral remained a thorn in their side at all material times after the meeting, and they felt they had to continue competing with Balmoral in a way that they clearly were not competing with each other. So there is a significant and important difference in that regard.

That is the cartel decision. If we can go back a tab to the second decision, it is at tab 8, the information sharing decision.

If I can start, if I may, at paragraph 2.114, internal page 35. There was a single statement of objections covering both the cartel infringement and the second infringement sent to all parties, so there was a composite document, albeit presented as separate infringements.

Then on the transcript there is a couple of points which may be worth noting. This is at the bottom of the page.

You see from 2.119 that the transcript was first provided in October 2015. It was then amended and provided almost a year later on 8 September 2016. However, we see at 2.121 that it still proved unreliable and it actually was not finalised until 2 December 2016, which we can see from paragraph 2.122.

I note in passing, you see from 2.124 that the final transcript was presented after the draft penalty statement had been sent to Balmoral and after Balmoral had put in its observations on the draft penalty statement.

Turning to the infringement itself, we can start at paragraph 3.7. There are two important findings. One we have already seen:

"The CMA does not consider that Balmoral was a party to the main cartel infringement."

Secondly:

"Makes no finding that Balmoral was party to any infringement of competition law prior to the 11 July 2012 meeting which is the subject of the information sharing infringement."

MS. DALY: Which paragraph was that?

MR. O'DONOGHUE: It is 3.7 of the second decision.

Then at 3.10, over the page, we pick up a point we have touched on to some extent already:

"The cartelists had decided that rather than abandoning the main cartel and allowing the return of competition, they instead decided to persuade Balmoral to join the long standing cartel arrangements."

This is Mr. Snee talking about his strategy:

"The idea was to try and convince Balmoral/Allan that Balmoral should raise its prices to meet ours in exchange for an equal share of the market. This way each would have to accept a limit on their proportion of the market but in the knowledge that they would operate a far greater profit margin."

In other words, for Balmoral they would make greater profits but at a smaller output.

We then see a series of descriptions of a number of meetings that preceded the July meeting, and as I indicated at 3.7, there is no finding that in any of these meetings Balmoral at least restricted competition in any way, so we can take this quite briskly.

One point I want to pick up at 3.16, which relates to one of the earlier meetings, and it is at the end of that paragraph we have Mr. Joyce of Balmoral explaining to Mr. Snee at Franklin Hodge that Mr. Snee should not contact Mr. Ross and their communications should be with him instead.

The backdrop to this is that Mr. Snee had unilaterally reached out to Mr. Norman Ross, who is a sales director within Balmoral, and Mr. Joyce had to put Mr. Snee in his place to tell him not to contact his salespeople and that he had to go instead through Mr. Joyce. So we see Mr. Joyce protecting his salesforce from approaches by the cartelists.

The next meeting is on 7 or 8 February, at the bottom of that page. You will see at 3.20 a contemporaneous note of the meeting.

Mr. Stringer invited Balmoral Tanks to the next meeting. Again Balmoral Tanks declined, with Mr. Joyce recording "Obviously we are not interested in discussions of this type".

Then further down, in the same note Mr. Joyce continues:

"We are very uneasy about the cosy way this market appears to be working but will continue to appear we are interested in further discussions until the launch of our own vortex inhibitor."

He concludes the note with:

"I appreciate we have no interest in any form of collusion with the other players in the market and will ensure we never compromise our business, people or brand during any conversations with them. We cannot avoid meeting them in places, but this will be the extent of any dialogue once we complete the testing of our own vortex inhibitor."

You may have picked this up in the skeletons. For the first six months of its entry into the CGST market, Balmoral did not have its own independent production of a vortex inhibitor, which is one of ancillaries that we saw on the brochure, so it relied on Vulcan CST to supply this important ancillary, and that situation continued until the final order was made and delivered in June 2012.

Certainly by the time of the July meeting, Balmoral at that stage had access to its own production of a vortex inhibitor, but the point is that at all of the meetings prior to July it was still dependent on Vulcan CST for this inhibitor; and its motivation for playing along, if I can call it that, was that they needed one of the competitors, and they needed to give the impression, a wrongful impression, of being interested in something.

Then moving on swiftly, the next meeting is on 22 March 2012, it is at paragraph 3.21. The only point that I want to pick up here is paragraph 3.22. There were complaints to Mr. Snee that Balmoral -- the middle of the paragraph -- "were significantly below the established market price for such tanks". Mr. Snee recalled Balmoral Tanks remaining very much noncommittal on the issue of pricing, and Mr. Joyce said that Balmoral was not able to increase their prices as they were still establishing what their true costs of manufacture were.

The final meeting before the July meeting was 2 March, and again more of the same. Over the page at 46, Mr. Stringer complained about the prices that Balmoral Tanks was quoting and the amount of work it was winning. The same answer from Balmoral, at the end of that paragraph:

> "Balmoral were new to the market, finding our feet, and our pricing structure was all over the place."

The next section is essentially the lead up to the critical meeting, and I want to pick up, if I may, in the middle of page 47. This is a text message from Mr. Stringer of Galglass to Mr. Dean of Kondea and Mr. Snee of Franklin Hodge. Clive Dean says:

> "Yesterday they [Balmoral] quoted and were at least £5,000 below me after I had discounted by 7%."

Then Dean says:

> "I am thinking an emergency meeting."

Stringer says in response:

> "Yes, an emergency meeting is needed."

So at this stage the cartelists were, frankly, becoming desperate. They were talking of an emergency meeting, and they agreed that that needed to occur.

We pick up a similar sentiment on page 49. Now we are into the meeting of 11 July. Sorry, over the page at 50, this is Mr. Snee's commentary on the pre-meeting objectives and the situation. He says:

> "Clive had been pushing for us to have this meeting [which is true] and to seek to bring Allan and Balmoral on board. In my view, Clive had the most to lose if the arrangement fell apart."

Pausing there, the reason was that Kondea was a distributor and installer, it did not have its own manufactured products, so it was effectively a reseller, and therefore it was a bit more exposed than the manufacturers. Then Snee says:

> "Although 'desperate' will be too strong a word, he was very keen that the meeting with Allan went ahead."

The Balmoral side, at 3.35, we pick up their purpose, which was an opposing one. Balmoral wished to make it clear that Balmoral Tanks would be competing for business in the sector and to put to an end attempts to involve Balmoral Tanks in any anti-competitive conduct. Mr. Joyce explains, this is one of his statements from 2012:

> "I wanted to end the contact. I wanted to make sure that they saw Balmoral as a credible competitor. I did not want to kill off all legitimate contact with them."

Then in the interview he made the additional comment:

> "What we were trying to avoid in all seriousness was a price war."

That is something I will have to come back to, because that is something that the CMA places some emphasis on.

Then at 3.36, this is from Jim Milne, who was the chairman of Balmoral, at the end of that paragraph he says:

> "The calls had to stop."

These were the calls from the cartelists, which Mr. Joyce had made his senior management aware of.

Pausing there, it is common ground that at this stage Mr. Joyce had gone to two of the most senior personnel in his company, Mr. Milne, his chairman, and Mr. Main, his financial director; he had actively and voluntarily disclosed the contacts he had been receiving, which we have seen; and they formulated a common plan, and a singular plan, that the meeting would be for the purposes, on their side, of drawing a line under all of these contacts and to bring them to an end. The calls had to stop.

So at this stage it is, or at least ought to be, common ground that the cartelists had a single purpose of trying to recruit Balmoral to the cartel, this was the emergency meeting, and at

this stage Balmoral's only purpose, as discussed at the highest levels in the company, was to bring to an end any suggestion that Balmoral might be interested in an improper arrangement of any kind.

The CMA does say that at least during the meeting, even if that was not their initial objective, something changed. We will have quite a lot to say about that, but I do want to emphasise the point that at this stage the objectives of both parties in attending the meeting were clear and opposing, and singular.

Moving through the description of the meeting in the second decision, we can pick up at 3.44 the part where the CMA accepts that Balmoral successfully resisted significant pressure to join the cartel. At 3.44 Mr. Snee confirms the existence of the customer allocation agreement, and then there is a quote from the transcript:

"Obviously it is going to be difficult to arrange that with you guys now."

The next paragraph is important because the CMA's case is that after these arrangements, in other words, the cartel, was confirmed to him, Balmoral remains in the room for over an hour continuing to discuss the size of the market, market share and current pricing and future pricing intentions. In other words, the CMA's analysis of this meeting is that at the point Mr. Snee says "Obviously this is going to be difficult to arrange with you guys now", that is effectively the end of the cartel discussion.

In our submission, that is a fundamental misanalysis of the meeting. In our submission, at all material points subsequent to this until the end of meeting, at least insofar as concerns Mr. Joyce, there were multiple further attempts to recruit Balmoral to the cartel.

I will come back to that, this is very important, but I do want to lay down the marker at this stage that we say there has been a function misanalysis of the transcript. The cartel overtures, if I can call them that, continued on multiple occasions after this period. So the criticism of Mr. Joyce remaining in the room after this, in our submission, goes nowhere.

In terms of the information or the conduct which is said to be infringing, we see this set out in effectively two parts in the second decision. There is a first part concerning what I would call past or current pricing, and that is at paragraphs 3.46 to 3.49. Then there is a second part which starts at 3.50, where the CMA says the attendees also provide information relating to future pricing intentions.

If one goes back to 3.46 and keeps your finger there until 3.50, it is clear that what is not said to involve future pricing intentions is very, very slim indeed. So for that section of the alleged infringement we are really talking about a handful of disclosures.

I will obviously have to deal with those in cross-examination but I want to make the point at this stage that the centre of gravity of the CMA's case, at least under the decision, really is to do with future pricing intentions from paragraph 3.50 and onwards.

We can pick this up very clearly from the subsequent paragraphs. So for example at paragraph 3.54, the CMA says:

> "All attendees take an active role in discussing what should be the target price bands for future bids for schools and 135 cubic metre squared tanks."

Then at 3.56:

> "Detailed discussion of what the price bands should be for two specific models of tank going forward."

Then at 3.58 the CMA cites Mr. Snee saying "So in summary then we have got some agreement on bands" and they say none of the attendees register any dissent to this assertion.

So the decision describes the targets, the bands, the agreement on bands, as essentially relating to future intentions and prospective behaviour. That is something important.

One point before I leave what is said to be the infringement. There are at least two places in the CMA skeleton where they cite disclosures made in the transcript and suggest they are part of the infringement, but they are not actually found in the decision itself. I will just give you the references.

At paragraph 46(c) of their skeleton they cite a part from the transcript which says:

> "Let us see if you guys still want to have a chat."

That is not something, as far as we can tell, which is part of the decision.

Again, the final sentence of paragraph 46(f) of their skeleton there is a quotation:

> "What I am trying to get to is in the marketplace."

That is not something that we are able to find in the decision.

In our submission, the totality of the infringement has to obviously be located within the four walls of the decision. What the CMA is not entitled is to do at this stage is to embroider the decision with other disclosures not said in the decision to be part of the infringement. So when it comes to cross-examination we will obviously be vigilant to make sure that that distinction is maintained.

MS. DALY: Would you tell me the paragraph numbers again in the CMA skeleton?

MR. O'DONOGHUE: It is the bottom of paragraph 46(c) and the final sentence of paragraph 46(f).

MS. DALY: Thank you.

Just to wrap this up, at paragraph 3.59 the CMA cites the following, it says:

> "At the end of the meeting Mr. Joyce explains that he found the discussion to be very positive."

In our submission that is a wholly selective reference. If one goes to the transcript, on my version it is page 53, and at least in my version at the bottom of the page it says:

> "AJ laughing, very positive, puts jacket on preparing to leave."

Then a couple of lines above that Mr. Snee says:

> "Let us not get ourselves in total depression. We are looking very gloomy."

Mr. Joyce's laughing comment was obviously a response to that, whereas when one reads the decision --

THE CHAIRMAN: No. There is the bit in between, that Mr. Snee receives a text from Mr. Stringer and says that Mr. Stringer was hoping for a positive reaction "from your side", your side being Mr. Joyce.

MR. O'DONOGHUE: Yes.

THE CHAIRMAN: Then Mr. Joyce laughs and says "Very positive". So the word "positive" is what is picked up from Mr. Stringer's text, is it not?

MR. O'DONOGHUE: Indeed, but immediately preceded by everybody looking very gloomy. Anyway, we can deal with this in cross-examination. I want to make the point here that this at the very least is not complete, and in our submission is misleading, but we can pick this up in cross-examination.

Just to complete a couple of final points on the post-meeting situation, so this is at paragraph 3.75. The CMA says it has not seen any evidence that further information was exchanged following the 11 July 2012 meeting. We see at 3.76 there were intermittent calls and texts to Mr. Joyce but they began to peter out, so the CMA concludes at 3.79:

> "On the basis of the evidence available to it, CMA does not therefore find that the information exchange infringement continued after July 2012."

So it was a single meeting, a single shot, and there is no evidence that any information that they would regard as competitively sensitive was exchanged, at least with Balmoral, after July 2012.

I will come back to the question of penalties when I deal with some outline submissions on penalties.

I am now going to move to two or three of the key cases in this area. I am in the Tribunal's hands as to whether now would be a convenient time.

THE CHAIRMAN: Yes, all right, we will take a five minute break.

(3.10 pm) (A short break)

(3.15 pm)

THE CHAIRMAN: Which authorities bundle are you going to start with?

MR. O'DONOGHUE: I will start with 4, but there may be a couple of others.

THE CHAIRMAN: Thank you.

MR. O'DONOGHUE: The Tribunal, as is customary in these things, has been deluged with an awful lot of authorities, most of which in my view are not central.

On the issue of concerted practices on a stand alone basis, what is striking about the case law is that there are surprisingly few cases in which such infringements arise.

In a domestic context there is not any case directly on point. We have a number of cases which deal with the so-called ABC cartels, which is horizontal collusion effected by vertical information sharing.

In terms of stand alone concerted practices to do with the sharing of information, the authorities primarily arise on the European side and there are three in particular that I want to focus on today. The first being the series of judgments in the *Bananas* case, then there is *T-Mobile* and then there is a case call *Anic*.

Just to pick up on what is the overarching test to be applied in this regard, we can pick this up in one of the Advocate General's opinions in the *Bananas* case, and this is in tab 39 of authorities bundle 4. This is Advocate General Kokott in an appeal against the general court judgment in that case. It about half of the way in at paragraph 208/209.

THE CHAIRMAN: Folder 4 you said.

MR. O'DONOGHUE: Yes, it is case C-293/1.

THE CHAIRMAN: What tab?

MR. O'DONOGHUE: I am in tab 39.

THE CHAIRMAN: Advocate General Kokott.

MR. O'DONOGHUE: Yes. In terms of the overarching test, paragraph 209, in my submission, is a very good articulation of it. She says at 208:

> "Not every exchange of information between competitors necessarily has as its object the restriction of competition."

Then at 209:

> "The question whether by its very nature such an exchange of information reveals a sufficient degree of harm to competition that it may be considered a restriction by object, must be assessed having regard to ..." and she lists a number of things.

There are five separate criteria. First, the subject matter of the information exchanged; secondly, the objectives of the exchange; third, the economic and legal context in which that exchange takes place; fourth, the nature of the goods or services affected; and fifth, the real conditions of the functioning structure of the market or markets in question. So it is a multi-layered test.

The leading Court of Justice authority on this area, of course, is probably T-Mobile. We can pick that up in authorities bundle 3.

Just to be clear as to the underlying factual matrix, at paragraph 10 --

THE CHAIRMAN: Tab 30 is this?

MR. O'DONOGHUE: Madam, yes. The underlying factual matrix, there were five operators in the Netherlands with their own mobile phone networks, and you see the market shares in the middle of that paragraph, and it was unforeseeable that a sixth mobile operator would be established because no further licences had been issued. So it was a five player market.

The critical exchange in this case is a short and sweet one. You see this at paragraph 12:

> "On 13 June 2001 representatives of the five operators held a meeting. At that meeting they discussed inter alia the reduction of standard dealer remunerations for post paid subscriptions which was to take effect on or about 1 September 2001. As is evident from the order of reference, confidential information came up in discussions between the participants at the meeting."

This was clearly prospective information going to a fundamental competitive decision as to what reduction, if any, to apply to the standard dealer remunerations that they paid to the post paid subscription dealers.

So it was a single meeting about a single parameter of competition.

This, of course, was a preliminary reference, so the Court of Justice did not definitively rule as to whether there was or was not an infringement. That went back to the referring Dutch court. But it did give some very clear guidance on what the standard to be met in this regard is. We can pick this up at paragraph 35:

> "It follows that the exchange of information between competitors is liable to be incompatible with competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted."

Then it cites a number of previous cases.

One point I want to pick up which is important for the present context is the distinction between a one-off meeting and iterative contacts over months or years between competitors.

What the Court of Justice had to say on this is the following ... we pick this up at 58 at the end:

> "The presumption of anti-competitive harm [they say] is more compelling where undertakings have concerted their actions on a regular basis over a long period."

Then at 59, the second sentence:

> "Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may in principle constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical co-operation between them for the competition and the risks that that entails."

Then at 61 we see this being fleshed out to some extent. The court says:

> "The number in frequency and form of meetings between competitors needed to concert their market conduct depend on both the subject matter of the concerted action and the particular market conditions. If the undertakings concerned established a cartel with a complex system of concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, as in the main proceedings, the objective of the exercise is only to concert on a selective basis in relation to a one-off alteration in market conduct, with reference to simply one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object."

It goes on:

> "In those circumstances what matters is not so much the number of meetings held between undertakings as to whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question, and knowingly substitute practical co-operation between them for the risks of competition."

We see at 62 the point I have adverted to, which is that they left the ultimate question of infringement to the Dutch court.

On a postscript, what happened in that case was the reference went back to the Dutch court. The Dutch court found the NMA, the Dutch competition authority's, assessment in relation to the rebuttal of the presumption to be defective in a certain respect, and the NMA re-assessed that question and then re-adopted the decision finding an infringement.

That leads me to the second case, which in many ways is the latest or perhaps one of the most recent words on concerted practices and information sharing, which is the *Bananas* case itself, and this is in authorities bundle 2.

There were a number of judgments in these proceedings; for present purposes they do not differ in any material way. We can pick this up at tab 12, at paragraph 15. Again, just to put this in context as what the actual exchanges in this case were, in paragraph 15:

> "The undertakings engaged in bilateral pre-pricing communications during which they discussed price setting factors, that is to say factors relevant to the setting of quotation prices for the forthcoming week, or discussed to disclose price trends or gave indications of quotation prices for the forthcoming week. These communications took place before the undertakings concerned set their quotation prices, usually on Wednesday, and all related to future quotation prices."

Then at 18:

> "After setting their quotation prices on Thursday morning, the undertakings concerned exchanged their quotation prices bilaterally. That subsequent exchange enabled them to monitor the individual pricing decisions in the light of previous pre-pricing communications and reinforced their links of co-operation."

At 19:

> "The quotation prices served at least as market signals, trends and/or indications as to the intended development of banana prices and were relevant for the banana trade and the prices obtained. In some transactions, moreover, the price was directly linked to quotation prices though formulae based on quotation prices ..."

In this case, as we see from the operative part of the decision over the page at paragraph 32, these weekly or frequent communications lasted over a period of almost two years. That was the duration of the infringement.

We pick this up, I think, later in the decision at 638. The duration was two years; about 20 to 25 meetings in total.

In some ways what I have read out at paragraphs 15 to 19 slightly undersells this concerted practice, because you see at 638 of the same judgment (ii):

> "In some transactions actual prices were directly linked to quotation prices."

So it was not just pre-price signalling.

One important point which I want to pick up for present purposes, and which I will develop in a bit more detail, arises at paragraph 373 of this judgment. You will see at 368 and 369 the idea of one-off versus periodic meetings is raised by the Commission, and there was a

suggestion that, well, even if we could not prove all 20 or 25 individual meetings, that perhaps one or a small number of contacts would suffice. At 373 the general court deals with that point and it says:

> "Insofar as the Commission might have meant thereby that, on the assumption that its findings relating to the frequency of the communications and its conclusion that there was a consistent pattern of communications are not upheld, the existence of a single pre-pricing communication between Dole and its competitors for each year from 2000 to 2002 would be sufficient to establish collusive conduct, that claim would have to be rejected in the light of the specific object of the co-ordination complained of and of the nature of the market which was organised in weekly cycles."

We will come back to that, but we say that is an important finding in this case. The finding in a nutshell is that the object of this co-ordination necessarily required periodic and frequent contacts, and the suggestion that a single communication of the kind we saw in T-Mobile would have been sufficient given this object was rejected by the general court. There was an appeal in these cases to the Court of Justice, but the finding at paragraph 373 was not cross-appealed or picked up in any other manner that I am aware of. I will come back to that.

The final case that I want to touch on very quickly is an older case called Anic, from the 1970s and 1980s. This is in authorities bundle 1. In some ways this is a more extreme case from a number of perspectives. This is in tab 6.

The first point I wish to highlight is that the co-ordination in question in this case lasted over a period of five years -- it is paragraph 7 -- from 1977 until 1983. This was the petrochemical industry. At paragraph 7, the bottom of the page:

> "The producers concerned regularly set target prices by way of a series of price initiatives and developed a system of annual volume control to share out the available market between them according to agreed percentage or tonnage figures."

Then we see further down that page the frequency of the contacts. In the subparagraph:

> "They contacted each other and met regularly from the beginning of 1981, twice each month, in a series of secret meetings so as to discuss and determine their commercial policies and set target and minimum prices for the sale of the product, and agreed various measures designed to facilitate the implementation of such target prices, including restrictions on output, exchange of detailed information on deliveries the holding of local meetings, and a system of account management designed to implement price rises to individual customers ..."

Over the page:

> "... simultaneous price increases, and sharing the market by allocating each producer an annual sales target or quota."

It was a much more extreme case, in many ways closer to the cartel, than anything to do with information sharing. A couple of final points, if I may, on this case.

At paragraph 118, about a third of the way in, here the court reiterates the need for relationship of cause and effect between the concerted practice and the market impact. At 119 it says the court of first instance, as it then was:

> "... therefore committed an error in relation to the interpretation of concerted practice in holding that the undertakings' collusive practice had necessarily an effect on the conduct of the undertakings concerned."

So there is no automaticity. To be clear, to be fair to the CMA, at 121, we do of course have the presumption, and that is picked up by the court in very clear terms; but what is notable at the end of that passage is they mention the presumption and they say:

> "... particularly when they concert together on a regular basis over a long period, as was the case here, according to the findings of the court of first instance."

So there is a presumption, there is no automaticity, and the presumption is at its most compelling when there is frequent contact over an extended period.

One final authority, again which picks up on the same point, which I have just mentioned. This, unfortunately, is in the second supplemental bundle. It is at tab 30. Does the Tribunal have that?

THE CHAIRMAN: Yes.

MR. O'DONOGHUE: Very quickly, this picks up on essentially the point made by the Court of Justice at paragraph 118 of Anic. This is a notice from 1996. We can pick it up at paragraph 8:

> "The members of Eudim had formed a gentlemen's agreement according to which they were in principle not allowed to operate on the domestic market of other Eudim members."

There was a home market rule.

Then at 9:

> "The Commission found evidence that the members exchanged confidential information. A large part of the exchanged information related to the purchase of PHS market. By exchanging this kind of information the members seek to strengthen

their position vis-a-vis supplies by trying to obtain the best, lowest purchase prices, and according to the Eudim the objective was to reduce costs."

Then in the second column at paragraph 13 the Commission deals with the information exchange and says:

"As far as the information with regard to the sales PHS market is concerned, the Commission considers that this information does not restrict competition insofar as it is of a general and nonconfidential character, such as the exchange of opinions and general experience, market research and joint statistics. The exchange of confidential information and individual information, such as sales, volumes and market shares, which is normally not divulged to competitors, may restrict competition, particularly in an oligopolistic market, however, although all the members take prominent positions on their national markets, the wholesale market is too fragmented to be considered oligopolistic and it covers over 1 million products. The Commission therefore considered that the exchange of individual and confidential information between the members on the sales market would not have an appreciable effect on the competitive structure of the PHS wholesale market."

Again, no automaticity, it depends on the context; it depends on the subject matter; and it depends on the real conditions of the market in question.

Madam, you will have very clearly in mind the distinction in the case law and guidelines between purely historic information and future information. I do not propose to dwell on that in any great detail. I would reiterate the point I made earlier, which is insofar as the centre of gravity of the decision is concerned, it seems primarily concerned with information said to relate to future pricing intentions.

My Lady, that was all I wished to say at this stage on the limited case law. Obviously if there are questions Eudim very content to deal with those.

I was now going to move on to outline my submissions on the substance and on penalty, and I hope to finish in good time for today.

On the substance of the infringement, Balmoral has six core submissions that it wishes to develop before the Tribunal.

The first submission is that the CMA's case is incoherent, incongruous and lacking in basic common and business sense.

This is a market in which in 2012 we have a new entrant, according to the cartelists, storming the market by undercutting the cartel. By the time of the meeting, it had acquired 10% of the market by undercutting the cartel by 10 to 15% and sometimes more.

This was a seven year cartel in which the cartels had succeeded in elevating margins to the high 30% and they were obviously concerned that this cosy arrangement would come to an end. Indeed, CST were so worried that Balmoral's entry would cause the demise of the cartel that it went to the OFT, as it then was, for fear that Balmoral would beat it to the punch. That was in May 2012.

There was, as we saw, pressure on Balmoral for a six month period to join the cartel. It is common ground that at the meeting, despite significant pressure, it refused to join the cartel that comprised price-fixing customer allocation; but then, having refused to join the cartel, the CMA says the same company, in the same meeting with the same people, nonetheless agreed a restriction of competition in relation to pricing. We say this is an unreal position in the extreme. It implies a schizophrenia on the part of Balmoral that is stretched to breaking point.

One of the forensic difficulties that the CMA faces, and we have seen this quite clearly from the two decisions, there is not a shred of evidence, in respect of the cartelists or in respect of Balmoral, that anyone going to that meeting went to the meeting with the objective or purpose of formulating a secondary infringement that was distinct from the cartel.

It is conceivable that during the meeting a secondary purpose or a subsidiary purpose arose; but the absence of any anterior objective from anyone in relation to anything to do with information sharing on a subsidiary basis, in our submission is striking.

Contrast the three decisions we have seen. In *T-Mobile* , the mobile operators were faced with a critical decision about what to pay the dealers in relation to post paid subscriptions. They went to that meeting with one clear commercial purpose in mind. In *Bananas* it was clear that these 25 meetings over a two year period all related to pre-quotation and actual pricing. In *Anic* it was, for all intents and purposes, a cartel.

So the objective or the purpose, or lack of objective or purpose in our submission, is something which is important and striking.

We say there was only ever one purpose, for the cartelists to get Balmoral on board with the cartel, and on Balmoral's side it was to make sure that it was clear beyond any doubt that they would never be on board with the cartel or any other restriction of competition.

Now ex-post in the defence and skeleton, the CMA has suggested for the first time that there was a certain commercial logic to what Balmoral was doing in terms of a secondary or subsidiary infringement of concerted practice. In our submission, that new explanation makes even less sense. Put yourself in the shoes of Balmoral in this meeting. It had been told there was a cartel operating in the market making these high margins. It had told them

in clear terms it was not willing to come on board with that cartel. It had, prior to the meeting, been achieving considerable success through aggressive competition. For Balmoral, having understood that the cartelists were operating in a different way, it was extremely happy to learn that there was a cartel in the market, because it was guaranteed that they would continue to go on and win business.

That is exactly what happened. By the end of 2012, and we see this in Mr. Greaves' statement, Balmoral's market share had increased to 40%. It had gone from 10% at the time of the meeting, to 40% by the end of 2012. It is manifest what the revelations of the cartel did for Balmoral; it copper fastened its strategy of competing aggressively, it knew if it continued to compete aggressively it would continue to meet with success. By the end of 2012 the cartelists agreed that Balmoral was storming the market; it had acquired a 40% market share in a very, very short period of time.

It simply makes no sense to suggest that a company not in a cartel, who was threatened and pressurised by a cartel, would refuse to join that cartel and then limit its competitive efforts on price. There is not a shred of evidence to that effect and, with respect, it is an absurd claim that lacks common sense.

Because when one thinks about it, the cartel had the two components, customer allocation and price fixing. So Balmoral is not on board with customer allocation or price fixing with the cartel, but the concerted practice also concerns price fixing. So it is not in the price fixing component of the cartel but it is in something which is said to be separate or subsidiary to do with price.

In our submission, this is confused thinking and it is lacking in common sense. More importantly, there is not a shred of evidence that there was any reduction in the aggressive competition fostered by Balmoral. In fact, all the evidence shows post-meeting that Balmoral were more and more successful and had captured, as I said, 40% of the market in a very, very short period of time.

So we say as a starting point the CMA's case is completely and utterly lacking in common sense.

The second point I wish to develop, of course there was a criminal component to the cartel investigation and Mr. Joyce gave evidence at that trial on behalf of the CMA. He was a prosecution witness against the two defendants who were tried.

I made very very clear at the pre-trial review, at which the two lay members of the Tribunal were not present, that we are not running a case based on estoppel, but there are clear parts of the criminal case that bear very directly on what is now being put forward by the CMA

on the civil side, and the Tribunal should be fully aware of what was said at the time and what is being said now, because in my submission the two cannot fairly stand side by side. We can pick this up in a couple of parts of the transcript of the criminal proceedings. The first part I wish to look at is in the Notice of Appeal bundle.

The first part is at tab 4F, which is towards the back of the bundle. This is the closing speech by Mr. Ellison QC on behalf of the CMA. It is at internal page 30. This is his speech to the jury in the criminal case. It is starting at line 4 on page 30 of the transcript. Does the Tribunal have that?

THE CHAIRMAN: Yes. Page 30?

MR. O'DONOGHUE: Madam, yes. It starts:

> "Then the evidence was universally to the effect from these witnesses that the margins went up a lot during the cartel from what they had [seen] and a lot more than they ..."

THE CHAIRMAN: "... they had been and a lot more than .."

Is that right?

> "... during the cartel from what they had been ..."

MR. O'DONOGHUE: "... what they had been and a lot more than they became once this cartel was smashed by Mr. Joyce coming in with Balmoral and beginning to compete in the market once more."

So at that stage Balmoral was being presented as a sort of a hero for smashing the cartel. That is a rather general comment. There is a particular comment that I want to pick up in the criminal transcript which is very, very important. This is in the examination-in-chief of Mr. Joyce by Mr. Ellison QC on 11 June 2015. We can pick this up in tab G.

I would like to start, if I may, at page 63. Mr. Joyce was asked by Mr. Ellison, at the bottom of 62, what the purpose of the meeting on the 11th was, and he says:

> "I think we are still going back to see where Balmoral stood with ..."

THE CHAIRMAN: I think this is the summing up to the jury.

MR. WILLIAMS: I think it is E, Madam, rather than G.

MR. O'DONOGHUE: Yes, 11 June 2015.

THE CHAIRMAN: Which page in the transcript?

MR. O'DONOGHUE: It is page 62. Mr. Joyce is asked by the CMA what the purpose of this meeting on 11 July was. He says:

> "I think we are still going back to see where Balmoral stood with their pricing. I think that was the background to us, or for me anyway to be invited back to have the chat."

Then he says at 63:

"So we discussed internally that I should go there and almost try to say 'Look, it needs to stop and just get on with what you are doing. We will do what we are doing, but we will be a strong, credible competitor'."

That is the point of purpose which I mentioned.

Then over the page at 68, the bottom right, you will see at line 16 Mr. Ellison reads to Mr. Joyce from the transcript Mr. Snee's comments:

"So in summary we have got some agreement on bands."

Then Mr. Ellison asks Mr. Joyce:

"What is it that you are doing here?"

Mr. Joyce says:

"Probably shadow boxing to a degree. On those two prices for those tanks, I mean they are market prices. These are what tanks are being sold from which is obviously from my perspective significantly less than when Balmoral first came into the market. But I think we are really saying with those two sizes of tanks it is quite easy to throw a blanked over the two prices, very easy because they are a popular size."

Mr. Ellison says:

"So the prices that you are expecting some agreement as to bands is the price that it has reached by this time, is it?"

Mr. Joyce says:

"Yes.

"Question: In the market?

"Answer: Yes."

So the evidence-in-chief elicited by the CMA --

THE CHAIRMAN: What does it mean, to throw a blanket over the prices?

MR. O'DONOGHUE: From Mr. Joyce's perspective these were the sort of two extremes of the range of prices being observed historically, or at least at that point, on the market. So based on a sort of adding up and division you could work out the two extremes of what had been the prices for the schools' product at that stage.

By contrast, in the decision at paragraph 4.17, at the end of that paragraph the CMA says:

"The exchange of information about the prices that the parties were charging their customers and the price bands within which the parties would seek to charge going forward was clearly capable of reducing uncertainty about their future pricing."

In our submission, and this will obviously have to be explored in cross-examination, the CMA, in the criminal context, elicited evidence to the effect that the bands related to the

then historic or certainly no more than current prices observed in a range across the market, whereas on the civil side they say the bands are all about the price bands within which the parties would seek to charge going forward.

We say it is quite wrong and quite unfair for the CMA to elicit evidence on the price bands in one context, in the criminal sphere, and then to put forward something quite different in the civil decision. That is our second point.

The third point, again an important point, which I have adverted to, is the CMA, in our submission, has made a fundamental analytical mistake when analysing the meeting and its context. We have touched on this in part, which is the point that the CMA's criticism of Balmoral, or at least its observation, is that after the customer allocation aspect of the cartel was put to Balmoral, it remained in the room thereafter and did a number of things.

We can pick this up in the defence in a couple of places. I have shown you the part in the decision, which is 3.37, where they say this. Then in their defence it is at paragraphs 45 and 98, they make essentially the same criticism or observation of Balmoral.

We see at 45:

> "Mr. Joyce refused to participate in the main cartel. Nevertheless, after making that clear Mr. Joyce remained in the meeting for a further 70 minutes."

Then at 98:

> "He remained at the meeting for a further 70 minutes after he made his position clear on the cartel."

We say that is a complete misanalysis of the transcript and it is very easy to see this.

If we can go back to the decision at paragraph 3.10, this is something I read out at least once, if not twice, but it is very, very important. We have seen that:

> "Rather than abandoning the main cartel, the cartelists decided to attempt to persuade Balmoral to join the long-standing cartel arrangements."

Then Mr. Snee explained his strategy. He says:

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

It is very easy to see from the transcript that that idea, that cartel idea of allocating the market into equal shares with a view to raising prices, comes up on a number of occasions subsequent to the point at which the CMA criticises Mr. Joyce for remaining in the meeting having rebuffed the cartel overtures. If I can just show you some of the references.

THE CHAIRMAN: That is not the distinction they are making, though. They are making the distinction between joining the gold and silver customer categorisation, in which case it is

quite easy to allocate and maintain market shares, compared with trying to maintain market shares only through pricing, which is much more difficult, because then you have to guess whether you are going to win that business so that that counts towards your market share at the end of whatever period.

MR. O'DONOGHUE: Madam, you are quite right, that is the distinction they make now. Eudim making a slightly different point, if I may, which is that there is a carbon copy of what is suggested here, the equal allocation of market shares, which comes up time and time again after they say the cartel discussion had ended.

The point Eudim going to go on to make is that the entire meeting, in our submission, was all about trying to get Balmoral on board with the cartel there was a phase in the meeting to do with customer allocation, at which they accept there was a complete rebuffment by Balmoral, but Mr. Snee in particular -- on a number of occasions, and I will show you these -- raises again and again the idea of an equal market allocation mechanism subsequent and different to the customer allocation.

It is very, very important in our submission, because we can see this at 3.10 where he says:

> "This way each would have to accept a limit on their portion of the market but in the knowledge that they would operate at a far greater profit margin. In other words, Balmoral, they would make greater profits but on a smaller output."

We say that the disclosures made were enticements for that very objective, and that it was part and parcel at all stages of the cartel invitation; and that the misanalysis on the CMA's part is that they have essentially formed the view that about one-third of the way into the transcript, that is the cartel done and dusted. We say that is a complete misanalysis.

THE CHAIRMAN: It depends what you mean by "the cartel" though.

MR. O'DONOGHUE: The cartel, as I showed the Tribunal before the break, had two components; it involved customer allocation and price fixing. So the customer allocation component is only one part. There is a second part that the CMA seems to have forgotten about, which comes up again and again in the meeting, and the market sharing was with a view to fixing prices.

Let me show you the transcript, because what is striking about these parts of the transcript is that they are more or less a carbon copy of what Mr. Snee has set out here at paragraph 310. We can pick this up first of all at internal page -- it is 24 in mine, I hope it is the same on yours. It is a quote starting:

> "But the price is always a function of market share, is it not?"

Do you have that, Madam?

THE CHAIRMAN: Yes. Right at the top, yes.

MR. O'DONOGHUE: Yes. This is rather a long way after it is said Mr. Joyce should have left the meeting.

Then over the page at 25, again Mr. Snee, the top of the page, so he discloses some price information:

> "It is probably closer to the region of 6.5 to 7, I would have thought, so if we can, which is useful to talk about, then we can say look at the bigger picture, and say we are getting 25% of that, that is where we need to be, we need to be."

Then at 39 he says:

> "Good, so coming back to where we were then, it is going to be a complicated picture, is it not it not, on the pricing front? This is like market sharing, we are going to have to manage it as best we can, I suppose, is the conclusion Eudim coming to."

Then at 45, at the top of the page he says:

> "Yes, okay, well that is where it boils down to market share. If we make an assessment of where we think the total market is, and we say we would like to be around 25% of that, and then you can, I guess you can adjust where you were in that band at any one time, and say look, we are not getting near our 25% so we are going to drop down [something] band so we can drive a bit more volume, that is a complicated game."

Then Clive Dean says:

> "That will not work, you cannot do that. It might be what you want to do but I do not think you can ever manage that."

Time and time again, the idea of splitting the market four ways, 25 times four -- I have identified at least four; there are other references which we can go to. So it is analytically wrong, in our submission, to say the cartel was only about customer allocation, and that discussion effectively began and ended about one-third of the way into the transcript, because the subsequent transcript is replete with numerous references to the market sharing component of the cartel, and it was in that context that the idea of price fixing was being put to Balmoral.

We say once this is understood, and obviously it will have to be tested in cross-examination, the CMA has a serious problem, because on their version of events the cartel discussion effectively ends on page 21, where Mr. Snee says:

> "Obviously it is going to be difficult to arrange that with you guys now, given that you say that you do not want to go down that road."

They seem to have forgotten that there are numerous parts of the transcript after this in which the idea of equal division of market share, leading to price increases over time, was being proposed by the cartel. The disclosures they made in that context were again enticements to show Balmoral, look how wonderful this could be.

The CMA, by contrast, suggest that after page 21 Mr. Joyce should have got up, because at that stage the enticements and invitations to enter into the cartel had ended.

In my submission, it is manifest that is a complete misanalysis of the meeting, the context and the transcript. There is a direct link between the extracts in the transcript I have shown you and paragraph 3.10 of the division, where this is exactly the strategy that Mr. Snee had formulated and agreed before the meeting. It had nothing to do with information sharing; it was the cartel and only the cartel. Having failed on the first component, he then moved to essentially a plan B cartel, which was the second component.

THE CHAIRMAN: What is your point then? Is your point then that because the CMA have decided that Balmoral did not join the cartel in any aspect of it, then what they are trying to do here is separate the pricing information exchange from the cartel, accepting that Balmoral is not in the cartel, but you say that that distinction is not right because the pricing information was an alternative mechanism for attaining equal market share that it appeared that Balmoral was prepared to contemplate, although they would not contemplate the more direct gold and silver customer? Is that your point?

MR. O'DONOGHUE: Madam, yes, in part.

The first point, of course, if Eudim right in terms of my analysis of the meeting in the transcript, there is a serious concern because the entire meeting, in terms of its objective and how it evolved, has been misunderstood. That is an important point of context because it goes to the objective, the purpose, the subject matter. That is the first important point.

The second important point is that the CMA seems to accept, at least in principle, that it is possible that if someone makes certain enticements or disclosures with a view to joining a cartel, that you can rebuff those and be found not to be part of the cartel. That is the logic of their finding that Balmoral was not in the cartel.

If that is true, if the second part of the cartel, a form of equal market sharing leading to price rises, is also being proposed or enticed in the same way, it must be possible -- or it cannot be right that the mere receipt of those enticements by Balmoral condemns it to information sharing, or indeed anything else. Because the logic of their acceptance that they rebuff the cartel is that people can entice you but you can say no. That is the second point.

THE CHAIRMAN: Not that you can say no but that they did say no.

Let us see how this pans out. I do not entirely understand the point that you are making at the moment but perhaps it will become clearer.

MR. O'DONOGHUE: It will have to be explored in evidence, but I am making two very simple points; (1) there has been a complete misanalysis of meeting and (2) -- I mean, in my submission this is extremely clear from what Mr. Snee has said at 310. There was only ever one strategy, which was to get them on board with the cartel. There was never at any stage, from anyone, cartelists or Balmoral, a hint of a discussion that a secondary subsidiary form of information share would do as an alternative.

So when Mr. Snee is talking about equal market shares and making disclosures as enticements for that purpose, he is inviting Balmoral to join the cartel.

If they accept that Balmoral did not and would not join the cartel, they are compelled, through parity of reasoning and that logic, to accept that insofar as there was a second facet of the cartel to do with equal market sharing, and disclosures were made in that context, that they too rebuffed.

They have fundamentally got this backwards. Their analysis is that from page 21 of the transcript onwards you then put on a hat of information sharing, and you are looking at the information of whether it is of a certain kind. We say that is simply wrong. The context is at all stages until the very end of the meeting when Mr. Joyce leaves it was only about an invitation to join the cartel, albeit in a slightly modified form to the first component, to do with customer allocation.

Once you understand that, that that was the context so far as everyone was concerned, what was said by the cartelists and what was said by Mr. Joyce begins to look very, very different. I mean, it is trite to say that in law context is everything, but the context of an enticement to join a cartel on the one hand and a separate information sharing infringement on the other is fundamentally different.

Frankly, the cartel had no interest in information sharing; it was manifest to them, and this is what happened, that if Balmoral was not on board the whole thing would collapse. So the idea of having a bit of information, that that was an effective plan B or something which, frankly, was of any interest to them, is completely hopeless.

There was only game in town; it was the cartel. They knew -- and CST knew, which is why they sought leniency -- that if Balmoral was not on board, the game was over, and that is exactly what happened.

I have three further points, which I can take pretty rapidly. I see the time.

Our fourth point is that the CMA's posited concerted practice is inherently improbable and unworkable. You have my points that they have misanalysed the meeting, that there was no secondary or subsidiary purpose to do with information sharing. But even taking the case on its own terms it is inherently improbable.

This is a market in which the ultimate customers are schools and supermarkets. There are tens of thousands of schools and supermarkets in this country; they are highly fragmented and diverse in terms of size, geography and their particular requirements. It is a market in which there is tendering, and bids are frequent. The products in question, in our submission, are bespoke products, and there are large ranges in the possibilities that a customer may demand at any one point in time.

For the Tribunal's reference, this is Mr. Joyce's first statement at paragraph 11 and his second statement at paragraph 33. No doubt he will be cross-examined on this.

Balmoral operated a cost plus system for pricing, it did not have a price list. Again, for your reference this is Mr. Joyce's first statement, paragraph 18.

We say in the circumstances, the notion that a single meeting concerted practice in respect of pricing information, or even pricing uncertainty, was an effective mechanism by which to restrict competition by object is inherently implausible. In a strong sense, the CMA's argument to that effect is strongly reflective of the argument rejected by the General Court in paragraph 373 of the *Bananas* judgment. In other words, what was being proposed according to the CMA was by its very nature complex, iterative, it was not something by its very nature which was susceptible to the kind of one shot restriction of competition we saw in *T-Mobile* and concerned a single branch of competition: should we reduces commissions to post paid subscription dealers?

This was a multi-faceted, very complex set of suggestions and it was inherently unworkable. In effect, what the CMA is trying to do is to try to shoehorn what I would call a *Bananas* case into *T-Mobile*, and we say that is bananas.

The fifth point in a sense I have touched on already, but let me give you a few more references.

We say there has been a fundamental shift in the CMA's case. In the decision, the case as we understood it was that the discussion of the bands was to do with future pricing intentions. It was an understanding that the parties would somehow gravitate to pricing within the bands.

Let me very quickly give you the references. It is paragraph 4.17 of the decision.

Paragraph 4.56; and I am going to read out this bit, it says:

"The price bands served as targets for the parties to stick within."

Paragraph 4.66, and again I will read this:

"The price bands were useful because they provided a target for the parties to stick within, with the lower end of the range effectively indicating a price floor."

Then paragraph 4.67:

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

In its skeleton argument the CMA seems to want to run away from the decision in this important respect. Their skeleton, for example at paragraph 53, comes very, very close to saying that any exchange of price information between competitors, even one that occurs in the context of hypothetical ideal prices, is a per se object infringement. We say that is not what the decision says. The decision, at least in respect of the bands, is rooted in future pricing intentions.

MS. DALY: What paragraph of their case?

MR. O'DONOGHUE: It is paragraph 53 of their skeleton.

MS. DALY: Thank you.

MR. O'DONOGHUE: To test this proposition as a matter of law -- it comes back to the point that I mentioned briefly beforehand -- they accept that if you are invited to join a cartel, and enticements are made for that purpose, it is perfectly possible to resist that invitation. If that is the case, and they seem to accept that through the cartel decision, it seems very strange that the second a cartelist mentions anything to do with pricing you are condemned. That cannot be right. Because by that logic you could never resist significant pressure to join a cartel. The second they open their mouth, you are condemned; and that cannot be right.

The final point, I will try and say a couple of things on penalty but we are running out of time.

Obviously the litmus test of this case, the question the Tribunal needs to ask itself, assuming the CMA can succeed in showing there was any case of information sharing, is: was there the requisite degree of elimination of uncertainty?

You have my point about the inherent implausibility and unworkability of what was being suggested; but even on the CMA's more minimalist basis, the case for elimination of uncertainty simply does not stack up.

The first and fundamental problem, and we say fatal, is that there was a complete lack of trust between the cartelists on the one hand and Balmoral on the other. The cartelists were

obviously in the club and Balmoral was not; and there was a series of efforts made over a six month period to try and get Balmoral on board, and they failed.

We can turn to these very quickly. They are in our skeleton at paragraph 119.

On 119 there are a whole series of quotes. Mr. Joyce was "very evasive"; Mr. Joyce "had a knack of never really answering a question"; Mr. Snee was "not entirely" he believed Mr. Joyce, and "did not believe [Mr. Joyce] in the end ... he never put up his prices"; Mr. Joyce was "stringing 'him' along" and so on.

So there was a large body of evidence that there was a complete lack of trust on both sides. Frankly, from Mr. Joyce and Balmoral's perspective, if people had told you in a meeting they were in a dishonest cartel for many, many years, making excessive margins, and that they were threatening to compete and undercut you at every opportunity with Compco and other customers, the idea that you would trust these people, in my submission, is farcical. These were the very last people on earth you would trust.

In terms of the uncertainty on both sides, so in respect of the information received by Balmoral from the cartelists, there is the fundamental point, which has never been answered, that Mr. Joyce, who was the only Balmoral person at the meeting, had no role in relation to pricing. That is his second statement at paragraphs 29 to 30. That is corroborated by a further statement from Norman Ross, which is in the bundle, he was the sales director at Balmoral and it is paragraph 39 of his statement.

Even in terms of physical proximity, Mr. Joyce is in Aberdeen and the sales team is in Croydon, at the opposite end of the country.

So there is simply no evidence that the 1information imparted at the meeting went beyond Mr. Joyce to the sales team.

It is accepted, it is part of our evidence, that where margins went below a certain level, typically 10%, Mr. Joyce may have been called on to intervene and approve a price. But there is no evidence that for the period after the meeting until the cartel unravelled he was ever called upon to intervene in respect of any of these prices.

The CMA, of course, will question him on that but there is simply no evidence to that effect.

So the information at the meeting effectively went into a black hole comprising Mr. Joyce, and Mr. Joyce alone. Therefore, it is impossible that that information eliminated uncertainty in any way. Because the Balmoral sales team in Croydon, through their delegated pricing authority, went about their pricing decisions in the way they had done for many months before that. It had no impact whatsoever. It did not even find its way there.

A fundamental point which the CMA again does not seem to have ever realised is that the information disclosed by the cartelists was information about uncompetitive cartel prices. Conceptually the idea that I disclosing to you a thoroughly uncompetitive dishonest price eliminates uncertainty about competitive pricing in the market, is very very difficult to understand. It was a disclosure of a cartel price.

THE CHAIRMAN: The disclosure is not of either competitive or uncompetitive pricing; the disclosure is of what prices you are going to quote to your customers.

MR. O'DONOGHUE: There are two components, madam. I am glad you make the point about future intentions because we say that is their case and we say it fails evidentially. But the disclosures made by the cartel to Balmoral concerned their actual pricing on bids around that period. So these were the actual prices they were applying in a bid situation. These were rigged prices. They were manifestly uncompetitive prices.

So we simply do not understand conceptually how telling someone about an uncompetitive cartel price is a revealing insight into something which is competitively significant and is capable of eliminating uncertainty. It is staggering in my submission that having rendered the cartel decision there is no acknowledgment at any stage in terms of the analysis of uncertainty in the context that there was a cartel for 90% of the market. It seems astonishing. That is not recognised anywhere.

You have the point which I started off with, which is there was the last bite of the cherry phenomenon. So the customers were in the habit of telling the competing supplier, "Here is the quote. This what is you have to beat". This was an endemic feature of this market.

That also meant that the cartel would always find out who was potentially getting the last bite of the cherry or who their competitor was. There was a lot of cross-hiring in this country. Mr. MacLaren of Vulcan was recruited by Balmoral; Mr. Snee and Mr. Dean were almost recruited by Balmoral at different periods. In footnote 28 of our skeleton Balmoral hired Mr. Hudec who was a former employee of Hall and Kay, who was a customer.

The fundamental point, which in my submission is unanswerable, is that in the period from the meeting until the cartel unravelled, Balmoral's share increased in CGSTs to 40%. That is the simplest and clearest indication of a company which was competing very, very aggressively; it is the antithesis of a company responding by diminishing its competitive efforts because of a reduction in uncertainty.

These are obviously points that we will have to develop in more detail in cross-examination and in submission, but those are the essential points that we would wish to make in respect of the substantive infringement.

Madam, I am conscious of the time. I have a couple of points to make in relation to penalty, but I am content to do it now or perhaps in ten minutes in the morning.

THE CHAIRMAN: Yes, let us finish it now.

MR. O'DONOGHUE: I am grateful.

On penalty we have two types of argument. The first argument is that no penalty should be imposed and the second argument is that the penalty should be in any event reduced.

On the first point can we turn up the decision at paragraph 1.5. A point I did not mention in opening is that the only company fined for this second infringement was Balmoral. None of the cartelists, despite being addressees of this decision, were fined. The only explanation that we received in the decision as to why this was so is the final sentence of paragraph 1.5. It says:

> "The CMA has not imposed an additional penalty on the settling parties in respect of their participation in the information exchange infringement taking into account the particular circumstances of this case."

The decision at least does not explain what those particular circumstances are. In my submission that is already a reason enough to be concerned because it is very, very difficult for this Tribunal to exercise a judicial control function in respect of reasons that are not explained.

The first explanation we have had was actually in the defence at paragraph 244. It is not very satisfactory in various respects. They make a number of points. They say that one of the differences that is unexplained in paragraph 1.5 is that the CMA had already imposed a penalty on the cartel. That is true, but it is hard to see where that takes them because according to the CMA that was for a separate offence not involving Balmoral, and it does not in itself offer any explanation of why a distinct offence involving the cartelists and Balmoral was not sanctioned.

The second point which is made is in two of the three cases in the cartel decision the statutory cap was reached. That clearly does not explain why no fine was imposed on the company given the statutory cap did not apply. Again it is analytically wrong. The correct analysis would be to go through the steps on fining and if at the end of those steps, having imposed a fine on the two cartelists that were subject to a statutory cap in a different case, the statutory cap was hit again, then at that stage and that stage only that could be factored in. But the idea that this was a reason not to address a fine to anyone apart from Balmoral at all is not a good reason.

So there is a lack of explanation as to on what basis Balmoral was treated differently. We say that Balmoral was discriminated against.

So that is our principal argument in terms of the no penalty. Of course, standing back from all of this there is a more basic point, which is here was a company, Balmoral, who had outcompeted a seven year cartel for the six months following its entry; had caused the demise of that cartel by the end of 2012; had rebuffed an attempt to join the cartel. In terms of a policy decision, in reflecting the seriousness of Balmoral's conduct, it is a very bizarre decision not to fine the people who were most culpable for pressurising Balmoral, the cartelists, and to only fine the person who was virtuous in the middle of all of this. That seems a very, very strange decision to us. The cartelists deserved censure and penalties and Balmoral deserved credit and no penalty. That was the correct analysis in our submission.

On the reduction in penalty there are essentially two ways the Tribunal can approach this, and they amount to the same thing. The one approach is to consider the justice of the penalty overall. That is the Eden Brown and Umbro case law. That is a matter of discretion for the Tribunal.

The other approach is a slightly disaggregated one, which is one that goes step by step through the steps in the fine calculation, and one deals with particular points under those headings.

You have my point on the overall justice or policy of imposing a fine at all. That also applies to the amount of the fine. There are three specific points we wish to make in relation to the steps.

The first one is in relation to the relevant year of turnover. The rule is under the Penalties Guidance at 2.7 is that it is the last financial year of the undertaking concerned which is relevant. In the case of Balmoral that was £19,000 of turnover. We accept that in paragraph 2.8 of the Penalties Guidance it says in exceptional circumstances a different figure can you used as reflecting the true scale of the activities in the relevant market.

What the CMA did in this case, instead of adopting the £19,000 turnover under the recent financial year, was to apply a figure of £802,000 which was a 4,000% increase.

This was based on the 12-month period of turnover for the period immediately preceding the infringement. We say if that is their position, then it is particularly illogical, because the period until July 2012 involved the period where for the most part Balmoral was not active on the market at all. It entered the market in early 2012. It also involved a period where on the CMA's own case Balmoral was not only not infringing competition law but was actively undermining a cartel. That is why the meeting of July was a make or break meeting. So the

inclusion of turnover for those periods, in our submission, offers a wholly inaccurate representation of the affected turnover.

I have two further points very, very quickly. This is an unprecedented infringement of competition law. We do not know how long the meeting in T-Mobile lasted, but this is either the shortest infringement in the history of competition law or the second shortest. It was part of one meeting.

The CMA's decision to apply a duration effectively of one year to that part of one meeting in our submission is unfair and wrong. If there was ever a case of which a duration of less than one year, which the CMA is entitled to do under its own guidance were justified, this case is it.

The final point we wish to make on the individual steps is that Balmoral received a reduction of 15% for its co-operation with the CMA. In our submission that was unfair and too low. Balmoral was of considerable assistance on the criminal trial and voluntarily, it has to be said so. Mr. Joyce was not charged with any offence. He assisted the CMA because he felt it was the right thing to do. Balmoral extensively assisted on the civil side. By way of comparison, Franklin Hodge on the cartel side received a 30% reduction for its co-operation with the CMA.

We accept that was in the context of leniency, but of course it was the circumstances where CST had already applied for immunity and there was of course a recording of the meeting. So from that perspective Balmoral was akin to an informant in respect of the cartel and the evidence it gave on the pre-meeting situation and on the post-meeting situation, and during the meeting, in terms of text, and so on, was an important part of the picture and context for the CMA.

So we say any which way one looks at this fine there are compelling grounds for a material reduction.

Madam, those are my submissions unless I can assist further.

THE CHAIRMAN: All right, thank you very much.

Yes, Mr. Williams.

MR. WILLIAMS: I was not rising to start my submission. On a point of housekeeping you will remember there was some discussion at the pre-trial review about the cross-examination of Mr. Joyce. Where we got to was that we cross-examine tomorrow afternoon and then there was sometime in the timetable for spill-over. Your indication, it is right for me to say, was that you wanted me to make sure that it was dealt with in the afternoon if possible. I do not think that is going to be possible, madam. You have seen the way that the case is put in the

skeleton argument. There is a difference of views about how one interprets the meeting in the transcript.

THE CHAIRMAN: How long are you going to be; how long tomorrow morning before we get to the cross-examination?

MR. WILLIAMS: I think I will be tomorrow morning opening the case. I expect that I will take some of, but I do not think all of, the following morning completing the cross-examination. It may go more quickly but I just thought it right to say now given the discussion that we had at the pre-trial review and given that Mr. Joyce has arrangements. I think your indication was he ought to be available on the Wednesday morning.

THE CHAIRMAN: I am just wondering if there is any chance that we might, for example, start the cross-examination at sort of noon tomorrow rather than at 2.00 pm?

MR. WILLIAMS: I think if I open on the penalty I think probably not. What I would like to do, can I see how I am going mid-morning when we have the break for the shorthand writer, but I do have quite a lot of ground to cover in the same way that Mr. O'Donoghue has covered quite a lot today.

THE CHAIRMAN: Could Mr. Joyce be available from 12.00 pm say, so we do not have a gap if Mr. Williams is ...

MR. O'DONOGHUE: He is available for the full day. I have not checked the transcript, but the words used at the PTR, from my recollection, was there was an expectation, expressed in strong terms, that Mr. Joyce would be completed by the end of tomorrow. We are concerned as to why more time is needed now because it is not clear to us what has changed.

THE CHAIRMAN: Let us have Mr. Joyce available from 12.00 pm in case we get to him more quickly. If there are matters that are dealt with fully in your skeleton or which you will be able to deal with fully in closing, then it may be that that would be a way to shorten your opening submissions.

MR. WILLIAMS: I will look at it again in the light of that, Madam.

THE CHAIRMAN: All right. We will come back at 10.30 tomorrow morning.