IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1337/1/12/19

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

Wednesday 20 May 2020

Before:
The Honourable Mr Justice Morgan
Eamonn Doran
Sir Iain McMillan CBE FRSE DL
(Sitting as a Tribunal in England and Wales)

BETWEEN:

FP McCann Limited

Appellant

v

Competition and Markets Authority

Respondent

A P P E A R AN C E S

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

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Wednesday, 20 May 2020

(10.42 am)

Housekeeping

MR JUSTICE MORGAN: The hearing is now I think in progress. I am the chair of the Tribunal today, I am Mr Justice Morgan and I will invite the other two members to introduce themselves, then we will get underway proper.

MR DORAN: My name is Eamonn Doran. I am a member of the Tribunal sitting today.

SIR IAIN: Good morning, my name is Iain McMillan. I am a member of the Tribunal sitting today.

MR JUSTICE MORGAN: Right. Just on housekeeping before we get down to business, I think we will have a ten minute break mid-morning and if we get that far a ten minute break mid-afternoon. Mid-morning, we are starting a little late but I think mid-morning will be 11.45 so whoever is speaking at 11.45 if they keep an eye on the time and indicate near to 11.45 when is convenient to have a short break. So I think that is the housekeeping.

Just to inform counsel that we have been provided with the electronic hearing bundle. I also have the documents in paper format from an earlier time, I think in March when I first had them. We have also had the submissions, the initial set of submissions by both sides followed by reply submissions and we have obviously read those submissions and as much of the other material as was needed to follow the points that were being raised.

So we are conducting a case management conference and I think that in some circumstances I would take the lead and raise points on my agenda and ask for the parties to indicate their position. I think that most of the matters are not

difficult and there is not really contention about them but there is contention on the question of disclosure and on matters that are linked, such as the witness statement of Dr Grenfell.

I think in the circumstances I will invite leading counsel, Mr O'Donoghue, for the appellant, to open the matter to us, to take us to the points in the sequence he thinks fit so we can deal with non-contentious matters or straightforward matters and then at some point he will reach the question of disclosure, in which case he should present his case on that. And when he has done that we will consider what to do next; probably call upon Mr Williams to deal with the case on disclosure.

I hope that is useful as an indicator of how we would like things to proceed. So let me invite Mr O'Donoghue to present his side of the argument as regards directions and in particular disclosure.

Submissions by MR O'DONOGHUE

MR O'DONOGHUE: My Lord, I am grateful. My Lord, for the record I had better introduce the cast of counsel.

I appear on behalf of FP McCann with Mr Howell and Mr Williams QC and Mr Jones appear for the CMA.

My Lord, I am very grateful for the introduction, teeing up and streamlining of the issues.

In terms of the issues that we see on the agenda, there is first of all the consent order in the disqualification related proceedings, which is with the Tribunal. I will park that for now. There are a couple of disclosure points, disclosure in respect of ground 5(b) of the notice of appeal and disclosure in respect of ground 1(a) of the notice of appeal. There is effectively a CMA application, or

at least an issue to be considered in relation to the scope of cross-examination of FP McCann's witnesses at trial and finally there are related directions issues as we progress to trial, and of course to the extent it is capable of being set down today, a firm trial date as opposed to a provisional allocation.

So those are the issues that we see as being the agenda items. If we have omitted or conflated anything, I am very happy of course to be corrected.

MR JUSTICE MORGAN: No, I recognise what you have said. It may be convenient to deal with the consent order and put that to one side and then I think go straight into the disclosure issues.

Let me just put my hands on the consent order.

I understand what is intended to be achieved by the consent order. It seems to me that it does achieve it. It is a good thing that the parties are able to agree. I have one slightly pedantic correction to the drafting, I wonder if I could raise that straight away.

If you have the consent order and go to the second page of it, there are a number of recitals. It is the fourth recital. It says:

"Upon the proposed interveners confirming and agreeing..."

And then in the third line it says:

"... they will not take any issue with the decision which is not already the subject of the appeal."

I wondered if it was slightly better to say:

"... they will not raise any issue in relation to the decision which is not already the subject of the appeal."

I think that is what is intended to be said I just think "taking issue" was perhaps less clear than "raise any issue in relation to the decision". Will the parties humour

me and agree my suggested revision to that wording?

MR O'DONOGHUE: My Lord, we embrace it with open arms.

MR JUSTICE MORGAN: Right. Well I think all members of the Tribunal are agreed that the consent order is appropriate. The parties agree it, so that order will be made with that minor revision.

Right. Good so that gets the consent order done. So you take your course from there Mr O'Donoghue.

MR O'DONOGHUE: My Lord, yes. If I could start with the two disclosure points then deal with the witness evidence points, and perhaps then later in the day we can come back to the shape of the trial and questions of timing.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: I start if I may with the ground 5(b) disclosure application, if I can call it that.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Which relates to the duration of the investigations.

Can we just first see what this point actually goes to? If we can turn up the CMA's decision at 363 of the electronic bundle, it is paragraphs 6.77 and over the page 6.78.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: So the Tribunal will see there was in summary form a complaint by FPM about the duration of the investigations and then the response at 6.78 that the CMA had proceeded as expeditiously as possible, given the complexity and difficulties of the two investigations. So that is where we find that in the decision.

Then in terms of the challenge in the notice of appeal back at bundle page 101, please, paragraph 107, I quote, this is the challenge in terms of the legal

ground:

"The CMA decided that it had 'proceeded as expeditiously as possible in circumstances where both the criminal and civil investigations were large and complex': Decision, §6.78. In so finding, the CMA erred in fact."

So there is a factual dispute as to whether the CMA proceeded as expeditiously as possible in its two investigations. That is the point, that is the core point that the disclosure application relates to.

Just to tee up the timeline, we are in a somewhat extraordinary position that even today we do not know when exactly the criminal investigation commenced. All we know is that on 29 August 2012 there was a covert recording of a meeting and obviously for that to happen the criminal investigation must have started at some point in advance of then. The CMA won't actually tell us when it started, which I will come back to. So that is the starting point, or at least the starting point we are aware of.

The next date is 12 March 2013, which was the arrest of the seven individuals at the Novotel in Coventry.

Then on 13 November 2013 one of the defendants, Stanton Bonna, made a civil application for leniency.

On 9 March 2016 we then see from the disclosure documents attached to Dr Grenfell's statement the recommendation from Deborah Wilkie et al to the Pipeline Steering Group to open the civil case in parallel with the criminal case. That was then considered at a Pipeline Steering Group meeting on 14 March 2016.

On 21 March 2016 Barry Cooper pleaded guilty to a criminal offence.

There is then some dispute as to when precisely the civil investigation started. The Decision in paragraph 2.62 says 30 March 2016. Dr Grenfell by contrast says

that at least the formal opening wasn't until 13 April 2016, that is paragraph 17 of his statement. But what is certain is that the parties were informed on 15 April by the CMA of the commencement of the civil case. That is at bundle 1170.

Three final dates. 17 June 2017, the CMA decided to charge none of the other six individuals who had been originally arrested. 13 December 2018 statement of objections issued in the civil case and finally 23 October 2019 we had the final decision in the civil case. So those are the key dates from our perspective.

The headline figures or dates in our submission are extremely striking. More than 7 years elapsed between the first covert recording of a meeting in August 2012 and the final civil decision. 51-months elapsed between the criminal arrests in 2013 and the dropping of the criminal case against the six individuals who had been arrested. 42-months elapsed between the opening of the civil case and the final decision in the civil case and set against those durations the Tribunal will see the reference in paragraph 108 of our notice of appeal to the CMA's annual report 2018/2019, which cited a figure of 18-months for Competition Act 1998 civil cases. In fact the 18-month figure was for an earlier period. The figure set out for 2018/2019 was even lower; 17-months.

So we say that --

MR JUSTICE MORGAN: Just to interrupt, that was stated to be an average, as I understand it.

MR O'DONOGHUE: Yes. Obviously some will be longer, some will be shorter.

MR JUSTICE MORGAN: Yes. It is not a target or a statement of what was desired, it was a statement, or it was really a statistic that if you look at the cases dealt with in the relevant period, the average length was that period, 17-months or

18-months. Is that understanding correct?

MR O'DONOGHUE: Well, that is certainly partly correct. But if one looks at the report, which unfortunately I think is not in the bundle, it is certainly what I would describe as a soft target or an aspiration, because the CMA, for reasons which are understandable and commendable, has a general desire to try and shorten its proceedings when it can and the reason for these statistical figures is so that one can observe over time the evolution of the length of investigations. So it isn't a hard target but it is something which is considered of sufficient importance within the CMA that it forms part of the key indicators in the annual report.

Mr Williams perhaps can say more about that but we say the figure is there for a reason and on any view is strikingly different from the present case.

MR JUSTICE MORGAN: Right. Before we get into what would happen at the trial, what we would be asked to decide and using what material, can we just identify the way in which you say delay is relevant here. I know there is one point you make about delay. Let's see if it is the only point. The point about delay is that as I understand it there is a statutory cap on the amount of the penalty and it is 10 per cent of turnover in the relevant year. The relevant year as I understand it is measured by reference to the date of the decision, so if the decision in this case had been made in 2015 or 2016 rather than 2019 one would have a relevant year and one would have a different figure for turnover and then one would have a different 10 per cent. Whereas the 10 per cent here produced a penalty of just over 25 million, 10 per cent using a different year would have produced a lower penalty.

Now, have I understood that point correctly? That is the point you will make at the substantive hearing.

MR O'DONOGHUE: My Lord, yes. If we look at the bundle at page 932 there is a table which shows you exactly the significant impact of the delay.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: It is table 4, bundle 932.

MR JUSTICE MORGAN: Can you give me the document in which that is?

MR O'DONOGHUE: Yes it is FPM's response to the draft penalty statement.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: It is tab 932 for those with an electronic bundle.

MR JUSTICE MORGAN: Yes. It is table?

MR O'DONOGHUE: Table 4. Your Lordship will see the figures for the different years. There are figures of 13 million, 16 million and then in this case over 25 million.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: So on one view had a year been shaved off the investigation the fine would have been halved. Or looked at another way the delay we say caused the fine to be effectively doubled.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: On any view, that is a dramatic difference in absolute or relative terms.

So we say this is a serious point with serious consequences for FPM.

MR JUSTICE MORGAN: Right. Following on from that, do you have any particular case at this point, at this stage, as to what would have been a reasonable period, and in particular when the decision you say should have been made at the end of a reasonable period? We know when it did emerge. Do you have an alternative substitute date to use?

MR O'DONOGHUE: My Lord, at this stage it is difficult for me to be proscriptive. At

this stage all I can see from public documents are the headline averages, but the devil will be in the detail because we know for example that this investigation on the civil side was paused for well over a year. There has been no real explanation as to why that was done, so I will come to that. But the point I am gravitating towards is that the twists and turns and the milestones in the investigations, we will be interrogating those because what was done or not done at particular junctures and why it was done or not done will be relevant to the assessment of the factual question of the overall question of delay. So that is why at this stage for me to give a largely abstract answer is quite difficult.

The headline averages are striking figures and the headline figures in this case are many multiples higher than those averages. So in our submission there is at least something which calls for an explanation, or put another way that there is a strong prima facie case for saying that the investigations could and should have been appreciably shorter.

At this stage it is very difficult for me to say more than that, and in large part the purpose of my application for disclosure is to understand and interrogate what exactly happened or did not happen when and why.

MR JUSTICE MORGAN: Right. Well, I think for today's purposes you have raised an issue which is, succinctly, the delay was unreasonable and that is relevant to penalty. We are not being asked today to rule that it is wholly irrelevant. Arguments of that kind are for another day. So it is an issue, and we have to decide how it is going to be dealt with at a hearing and then working backwards what disclosure, if any, is appropriate in advance of the hearing.

Before we go to that, you helped with explaining why you say this point of delay is relevant. One of the questions I wanted you to deal with is is that the only

way in which delay is relevant? I am not saying you need to add any other reason but just to clear one's thinking, is it relevant in any other way?

MR O'DONOGHUE: Well we are. There is a second string to our bow which is delay in any event, regardless of the factual dispute, is a mitigating factor. That is at page 99 of the bundle which is our NOA, paragraph 104. So it is both.

MR JUSTICE MORGAN: Let me just read that. You say ground, 5(a), unreasonable delay is capable of being a mitigating factor. And just help us why is it a mitigating factor? In what way can it be a mitigating factor? What do you say about that?

MR O'DONOGHUE: My Lord that will be a matter for legal submissions at trial. We have set out in 5(a) what we see as the contours of the point.

MR JUSTICE MORGAN: Well just help with what are the contours of the point? I mean, delay in court and litigation proceedings can be relevant in all sorts of ways. I don't want to make suggestions as to how it is relevant, it is for the appellant to make its case, but why is it mitigation?

MR O'DONOGHUE: Well, my Lord for a series of reasons. It certainly increased the costs on the defence side substantially. It is an iron law of all litigation and administrative proceedings that the longer they go on the more expensive they are, and so it was here. There is of course the fining point. And there is the more basic point that if one has a quasi criminal charge hanging over oneself it shouldn't be hanging over any longer than it absolutely needs to be. So there are a series of cumulative reasons. There is quite a lot of case law, particularly on the European front, as to delay as a mitigating factor and we will develop that at trial. But it is a separate ground of appeal in the NOA, for the reasons I have given.

MR JUSTICE MORGAN: Well, I mean, left to myself, I had worked out that in some cases -- I am not saying this is or isn't the case here -- delay has an adverse effect on the person who is later found liable because they have had the stress and strain of court proceedings for a longer period, they have had the expense and so on. But I wasn't clear that those points were being raised under 5(a). You told us today it increased the costs. Is that anywhere in the notice of appeal?

MR O'DONOGHUE: My Lord, that is a point for submission. It is a rather intuitive point.

MR JUSTICE MORGAN: Without evidence?

MR O'DONOGHUE: Well, my Lord, we can give a pretty reliable indicator of the magnitude because you can scale this up on the basis of an annual cost and it is --

MR JUSTICE MORGAN: Well there is no hint of that in the -- I mean I thought that we were really only talking about the 10 per cent cap by reference to the turnover in the year before the decision. I thought we might make progress in narrowing things down, but you are not, you are not narrowing things down, you are suggesting that delay is going to be relevant in some other way, not really expressed in the notice of appeal and not supported by the necessary evidence.

MR O'DONOGHUE: Well my Lord we are certainly not abandoning ground 5(a) today. What your Lordship says is perfectly fair and we will take that on board and reflect on it.

MR JUSTICE MORGAN: Right. At any rate what is clear is that you do say it is relevant because of the 10 per cent cap point. You have said that it could matter significantly in terms of the number, if we look at table 4. We are not

asked today to make a finding about that, so we now have to work out with your help how this matter is going to be dealt with at the trial and then what we need to do before the trial.

Now, it is a long period, that is your point. It seemed to be a period, you say, of more than 7 years. And you are going to say, if you can, that it should have been a period of 18-months or two years or two and a half years, and you will be pushed back by degrees. We are going to have to go into why it was 7 years and why it wasn't 18-months. Now, that is a massive question.

You started to give some points that would need to be explored but what do you want to be in a position to do at the trial about this? Do you want to have the full case file in documentary form for 7 years and then when you have it you will know what happened and only then will you start to point to individual periods, individual steps that you criticise? What is it that will meet your request for disclosure?

MR O'DONOGHUE: My Lord, can I just deal with that point? First to pick up on the point your Lordship made at the start of this discussion, we entirely agree that at this stage the question of disclosure is what I would call a slightly bloodless exercise, in the sense that under normal litigation principles one looks at what are the pleaded issues, what are the issues in dispute and is there relevant and proportionate disclosure that goes to those issues. That is an entirely neutral assessment at this stage. Whether ultimately we are correct or not is a matter for trial.

Part of the difficulty with the CMA's approach to this application is that they effectively want the Tribunal to decide all of these issues in their favour at this stage and to shut out FPM from being able to test the fabric of the point at trial. So our basic point is that there is a clear factual issue in dispute and we

need and seek reasonable and proportionate disclosure to test that point, particularly of course with Dr Grenfell.

MR JUSTICE MORGAN: I know that much. But what I don't know and what is quite troubling is what disclosure you really want to have.

Taking it at its widest possible, you could say well there was an investigation for 7 years done by a large number of people and we want to have every document relating to the investigation. We will talk about privilege later, but subject to privilege we will have dates, individuals, the substance of what they did, we will be able to see the time they took to achieve a task and then we can consider for ourselves whether they are open to criticism on that. We may not know if they are open to criticism until we have cross-examined somebody, and at the end of that we will tell the Tribunal what we say was a reasonable period when the decision should have come, what turnover is relevant and what the 10 per cent figure is.

That could be what you are asking for, but it may be you are asking for something less. I think you did say in your written argument you are not going to ask for an audit of the whole investigation process. Is that right?

MR O'DONOGHUE: That is absolutely right.

MR JUSTICE MORGAN: So what will you do? What do you want?

MR O'DONOGHUE: My Lord, the simplest way of going through this is to make it a bit more concrete. If we start with what has been disclosed at bundle 1147.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: So this is the paper from Deborah Wilkie and her team.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: It is effectively a note to the Pipeline Steering Group going through the reasons why the civil and criminal cases should be run in parallel.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: If you see at paragraph 3, my Lord, it lists a whole series of reasons for why the parallel approach is an efficient one.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: You will see (a), (b) and (c); "evidentially strong",

(c) can be done "with relatively little resource",

(e) has "strategic significance".

And so on.

(h) will "enable us to take civil enforcement action as quickly and efficiently as possible".

(i) "would reduce the risk that the parties would argue that such a case wasn't properly delayed to the detriment of their rights of defence."

Footnote 2:

"There are a number of policy reasons for running parallel criminal and civil cases".

Point 31 at page 1155:

"There are compelling reasons for conducting [the two investigations] in parallel."

And then paragraph 60 at 1161:

"The civil file in relation to the conduct covered by the Project South [which is the criminal investigation or the civil investigation] will be comprised of the a subset of the documents on the Project Cross file."

So a few points, if I may. First of all this is illustrative of the type of document that we are seeking disclosure of. This is not a trawl through individual emails of each and every person who worked on the investigations ever, it is documents which go to key milestones in the investigations over their course. One practical way for example to deal with this particular category, we know there was a core team comprising Deborah Wilkie and a couple of other individuals

who you see are the authors of this paper. There will be questions as to whether that group or a similar group in the context of the criminal case elaborated documents of a similar kind in relation to other key milestones. So it really is the key milestones which are the critical thing. No one is suggesting that we would spend the trial ad nauseam going through individual emails and saying why didn't you do that two hours quicker than you actually did it? And so on. It is really the key milestones in relation to both investigations.

Now, one of the difficulties --

MR JUSTICE MORGAN: Well you will have to define that, because if we make an order it will have to be understood by the CMA and complied with. Indeed, we will need to have some understanding at this hearing of what is involved, because you accept that proportionality is relevant to our decision. Have you done a draft setting out the wording that you have seen?

We have your draft order but I am not sure it limits things very much. It seems to say "we want everything for 7 years". That is my reading of it.

MR O'DONOGHUE: Well, my Lord, of course proportionality will be central in any event. I mean, the difficulty we face is the asymmetry of information, because these are internal groups within the CMA. They have been rather coy in terms of explaining how these particular groups worked. There has been some talk of proportionality on their side. But what is striking is they haven't come back with information within their sphere to say well we are not willing to do an audit of all individual participants -- which we perfectly understand -- but we think that the following key milestones and key groups is something that would be proportionate.

They have in my submission to try and attempt to meet us halfway. There is

an asymmetry of information. We are not internal to the CMA. We have had disclosure of one document, for the entirety of these two investigations, on its progress. I am going to come to some of the questions it raises. But there has to be something from the CMA coming in the other direction which says well we do not think that that is proportionate but we think if we offered you the following it would be proportionate.

What should have been done in my submission if the CMA was to make a proportionality point is they would say well, based on the maximum approach that would be X number of documents and it would take Y time to review and a more proportionate solution would be to limit it in the following respects, which would involve Z number of documents at a different cost.

They haven't done that. There has been allusions to proportionality without any assistance from them as to what they say might be proportionate. We perfectly understand and take on board this has to be tractable. We have no desire to increase the costs of these proceedings to no apparent end. In my submission it is clear what we are after in terms of key milestone documents of the kind we have just seen and it really should not be beyond the realms of possibility for the CMA to come up with what they say is a reasonable and proportionate search with that firmly in mind. That is the general point.

If I may make a more specific point which I think arises in any event, the problem, really, which arises with Dr Grenfell's disclosure is that despite trumpeting the benefits of running the two investigations in parallel, we now learn for the first time in the defence that the CMA apparently more or less immediately reached the opposite conclusion and paused the investigations for well over a year. This is paragraph 21 of Dr Grenfell's statement, electronic bundle 1142.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: So he says:

"On reflection, soon after opening the civil investigation it became apparent that any material progress in the Competition Act investigation would need to wait for the criminal investigation to conclude, because the difficulties of running the investigations simultaneously outweighed any efficiencies. As a result the CMA did not actively advance the civil investigation until after June 2017."

So having made some fanfare of all the compelling reasons to run the two investigations in parallel, we then find out for the first time in Dr Grenfell's statement that the CMA deliberately paused its investigation from April 2016 until June 2017, a period of over a year.

In my submission this calls for an explanation by way of disclosure, which has thus far been lacking.

MR JUSTICE MORGAN: Well, I mean, speaking for myself my reaction to that paragraph and the next one in Dr Grenfell's statement was that if Dr Grenfell is called and the CMA wish to call him, so let's assume he will be called just for the sake of the question, then he says there were difficulties but he doesn't tell you what they are. So if he is called it is inevitable he will be asked to identify the difficulties.

MR O'DONOGHUE: Well my Lord, in my submission that is where the unfairness comes in.

MR JUSTICE MORGAN: I follow. He will begin to tell you the difficulties and he might have a lot to say about the difficulties and he might give evidence running for substantial number of pages of transcript about the number of difficulties and you will be hearing it for the first time, and you won't know whether he is overemphasising points, I am not going to suggest he is going

to say things that are flatly untrue but --

MR O'DONOGHUE: Of course not.

MR JUSTICE MORGAN: -- he might emphasise points so as to make a minor point into a major point and he might minimise other points in the reverse direction, and you are not in any position to press him or test him on it.

MR O'DONOGHUE: My Lord, it is actually more fundamental than that, because you have seen in this document there are all these compelling reasons to run two horses together and then it seems within a matter of days or a week or two, a 360-degree about turn was made and the precise opposite conclusion was reached. We have no indication whatsoever from the documents why all of the good reasons of running in parallel all of a sudden became reasons for doing the opposite. It strikes us as very odd and very unsatisfactory that a document of the kind elaborated by Deborah Wilkie and her team, setting out in some detail all of the compelling reasons for doing all of this in parallel, there was then a volte face more or less immediately, and we are to believe that in relation to that dramatic and sudden step in the investigation there isn't a single other document setting out what were these sudden and new difficulties and how they were factored into the assessment. In my submission it would be profoundly unjust if the first time we are having to contend with this would be on the hoof with Dr Grenfell.

There is also a point of fairness from Dr Grenfell he only became the SRO in the criminal case from 2015 and therefore he is not in a position to give any direct testimony on the earlier years of the investigations and in our submission it is clear the documentary evidence for those periods is necessary, because he will not be able to assist the Tribunal or FPM on what was happening in the earlier stages he comes on the scene quite late in the day. So there is

a question of fairness to the Tribunal and Dr Grenfell as well.

The simple point we make on the specific issue is in paragraph 21 there has been a dramatic change in the CMA's position and we have as yet not been given a single document explaining what exactly was the basis for this reflection.

Your Lordship will have seen from Dr Grenfell's statement that the Pipeline Steering Committee comprises the chief executive of the CMA, and other senior executives, and the suggestion that they signed off in early April on running two horses in parallel and then all of a sudden this was halted and there was a pause for more than a year and this was not documented at the highest levels within the CMA strikes us as extraordinary. So there is a specific point raised by Dr Grenfell's statement that calls, in our submission, for documentary and clear explanation which has not been forthcoming to date. So there is both a general point and there is a very specific point which arises in the context of paragraph 21 of Dr Grenfell and the Deborah Wilkie document we have just seen.

MR JUSTICE MORGAN: I follow all that and it is only natural that you go straight to that because it is a clear point you are able to make forcefully, but of course the application for disclosure is not confined to investigating a single decision made shortly after March or April 2016, the application for disclosure extends to a 7-year period. And, I mean, my concern is not to have an order that requires the CMA to provide full file or many, many files recording the investigation, first the criminal, then the civil, for a 7-year period. So we have to have some, if we are to have an order at all, we have to have some definition of what it is they will be required to be disclosed. It may be that the CMA, if they are required to disclose certain documents, will want to give evidence which goes beyond the documents. But I am not going to say

anything about that at this stage.

Now, I wonder is there a way of meeting your point by either drafting a disclosure order or a request for information where you have highly targeted requests for either information or documents? I am not saying we will do this but it is an alternative to having a roving disclosure over a 7-year period. I am interested is it possible to draft something which would be focused, targeted, precise in that way?

MR O'DONOGHUE: My Lord, it must be, but because of the asymmetry of information we will require the CMA's assistance and good faith. All I can do sitting here today is to say we have had one document, which is the Deborah Wilkie note. There must be similar documents in the context of the civil investigation and there must be some analogue of what I would call the equivalent of the Wilkie team on the criminal side and something similar to the Pipeline Steering Committee on the criminal side.

So we actively want to help the CMA to make this as targeted as possible. We are very hamstrung because we do not have a window into these internal case teams and steering groups and other structures, so the CMA will have to assist us as best they can.

I do emphasise the point that it isn't good enough in the latest Radke statement to have allusions to proportionality and to complain about a trawl or audit but not to come up with any sensible proposal for what is the lie of the land. It is information within their sphere. In normal commercial litigation you would expect someone resisting disclosure to say "well, I have done a disclosure report. Here are the hit rates. Here are the custodians. Here is the corpus of documents. That is obviously disproportionate but here is a proportionate solution". That is what you would expect and you would expect dialogue,

particularly under the disclosure pilot, which obviously doesn't apply here but has some helpful analogies, one would expect the parties to be a bit more up front if they are going to make a proportionality point and to come up with constructive proposals.

We have taken this as far as we can on the basis of disclosure of a single document. We will commit to working with the CMA, but it has to be a two way process, because it is their organisation and their sphere.

MR JUSTICE MORGAN: You are making an application and you are seeking an order. I have a draft order. The draft order was drafted in March. It may be you have developed your thinking since March. Is the drafting of that order still what you want or do you recognise that some different drafting would be better from your point of view? I mean are we to examine the drafting of that order or are we to approach it some other way?

MR O'DONOGHUE: Well my Lord, it is implicit but it would be helpful to be explicit. If the CMA was ordered to a reasonable and proportionate search of the documents that relate to the investigations it would be a matter for the CMA in the first instance to come up with what it considers to be a reasonable and proportionate search. It may be --

MR JUSTICE MORGAN: But for what? It is not enough to say there should be a search and it should be proportionate, it is what are you after, what are you searching for?

Let me take some examples. It may be the case, and the Dr Grenfell paragraph 21 might be an example of it, that there was a period of delay which has a single explanation, namely that they decided in and around April 2016 that they would not progress the civil investigation in tandem with the criminal. That takes you all the way up to the middle of 2017. You might say to the Tribunal

"well, we want to know the reasons and a document which sets out the reasons".

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Now that I see. And we might, if we develop this thinking, we might identify some other questions or supporting documents in a similar way. But let me take an entirely different example. Say it was appropriate in the course of the investigation to interview Mr X; whoever, it doesn't matter, some potential witness. The CMA became aware of the identity of X as a potential witness on a date, and then they didn't contact Mr X for four months and when Mr X was contacted he was an extremely valuable witness who gave a lot of very helpful evidence and progressed the investigation.

Now, if you knew that, you might cross-examine and say well, why did you take four months? Why didn't you fix up to see Mr X in 14 days? It is not an insignificant period, that is three and a half months which went by; four months minus 14 days.

Now, is that something you want to have documents to enable you to advance, that case? Because those would be radically different types of documents, it strikes me.

MR O'DONOGHUE: Well my Lord as I hope I have made clear, what we see from the paper from Deborah Wilkie et al is there will be key milestone documents which were used to brief the decision makers and what we are really interested in is we see from paragraph 3 of the Wilkie paper, that there are all these compelling efficiencies of running the two investigations in parallel. What we want to understand is given they accept there were these efficiencies at that stage why was that not equally considered for other periods? My Lord, one has to recall there was a civil leniency confession from

Stanton Bonna in November 2013 and it seems the civil leniency application involved an admission of cartel wrongdoing by the applicant so they fessed up to committing a cartel, and as matters stand based on the single document we are to believe that the CMA sat on that for at least two and a half years before even beginning to gear up on the civil side.

What we are after is essentially at any stage consideration of whether to start or pause the civil investigation. What one sees from the criminal investigation, the investigatory work and the documents were mainly garnered from the criminal investigation and the civil file before the CMA was essentially a subset of the criminal documents. So there was a ready made corpus of documents that could be tapped into. We want to understand why was it apparently not considered efficient until April 2016 to run these two investigations in parallel.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: There must have been consideration of that point at least from the time that Stanton Bonna made a leniency application because that is the starting gun; someone has come in, fessed up to a cartel, they are admitting wrongdoing and you are at least two-nil up. The idea they sat on their hands for two and a half years and didn't for one second even consider what on earth they should do with this civil confession strikes me as very, very surprising.

So it is key milestone documents which go to considering -- I emphasise the word considering as opposed to deciding, because the statement from Jessica Radke submitted on Monday is rather narrowly focused around decisions, what we are interested in is the consideration of whether to start a civil investigation in parallel with the criminal investigation at any point.

To be clear, we are not interested in whether there was some minute delay in relation to interviewing someone this week as opposed to next week, we are concerned with, really, a question of principle as to why the CMA apparently did not consider until at least April 2016 why these two investigations could not be run in parallel.

So it will be something more high level and what your Lordship has described as the sort of micro approach, certainly in the first instance we agree that is not the way forward.

So in my submission, with cooperation from the CMA, this must be something tractable, and indeed we are led to believe from Jessica Radke's latest statement that in fact this is unlikely to show up many documents at all. So we simply don't understand the proportionality point.

If, as is common ground, there will not be some micro trawl of emails in relation to micro delays, it must be possible to come up with something which is proportionate.

MR JUSTICE MORGAN: Right. Well it is a matter of identifying what they opt to give you, if we make an order, and what is the best way to identify it. We don't want too many stages for this, we don't want you to have an order for A, B, C and D and they then tell you what their response is, A doesn't exist, B is privileged, C is redacted but here it is and here is D, and then the next stage is you say well now we have seen that we obviously need E, F, G, H all the way to Z. And then we have another hearing about that.

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: We really have to knock this on the head as best we are able at this hearing, don't we?

MR O'DONOGHUE: My Lord, yes.

So my Lord if I can be constructive, I would suggest in the first instance that what is required at this stage is that the CMA, whether by way of letter or witness statement we can discuss, but the CMA needs to tell us at a certain level of detail what were the formal and informal constituents in relation to the investigations who would have considered the key milestone stages. This is all something which should be capable of being reconstructed without great difficulty, because these are pre-existing groups, formal or informal. We can see for example in Deborah Wilkie's paper that there was a team under her stewardship who seemed to be responsible for the civil side of things and there must be an analogue on the criminal side. So we need a description from the CMA as to what were the key formal and informal considering bodies of persons and on the basis of that I think we can come up with something which is very targeted and is not at all onerous.

MR JUSTICE MORGAN: One thing is for you to draft the wording you want us to order, because we are not going to go wider than that and the CMA can look at your wording and indicate their position. They may say you shouldn't have anything, you should have zero. But if they are wrong about that and you should have something we would hear them in the alternative as to what that should be.

Another alternative is for you to request information. I don't know if the competition rules have a formal request for information rule, but we can do what is done under the CPR and you say here are the questions you have, and then in the light of the response you will then take the next step. Now that has got the advice that it is a bit too sequential for my taste but it is one way of doing it.

We are going to have a break shortly and it may be you can reflect on our discussion and Mr Williams can obviously reflect also. Can I just have an idea where we

might end up and the implications for other cases? If it appears that at some time during the 7-year period the CMA did go slow on this one because they had a lot of other cases and they had only limited resources, I mean do you accept that that is not a matter you can complain of or do you say no, you can complain of that. Reasonable delay should be a reasonable time, should be the time taken by a reasonable regulator, properly resourced and giving proper priority to the particular case?

I mean we might well have a major debate later about this, but do you have position on that?

MR O'DONOGHUE: Well, my Lord, from our perspective the basis of this application it is something exceptional for two reasons. One, the duration of these investigations based on any statistic which is available is exceptionally long and calls for an explanation. And the second point is that the impact in terms of fines on my client was potentially very dramatic indeed. Now, this isn't some footling point that the fine went up by a few quid because of a short delay, we are talking potentially about a doubling. This is not a garden variety case. And I understand your Lordship's concern that it would be troubling if there was some micro ordered trawl of each and every step of the CMA's processes. We are not suggesting that for a second. It is high level stuff we are interested in, in relation to key milestones.

My Lord can I just leave you with this thought before the break: in my submission, given that we have had two statements from the CMA which for the reason I have outlined probably raise more questions than answers, that the way forward should be a clarificatory statement from the CMA describing how these investigations functioned in terms of formal and informal teams and consideration of the issues. My concern, my Lord, to be candid is that

I understand that the order is for the applicant to make but given the information, at this stage based on what we know beyond adding the words "a reasonable and proportionate search", which may well be sufficient, my concern is that it would be a waste of time frankly to ask FPM to peer into the minds of the CMA in the absence of any specific knowledge as to how the consideration internally functioned. That is information which is exclusively within their sphere.

We can of course do this by information but I would suggest the more pragmatic course, given the two statements to date, would be a further clarificatory statement.

SIR IAIN: Chairman, may I come in here?

MR JUSTICE MORGAN: Certainly, Iain.

SIR IAIN: Thank you very much. It is really a question for Mr O'Donoghue. Let me just play back to you if I may what I think you are saying. There was a change made from parallel investigations, criminal and civil, that moved that from parallel to consecutive or, near consecutive. Is it what you are looking for from the CMA something like an internal note of a meeting, a minute which actually sets out in some detail and clearly why the decision was made?

MR O'DONOGHUE: Well, Sir, that is certainly one of the things, because as I have indicated there was a paper on the compelling efficiencies. We are then led to believe within a week or two, or perhaps even more quickly, the opposite conclusion was reached and we haven't a single document explaining the basis for this volte face. It does call for an explanation because one cannot trumpet all these efficiency benefits and then a week later say actually that is all wrong and now the opposite conclusion is that there are disbenefits and we must make these sequential, and that calls for an explanation, because the

Pipeline Steering Group, as I indicated, was composed of very senior individuals and if there was to be a pause for a lengthy period in excess of a year it is very, very difficult to believe, given the decision was which made, that that wasn't articulated at some length in one or more documents. We haven't seen that and it is striking.

But it really is a small example of the wider problem, because we are led to believe that there were considerable efficiencies in running these in parallel, that must have been true in our submission from an earlier stage, and we are entitled to understand, albeit at a high level, the consideration as to why these were or were not run in parallel sooner. It is a perfectly fair question in light of the CMA's own decision to run them in parallel at some point for some period.

SIR IAIN: Thank you.

MR DORAN: So Mr O'Donoghue are you asking for the Pipeline Steering Committee and its analogue in the criminal side, their papers insofar as they touch upon decisions to start or pause, the high level minutes that relate to those decisions?

MR O'DONOGHUE: Well, Sir, that is an obvious place to start because we can see that from the Deborah Wilkie document. My difficulty of course is that I am blind sided in terms of were there other formal or informal structures within the CMA where similar points would have been considered. We simply don't know. So that is one obvious thing which we will be seeking. But I want to make clear at this stage that depending on what the CMA says in response that may not be the end of it.

To be clear, Sir, it is high level material on key milestones.

MR DORAN: So it is the overall structure of the decision making and the high level minutes that relate to those decisions is what you seek?

MR O'DONOGHUE: And the consideration. Not simply decision making, consideration of whether to run these in parallel.

MR DORAN: Yes, okay.

MR JUSTICE MORGAN: As I understand you Mr O'Donoghue you say that is one part of what you want but it is not the entirety.

MR O'DONOGHUE: No, but my Lord I still hope, given that it would be articulated at a fairly high level of aggregation in relation to key milestones, it is nonetheless tractable.

MR JUSTICE MORGAN: Yes, I am looking at your draft order and in your draft order, paragraph 1, sub paragraph 2, you want documents relevant to the progress and timing of the criminal and civil investigations. Just pausing there. That is very broad, it is any document relevant to progress of the investigation. So it is my example about you took four months to interview X. That would be relevant to the progress of the investigation.

Now that phrase goes on. It says:

"... including decisions to delay, suspend or otherwise interrupt the same."

Now that is what Mr Doran was asking you about. You say you would like that but it is not the entirety. So it is getting some definition to this.

Let me, before we break, articulate one other concern. We are not told that a similar order for disclosure has been made in any earlier case, is that right? There isn't a precedent for an order for disclosure about the time taken in the investigation?

MR O'DONOGHUE: Well, we will check during the break. My Lord, I think this is probably the first time the point has been taken.

MR JUSTICE MORGAN: I suspect that is right. It is in my mind certainly, and I am sure it is in the mind of the other members of the Tribunal, if we make

an order it will be looked at with interest by other parties and if your point is a good one legally that you were disadvantaged because you had the wrong year for the turnover, for the 10 per cent cap point, we don't want blindly to make an order that is going to be repeated in lots of cases where everybody else argues well, it took four years to get a decision, it should have taken 18-months or, it took three years it should have taken 18-months, and it so happens my turnover in one year is very different from my turnover in another year.

If we produced an order that involved a micro audit of the progress of an investigation in this case and every other case the thing would be very undesirable with regards the system working.

MR O'DONOGHUE: My Lord, we are not seeking that. In large part the reason this arises now is that the disclosures made by Dr Grenfell in the documents, particularly paragraph 21, and to some extent Jessica Radke's statement as well, they raise more questions than answers. The CMA has elected to give a partial voluntary disclosure. We are seeking to interrogate that. So it is a (inaudible) case from that perspective.

MR JUSTICE MORGAN: If the CMA withdraw the statement, what then?

MR O'DONOGHUE: Well --

MR JUSTICE MORGAN: Do you still ask for disclosure?

MR O'DONOGHUE: Well, my Lord we may do or we may be submitting to your Lordship that there is no answer to our point, at trial.

MR JUSTICE MORGAN: Well there would be no evidence on the point beyond the dates which one sees from the documents. You say we don't know when the criminal investigation started. We know it was underway at a date, we know something about the other stages.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Well I mean the two points are linked because you have said if you don't get disclosure they can't have Dr Grenfell, and indeed your disclosure application was advanced on the basis well, look they have given us Dr Grenfell. We have lots of questions. We need documents.

MR O'DONOGHUE: Your Lordship is right. My Lord, without giving the game away, one of the obvious questions for Dr Grenfell is when you say in paragraph 21 that on reflection you decided to make these sequential rather than simultaneous, what were the reasons? He is going to have to answer that question and the suggestion that will be done without the benefit of contemporaneous documents I would suggest is quite unfair on Dr Grenfell, the Tribunal and my client. It has got to come out anyway and we want to be able to test this point fairly with regards to the contemporaneous documents.

My Lord, if I can leave you one thought, if we can go back to Deborah Wilkie's paper. It is bundle 1157.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Paragraph 41.

MR JUSTICE MORGAN: Right, I have it.

MR O'DONOGHUE: She says:

"Given this, it is possible that (non-leniency) parties may wish to seek to settle the case which would further contribute to a swift and successful outcome to a civil investigation. This may particularly be the case if the criminal trial proceeds to a successful outcome."

Now we are not suggesting for one minute this is what happened here, but a possibility is that part of the reason for the delay was to put a bit of pressure on parties to settle. If that were true, it would be something we would wish to

interrogate further.

So there is a fundamental unfairness that there is a black hole in terms of this period of reflection in relation to a volte face for which we have no documents.

MR JUSTICE MORGAN: Right. Well we have reached 11.55. I said at the beginning we would give you ten minutes, is there any merit in you having 15 minutes so that you can reflect on our discussion, perhaps take instructions, perhaps the CMA can take instructions too. Is there merit in 15 minutes?

MR O'DONOGHUE: My Lord, with respect that would be useful.

MR WILLIAMS: My Lord, I am sorry to interrupt. My Lord, I was going to ask for 20 minutes actually because we have covered quite a lot of ground this morning and the application to our eyes and ears doesn't really resemble the application that we were here to meet, my Lord. So I would be grateful for a little more time in order to take stock of where we have got to.

MR JUSTICE MORGAN: Right. That seems very sensible and I am not in a position to turn left and right to my fellow Tribunal members but I think 20 minutes will be useful so we will sit again at 12.15 pm.

What we will do is the Tribunal will leave the hearing room and we will go into our retiring room and then we will come back at 12.15 so we will see you then. Thank you.

(11.55 am)

(A short break)

(12.20 pm)

MR JUSTICE MORGAN: Right. Let's see if the principal participants are in the hearing room. I can see Sir Iain McMillan. Eamonn Doran --

MR DORAN: I am here.

MR JUSTICE MORGAN: You are. So the Tribunal is present. Mr O'Donoghue, I saw you a moment ago. You are here. Mr Williams?

MR WILLIAMS: I am here, Sir, I don't know if you can see me?

MR JUSTICE MORGAN: I think when you speak you come through on the video. For some reason I haven't got you -- let me see if I can --

MR WILLIAMS: If I speak again maybe I will appear and you can pin me, Sir.

MR JUSTICE MORGAN: All right. Let's resume and I will go to Mr O'Donoghue to continue with his submissions on disclosure.

MR O'DONOGHUE: My Lord, during the short break we have had a go at amending the wording of the draft order. We have emailed that to the registry. I don't know if it has found its way yet to the members of the Tribunal.

MR JUSTICE MORGAN: We have been told about it. I don't think it has come through on my email but if it is short and you can read it, please do that.

MR O'DONOGHUE: I am grateful, my Lord. We have also copied this to the CMA, but obviously it is far from agreed. So what we have tried to do, my Lord, is to give specificity in light of your Lordship's comments, so there are five sub clauses so I will read it out:

"The CMA shall by no later than date X disclose to FPM all documents within its possession, custody or power.

"1. Constituting or reflecting a decision to open its investigation under section 192..."

That **is the criminal investigation.**

MR JUSTICE MORGAN: Just a minute. I'll write it down. Constituting or reflecting?

MR O'DONOGHUE: "... a decision to open its investigation under section 192 of the Enterprise Act."

So that is the criminal investigation.

"2. Considering whether to open an investigation under section 25 of the

Competition Act..."

MR JUSTICE MORGAN: "Considering whether to open an investigation under section 25 of the competition Act 1998."

MR O'DONOGHUE: "...between August 2012 and 9 March 2016."

That is intended to capture the period before the disclosure that has been given.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: Then 3 is the period we are considering:

"... considering why no progress was made on its investigation --"

MR JUSTICE MORGAN: Considering why no progress was made in its investigation?

MR O'DONOGHUE: "... under section 25 of the Competition Act."

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: The civil investigation "... between 13 April 2016 and June 2017."

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: And then:

"4. Showing consideration of the overall progress of the civil and criminal investigations."

MR JUSTICE MORGAN: Showing consideration of the overall progress?

MR O'DONOGHUE: "... of the civil and criminal investigations by the Pipeline Steering Group or equivalent body or its members."

MR JUSTICE MORGAN: Just a moment. Perfect. I have got to by the Pipeline Steering Group or?

MR O'DONOGHUE: "... any equivalent body or its members."

Then 5 is:

"Constituting known adverse documents within the meaning of CPR practice

direction 51U."

So my Lord, obviously the CPR doesn't apply but by analogy we submit that known adverse documents should be disclosed in any event.

MR JUSTICE MORGAN: Right. So I am going to read it back to you because I want to be absolutely clear I have got it. I will just read the five categories: The first is:

"Constituting or reflecting a decision to open an investigation under section 192 of the Enterprise Act 2002."

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: I know you are defining that as criminal investigation but I haven't written that down.

2 is:

"Considering whether to open an investigation under section 25 of the Competition Act 1998 between August 2012 and 9 March 2016."

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: "3. Considering why no progress was made in its investigation under section 25 [et cetera] between 13 April 2016 and June 2017.

"4. Showing consideration of the overall progress of the civil and criminal investigations by the Pipeline Steering Group or any equivalent body or its members.

"5. Constituting known adverse documents within the meaning of practice direction 51U."

Right, is that accurate, Mr O'Donoghue?

MR O'DONOGHUE: My Lord, yes. Save that in relation to sub clause 5 the adverse documents would be in relation to ground 5(b) of the appeal.

MR JUSTICE MORGAN: Understood.

Right. So we have had a lot of exchanges. To recap you have explained the relevance of delay to the penalty, you have taken us to all the information you currently have and don't have about the progress of the investigations, you have identified those five categories and you say that those documents are relevant and they are necessary and they are proportionate, to use the language of the test we apply.

Right. Now, we have all that, what else do you want to say before we hear from Mr Williams?

MR O'DONOGHUE: My Lord, just, I don't know if the Tribunal has received the latest statement from Jessica Radke.

MR JUSTICE MORGAN: Yes we have, yes.

MR O'DONOGHUE: If I can just make a couple of points in relation to that. We received this around midday on Monday, so it is rather late but anyway ...

A couple of points, first if we can start with paragraph 13 of her statement.

MR JUSTICE MORGAN: Let me get that. Yes, speaking for myself I now have that, thank you.

MR O'DONOGHUE: My Lord, I am grateful.

So she says:

"For the avoidance of doubt Dr Grenfell did not take any decision whether to open a civil case before that described in his witness statement."

Then halfway down:

"I do not believe that any decision whether to open a civil case was made by his predecessors."

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: My Lord, if one can keep a finger on the word "decision" and

then look at 12. She uses a different formulation, she says:

"The CMA has not identified any documents considering whether a civil case should be opened at the time the criminal investigation was opened."

So there is a rather careful and deliberate distinction between consideration on the one hand and formal decision making on the other.

Our concern, to be candid, is if one then looks at paragraph 14 she says:

"Based on the searches carried out and inquiries made, no formal decision was made to pause the civil investigation pending the completion of the criminal case, and hence no documents relating to any such decision have been produced."

We make the simple point that this perfectly illustrates the excessive narrowness of her approach, because on her approach, because she says no formal decision was made in relation to pausing the investigation in April 2016 the volte face, therefore we are entitled to no disclosure, whereas if one adopts our formulation of consideration then it seems we would be entitled to some documentary disclosure. We say this is far too narrow. If one tethers this to formal decision making it seems to yield next to nothing. So in our submission this shows why the consideration, which is the critical phrase in our revised wording, is central to proportionate disclosure.

That is all we wish to say about Jessica Radke's statement.

One final --

MR JUSTICE MORGAN: Just before I leave it, with your help on paragraph 14, she refers back to paragraph 21 of Dr Grenfell. We don't have to go there. He said there were difficulties. He said:

"Hence the civil case did not proceed as had been envisaged."

Then she said:

"No formal decision was made to pause it."

What does that mean? I know it is not your statement, but is she saying "we didn't decide to pause it, but in practice it just stopped"?

MR O'DONOGHUE: Well, yes, I think she is making a slightly bureaucratic, which is as a matter of public law, internal CMA procedure, they didn't decide to pause, what they did was de facto to pause and do nothing. But I mean it is a rather formalistic distinction and the practical point is that if this were accepted then on her evidence we would be entitled to no disclosure of a whole range of documents of which this was considered but not formally decided. So it really is too narrow. It is a bureaucratic distinction that in disclosure terms is not useful.

One final point, if I may. There is some passing reference in her statement at 16 and 17 to proportionality.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: It is striking. We have now had two statements from the CMA where there are allusions to proportionality. I said before the short break one would expect in ordinary litigation that if one was resisting a disclosure application on proportionality grounds they would come to the court with some facts and figures as to why this order is disproportionate, but some other order drawn in narrower terms. Instead what we have are these non specific allusions. They have had two goes at this and at this stage in my submission this really isn't good enough.

One has to bear in mind when it comes to proportionality, on our substantive case the delay had at least the effect of doubling the fine; £12 million, £13 million. That is also relevant to proportionality. One could proxy this as effectively the amount in dispute. The proportionality must be looked at from that

perspective as well.

My Lord that is all I wish to say on the first disclosure application. I am in your hands as to whether you want to go to Mr Williams on that or whether I proceed with the other application.

MR JUSTICE MORGAN: I get the impression the other application will be relatively short.

MR O'DONOGHUE: My Lord, that is correct.

MR JUSTICE MORGAN: Yes, in which case I think I would like -- I think the Tribunal should hear you on it as well and then we will go to Mr Williams.

MR O'DONOGHUE: My Lord, yes, I will be as quick as I can because I want to give Mr Williams a fair crack of the whip.

So the second point is really the inverse or flip side of the disclosure application, which is we say that if no disclosure is to be given then the new evidence from the CMA should be declared inadmissible. This is a very short point. It is common ground that the CMA is, under Dr Grenfell's statement and accompanying documents, tendering new evidence. This is accepted on the cover sheet of the schedule of Dr Grenfell's evidence. This is bundle 1131, for your reference. So it is accepted that this is new evidence. Therefore the Tribunal's new rules from 2015 under rule 21 are engaged and the Tribunal doubtless has this point, but the Tribunal's rules in 2015 were tightened in respect of new evidence. Two changes of particular interest were made. First of all rule 21.2(b) now asks whether the substance of the evidence was available to the respondent before the disputed decision was taken. By contrast the old rule 22 merely referred to the evidence.

MR JUSTICE MORGAN: I may have misunderstood what topic we are addressing. I thought we were going to deal with disclosure on 1(a), am I wrong about

that?

MR O'DONOGHUE: My Lord that, is the third application.

MR JUSTICE MORGAN: Right. You are not on disclosure 1(a) yet, you are on the question of --

MR O'DONOGHUE: Of 5(b), admissibility.

MR JUSTICE MORGAN: Fine. Sorry. It is my fault. I just didn't pick up what you were addressing.

MR O'DONOGHUE: My Lord, I thought, maybe wrongly, there was a hindrance in doing them together, but I am in your hands.

MR JUSTICE MORGAN: You are saying if there is no disclosure given in relation to 5(b) then Dr Grenfell's statement should not be admissible.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: If there is disclosure in relation to 5(b) then you don't object to Dr Grenfell's statement.

MR O'DONOGHUE: Well, no. There has been criticism, if I may, we have been called opportunistic. We see it differently. We are grown ups. We want to deal with the substance of the case.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: We would rather deal with the point head on and not have to take cute points of admissibility. But there is a rule in rule 21 which is now strict on new evidence and we are perfectly entitled to take that point. Indeed the Tribunal could raise it of its own motion.

MR JUSTICE MORGAN: Yes. I suspect -- well, I will let you make the point, if it can be made succinctly.

MR O'DONOGHUE: It is a very short point.

MR JUSTICE MORGAN: I think this rule 21 point is not your best point. I think you

have a point that is of more moment; that if you are stopped from getting disclosure for some reason then it is really not fair to allow the CMA to tell you things that they choose about the process but deny you the opportunity of testing that evidence. You have made that point. But this point about rule 21, if the CMA were trying to defend the decision by making allegations about you, McCann, which they hadn't put in the decision, that would be one thing. But you are accusing them of delay and they are giving responsive evidence to an allegation you are making about them, which is said to be relevant to penalty. If you make an allegation about them they are entitled to answer it, and they did answer it in the decision by saying that the delay was not unreasonable. You are asserting it is unreasonable. That they can respond, surely?

MR O'DONOGHUE: Well my Lord, a couple of points, if I may. First your Lordship is absolutely right that our primary position is the substantive unfairness to my client with having to fight this fight with one if not two hands tied behind their back in relation to the disclosure which has been given. That is clearly correct. But our rule 21 point is not a what I would call a pointy headed point, there is some substance to the point and a question of unfairness, because my Lord we do not accept that this is a responsive point, because the question of delay was teed up at some considerable length in FP McCann's response to the draft penalty statement. I showed your Lordship table 4 where we set out the effect of the delay and we set out facts and figures on why there was exceptional delay in this case. So all of that was extremely well telegraphed well before the decision was rendered. Instead of dealing with those points as they should have in the decision, what the CMA did and said was, we have a handful of words asserting that they had proceeded as

expeditiously as possible which has now been supplemented to a significant extent by the new evidence from Dr Grenfell and the two or three documents we have been given.

In technical terms under rule 21 (a) the evidence was in substance, indeed in totality, available to the CMA at the time it rendered the decision and (b) there was absolutely no reason why the points it now seeks to make couldn't have been fully ventilated in the decision as they should have been. That is a perfectly coherent, indeed complete, basis for refusing to admit that evidence under rule 21. Those are the conditions. If the substance was available and there is no good reason why it was not ventilated in the decision, then those are the critical conditions.

In my submission, on the two critical conditions, the CMA really has no answer because it had known of the case it had to meet and it should all have been in the decision.

MR JUSTICE MORGAN: Just on the conditions, Mr O'Donoghue, sorry to interrupt, looking at 21 sub rule (2), (a) to (e) are factors, you have taken us to (b), whether or not the substance of the evidence was available for the disputed decision was taken. Do you rely on anything else in (a) to (e)?

MR O'DONOGHUE: Well, my Lord, (c) of course, because --

MR JUSTICE MORGAN: Where it was not available --

MR O'DONOGHUE: Has to give a reason.

MR JUSTICE MORGAN: But you are saying the evidence was available.

MR O'DONOGHUE: Well, my Lord, it is a sequential point. They say it is responsive. We say there is no good reason why this couldn't have been dealt with in full in the decision. They had everything they needed to respond. The points made by Dr Grenfell, none of them are new. They are points that

for whatever reason they sat on until now. For example we were completely unaware until we saw his evidence there had been an informal pause in the investigation.

MR JUSTICE MORGAN: I am just making the pedantic point that c doesn't apply.

MR O'DONOGHUE: My Lord, yes, it is a sequential point, that is correct.

MR JUSTICE MORGAN: Well, it is an alternative to (b). I suppose -- you are saying it was available so on your submission (c) doesn't apply.

MR O'DONOGHUE: Yes. My Lord we also rely on prejudice.

MR JUSTICE MORGAN: (c) is not about making it available to -- well let's just be clear, the respondent is the CMA.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Let me just check that. You were the respondent in the investigation but you are the appellant for this part of the rules.

MR O'DONOGHUE: Yes, they are the respondent.

MR JUSTICE MORGAN: They are the respondent. So (c) is where the respondent doesn't have the evidence.

"Why the party seeking to adduce the evidence had not made it available to the respondent at that time."

So this is nothing to do with our case, because (c) assumes that the appellant seeks to adduce the evidence but didn't give it to the respondent earlier, isn't it?

MR O'DONOGHUE: My Lord that may well be so.

MR JUSTICE MORGAN: The only factor is (b), whether it was available, and because it is all internal CMA stuff it was obviously available to them.

MR O'DONOGHUE: My Lord, yes, in totality.

MR JUSTICE MORGAN: So then we go back to rule 21(2).

MR O'DONOGHUE: We also rely on prejudice.

MR JUSTICE MORGAN: The prejudice. Right. And (e). So it is (b), (d) and (e).

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: Right. You say the evidence was available, you were prejudiced and whether it was necessary. These are factors, they are not conditions they are factors. Rule 21(2) says the Tribunal has to decide whether it is just and proportionate to admit the evidence.

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: That is the framework. I have that clear, thank you.

MR O'DONOGHUE: My Lord, it is a very short point, which is we put in ground 5(b) on the basis of what was set out in the decision that they proceeded as expeditiously as possible and we now learn from Dr Grenfell in the attachments that there is much more fabric to that story. All of that material was available to the CMA at the time of the decision and should have been in the decision and we are now faced with a situation where, having made the appeal, the goalposts have been moved and they would, in the absence of giving any disclosure, be able to put forward new evidence on their side as to the conduct of the investigation. So that is why we say there is a prejudice to us.

MR JUSTICE MORGAN: Yes. I think in terms of logic you should be saying that your first point is that Dr Grenfell should not be admitted and if we make that ruling then there is no need for disclosure.

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: If on the other hand we admit Grenfell then there has to be disclosure.

MR O'DONOGHUE: Your Lordship is quite right. The admissibility comes first.

MR JUSTICE MORGAN: Well it is a matter of admissibility and also your position,

which is that if they are not calling Grenfell then you don't need disclosure, you will rely upon the passage of time and the absence of an explanation. Right, I understand the point.

Right, any more on rule 21?

MR O'DONOGHUE: My Lord, just to give you one reference. So you will have seen in bundle 925, section 5 of the McCann DPS response has a number of pages on the substantive delay point and the impact and so on.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: There was a very detailed submission made to the CMA and we in response at paragraph 6.78 get a handful of words. If one looks at this decision, which is almost 300-pages, which has reams and reams of material on things like market definition and things that ultimately don't matter at all.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: Prolixity doesn't seem to be a concern on the CMA's side. In view of the submission that was made in our submission it was incumbent on the CMA to deal with this issue properly at 6.78 instead of this handful of words that they assert they proceeded as expeditiously as possible. That does go to the overall question of the justice of admitting this. They chose to have the perfunctory response that is set out in 6.78. That doesn't in any shape or form do justice to the detailed submissions made by FP McCann in response to the DPS.

MR JUSTICE MORGAN: Yes. Right.

MR O'DONOGHUE: I think that is everything on that. I hope I could mop up on the final application before lunch and give Mr Williams a fair crack of the whip.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: So I conclude with ground 1(a) which is the final disclosure

application. This has been covered in some considerable detail in the written skeleton so I can be very brief indeed.

I really only wanted to make one further point on proportionality, since this is the point that the CMA mentioned specifically in paragraph 30 of its first skeleton. The CMA says it would be too onerous to go through different drafts of the draft decision to see what has changed relative to the objections and why. Just to recap on what is the point, the statement of objections had a very detailed section, section 4(i) of the statement of objections, bundle 534, which set out the CMA's provisional case on implementation of the alleged infringement by FP McCann. There was an entire section, and if one then looks at the corresponding part of the decision that has been deleted in whole. So there has been a wholesale deletion.

So with respect to the CMA, this is not a point which involves looking through different draft documents to see who changed which word, when and why, it is a rather more fundamental point, which is an entire section of what is effectively a draft decision has been deleted and there must be a document explaining why this substantial deletion was made. That explanation is not contained in the decision.

So in proportionality terms this is actually a very focused inquiry because at some point between the end of 2018 when the statement of objections was rendered and the adoption of the decision in 2019 somebody in the CMA took a decision that this entire section on implementation should be deleted.

Conceivably this is even a single document. It does not involve looking at iterative drafts, trying to find a needle in a haystack; it is hiding there in plain sight.

MR JUSTICE MORGAN: To what issue in the appeal are these documents relevant?

MR O'DONOGHUE: Well, my Lord, ground 1(a) is a challenge that the reasoning in the decision is inadequate in respect of the deletion of the implementation sections in the SO.

MR JUSTICE MORGAN: Well, you are appealing the decision.

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: The decision is either vulnerable to appeal or it is not. If you say the reasoning in the decision is inadequate, that is an error which may lead to consequences. Are you saying that the reasoning in the decision is inadequate to support the decision?

MR O'DONOGHUE: Well, we are saying that. But this particular point is responding to a point made in the defence, which is why we seek disclosure, because in the defence at paragraph 62, which is bundle 1052 --

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: -- the CMA advances for the first time what it says were the reasons for the deletions we identified.

MR JUSTICE MORGAN: Go back one step. How is it an issue that you can advance in support of your challenge to the decision that the decision is different from the statement of objections? I mean, I just don't understand this. The statement of objections did what it did. You are not appealing that, that is not the process. You respond to the statement of objections in great detail and the CMA is supposed to have regard to what you say. Their job then is to issue a decision. They do that. You wish to challenge the decision. You appeal the decision. You say something about reasons. If you are saying the reasoning in the decision is inadequate, then say it.

MR O'DONOGHUE: My Lord --

MR JUSTICE MORGAN: How is your attack on the reasons in the decision

advanced by looking at an earlier document which has been replaced by the decision?

MR O'DONOGHUE: Well my Lord, the point your Lordship averted to is a standalone point, which we do make. But there is a supplemental point, which is the one I am making now, which is for the first time in the defence the CMA has said "the reason we made these deletions was to remove or reduce ambiguity".

MR JUSTICE MORGAN: Yes, that is because you made what might be a bad point, that your challenge to the decision entitled you to compare the decision with an earlier document and say there is something wrong with the decision because it is different from the earlier document.

As I understand the CMA they say there is no need or opportunity to compare the decision with the earlier document, but if you were to do it here is the explanation.

At the moment I am not sure the Tribunal can see why we are going into a comparison with the earlier document, so we don't need to have an explanation for why there is a difference and unless we are satisfied that this will be a relevant matter at the trial, then...

The other point surely is that what the CMA say in their defence is not really evidence, it is really if one does the comparison -- although I hope we won't have to -- you can infer why things have been changed. I read the defence as really a set of submissions, and not evidence. If the CMA clarify that then we are not going to have evidence about this. We haven't got a witness statement, no witness has said "I made the change and here is the reason" so it is not in evidence, is it?

MR O'DONOGHUE: My Lord, we have a pleading signed by counsel which says

these are the reasons.

MR JUSTICE MORGAN: That is not evidence, that is a pleading.

MR O'DONOGHUE: My Lord, in my submission it would be strange if that put the CMA in a better position.

MR JUSTICE MORGAN: Well it puts them -- if evidence is needed they haven't got any. If it is a pleading then it would have to be developed by way of submission. The submissions are not based on evidence, not based on the drafting process, they are based on a comparison. And anyway, going back to the earlier point, so what?

MR O'DONOGHUE: Well, my Lord, I don't wish to labour the point. I see the time.

MR JUSTICE MORGAN: Right. At 2 o'clock you can tell us in a sentence or two summing up how you summarise your case on 1(a). We will give you an opportunity to reflect on that.

MR O'DONOGHUE: My Lord, I am grateful.

MR JUSTICE MORGAN: Right. So unless any other member of the Tribunal wants to ask a question or say something before we adjourn, we will now adjourn and the Tribunal will sit again at 2 o'clock. We will hear everything and deal with everything in the course of the afternoon.

Thank you.

MR O'DONOGHUE: Thank you.

MR WILLIAMS: Thank you very much.

(1.00 pm)

(The short adjournment)

(2.05 pm)

MR JUSTICE MORGAN: Good afternoon.

Can I see everyone who is needed? I see Sir Iain McMillan, is Mr Doran?

MR DORAN: I am here as well.

MR JUSTICE MORGAN: Right. Mr O'Donoghue and Mr Williams?

MR O'DONOGHUE: My Lord yes.

MR JUSTICE MORGAN: Mr Williams?

MR WILLIAMS: Yes Sir.

MR JUSTICE MORGAN: We will resume. Mr O'Donoghue, just to round off on ground of appeal 1(a), in your submissions this morning you said that the CMA were giving evidence about the differences between the statement of objections and the decision. I have looked at the defence pleading and I see certainly references to the differences between the statement of objections and the decision. Is that what you had in mind when you said they were giving evidence about the reasons for the differences?

MR O'DONOGHUE: My Lord, yes. So the first time we have seen the deletions explained is at paragraph 63 and following of the defence.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: The gist of that is they accept there was or they say there was ambiguity in the statement of objections and therefore the deletions were intended to minimise or remove that ambiguity and that is the first time we have heard that said. It is a similar point at 5 to the other disclosure applications in the sense that if these reasons are advanced for the first time in the defence, it is rather unfair on the appellant when they should have been set out in the decision. If these are said to be the only reasons, we are entitled to test whether that is correct or not. That is why we seek --

MR JUSTICE MORGAN: Disclosure.

MR O'DONOGHUE: -- disclosure for a limited period and purpose, I might add.

MR JUSTICE MORGAN: Yes.

Just to understand the submission, one of the things you say -- it may not be the only thing -- is you say these paragraphs are evidence which we will be invited to accept and you therefore want to test the evidence with disclosure, is that right?

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: What I haven't understood is how you say these are evidence. Evidence is given by witnesses.

MR O'DONOGHUE: My Lord, that is technically correct but we make the basic point that the only explanation we have been given at any stage is in the defence. That is all we have to contend with.

MR JUSTICE MORGAN: Well it is either evidence or it isn't. If there is an issue of fact here -- what was done, why was it done -- then we will have to decide it and we will hear the evidence and if there is no evidence we will do something else, we will perhaps draw inferences, but we won't be hearing evidence. This is not presented as evidence. I mean, if you read these paragraphs, in particular 68, it says:

"The points made above are apparent on a careful reading of the decision."

You are fighting a demon that is not there, that there is evidence being given as to the changes. These are suggestions, these are submissions that will either be made good in my submission or they will fail in submission. You can deal with them in submission, can't you?

MR O'DONOGHUE: Well my Lord in part but one way to test the point may be the following: suppose there is a document which explains why the deletion of this section in its entirety was made. Suppose it says for example well actually on reflection the case we made on implementation is hopeless and therefore we must take it out. That would have a very significant bearing not just on ground

1(a) but on the whole question of penalty. So it is really back to what is the contemporaneous explanation.

MR JUSTICE MORGAN: Well you don't get disclosure on an entirely speculative basis of an invented possibility.

At the moment it appears that the CMA is not giving evidence. Mr Williams and his junior no doubt drafted this document and are making contentions which they say are made good if you read the statement of objections and the decision together. You can submit that those inferences are not proper ones and we will, if we go into the point at all, we will rule on that at the trial. But the idea of disclosure is inappropriate if there is no evidence being given about it.

MR O'DONOGHUE: Well, my Lord, I won't labour the point but simply to say this: the section is intended to give the defendant sight of the full suite of objections and the deletion of an entire section in that draft decision is a very significant event. Indeed, one might well say that it is something which should have been properly put to and explained to the parties. Instead all we have is the mere deletion without any supporting reasoning and an explanation, albeit not evidence, advanced on instructions for the first time in the defence.

MR JUSTICE MORGAN: Help me on this, because I haven't got the familiarity you do with the documents. Does the decision anywhere else explain why it is expressed in different terms from the statement of objections?

MR O'DONOGHUE: No my Lord. That is precisely the problem.

MR JUSTICE MORGAN: Not just in this case about implementation. That is not the style of the decision in any case?

MR O'DONOGHUE: Well, my Lord, if an objection was made and is no longer maintained, one would ordinarily expect that to be made clear.

MR JUSTICE MORGAN: Well, ultimately, the thing that the authority needs to issue

is a decision. They have made their decision, they give their reasons, good or bad, and you are bound by the decision. But you are entitled to appeal it. The statement of objections is just a step on the road, isn't it? You don't appeal it, you answer it. Then if you get a bad decision you appeal the decision.

Surely in many cases the authority will change from the statement of objections to the decision. They have to have an open mind, they have to hear what you say in response, you will make good points some of the time and they will say "oh well we will express ourselves differently". They don't have to explain why they have changed they just have to say what they are deciding, don't they?

MR O'DONOGHUE: My Lord, generally yes. The problem with this case is the cake and eat it approach, which is they delete this section and then purport to retain the vestiges of at least some of the points in the decision. There are two problems: one, a section has been deleted, that is clear. But then various bits have been cut and pasted and peppered in different parts of the decision. So it is actually quite unclear as to what is their objection.

MR JUSTICE MORGAN: Their objection to what? What their finding is in the decision, do you mean?

MR O'DONOGHUE: My Lord, in stark terms it is unclear whether and to what extent implementation forms any part of their case. That is our core attack on the reasoning.

MR JUSTICE MORGAN: If you say a judgment of a judge is not adequately reasoned you look at his judgment. If you say a decision of the authority is not adequately reasoned you look at the decision. There is no cause to go to some preparatory document. Have we lost Mr O'Donoghue?

MR O'DONOGHUE: My Lord, no I am here.

MR JUSTICE MORGAN: Right. I think is there anything else you want to say on 1(a) before we hear from Mr Williams?

MR O'DONOGHUE: My Lord, no, you have the point.

MR JUSTICE MORGAN: Right I have the point. Thank you.

Thank you Mr O'Donoghue I have understood what you have said.

Let's go to Mr Williams.

MR WILLIAMS: Thank you, Sir. I wasn't sure whether Mr Doran wanted to ask a question of Mr O'Donoghue then just before I start my submissions.

MR DORAN: We may have gone past the point. I was merely going to partly question partly observation, isn't in truth the answer you seek Mr O'Donoghue in the refutations that you made to the statement of objections? Does that not sufficiently explain? They say whatever they say in the SO about implementation, you make your representations how they are wrong and in consequence the decision, which is what you are appealing, turns out the way it does. Because they have listened to you, in measure.

MR O'DONOGHUE: Well, Sir, the problem we face is that given the double approach of retaining certain things and deleting them, where precisely they come out is deeply ambiguous. They are unclear. We set out in the NOA there are at least three ways of reading the decision. The problem we have compared to the SO is it is entirely unclear which one the CMA decision is intended to comprise.

MR DORAN: Sorry which one?

MR O'DONOGHUE: Which one of the alternatives set out in the NOA it is intended to comprise.

MR DORAN: So the appeal then is the inadequacy of the reasoning in the decision.

MR O'DONOGHUE: Sir, yes. Set against the backdrop of what was the objection

articulated in the SO.

MR DORAN: Right.

MR JUSTICE MORGAN: If the decision is ambiguous, well, you will show us that. If you argue that you can't interpret the decision unless you know what the issues formally were, and that is a good submission, you will show us the statement of objections and your response. Then we will decide is the decision ambiguous, is it adequately clear applying the relevant test? But to go into why there was a redraft is wholly beside the point, isn't it? I don't begin to see why we would ever want to know why there was a redraft. What we look at is the redraft and ask is it flawed impermissibly because of inadequate reasons.

I am sure it is my fault, I am just not understanding how you can say you need disclosure of the drafting.

MR O'DONOGHUE: My Lord, perhaps it is best to give Mr Williams a chance.

MR JUSTICE MORGAN: He may say that I am being wholly unfair on you and you have a very strong case to which he hasn't got an answer. I will hear him when he says it.

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: Right, yes Mr Williams.

Submissions by MR WILLIAMS

MR WILLIAMS: Sir, members of the Tribunal, the main application made by Mr O'Donoghue this morning for disclosure going to ground 5 (b) has moved a very long way from the application as it was formulated in the draft order before the Tribunal before today. And indeed in the written submissions that were made.

The approach I propose to take is to address the Tribunal in relation to a number of points of principle going to an application of this nature and then to come in due course to the draft order as it has been reformulated this morning.

I have endeavoured to take instructions in relation to that reformulation of the application over the short adjournment and we do have a clear position on the principle. There are some matters of detail which may need to be ironed out at a later date but I think I can address you on what we say the position ought to be in principle.

The test for disclosure under the Tribunal's rules has been held in *Claymore Dairies*, and various other cases, to turn on three criteria. That is necessity, relevance and proportionality, to determine the issues which arise on the pleadings.

As to necessity, the issue which arises under ground 5(b) is whether the CMA can explain the duration of the investigations, and I will take you back to that briefly. In our submission, the application has been made almost without reference to that legal test and it has been made as if this were an ordinary CPR case in which disclosure is given as relevant to factual issues. And we do submit that once the application is seen in the context of the legal test it does take on a different complexion.

I will say straight away that a test under which the CMA is invited to explain the duration of the investigation clearly doesn't give the CMA free reign. It can't cherry pick disclosure, to use the language that is used in my learned friend's skeleton, and which triggered the additional witness statement, and it can't withhold material that would assist the appellant's case. So the CMA as the respondent can't provide a partial explanation, but it doesn't follow that an allegation of delay of this nature means that the CMA has to divulge details of the issues that it encounters in dealing with investigations of this nature,

whether criminal or civil, and how it resolves those issues. That sort of inquiry isn't fairly necessary in order to resolve ground 5(b).

MR JUSTICE MORGAN: Can I interrupt you. I understand the point you are making; you have touched on it in your written argument. The way Mr O'Donoghue puts it is that it is relevant to penalty in the way he has described; that the investigation in this case took, he alleges, an unreasonable amount of time. So it is relevant to penalty, and we are not, I think, debating that today. So the question is did the investigation take an unreasonable length of time? The question is not can the CMA explain themselves. He says the question is did it take an unreasonable length of time.

Now in his notice of appeal, I think it is where it appears, he says on the face of it, it took a long time, so long that it calls for an explanation. But he puts it that way just to show he has a prima facie case that he is right when he says it took an unreasonably long time.

So at the trial or the hearing of the appeal, as I understand it, the Tribunal is going to be asked has Mr O'Donoghue made good his assertion that there was an unreasonable length of time? If you like, unreasonable delay. That is the issue, isn't it? You can't get out of that issue by saying that the real issue is have you explained it and if you have put forward an explanation you have then factually explained it and the Tribunal will not query whether your explanation is right or wrong or fair or unfair. The ultimate issue is did this take an unreasonable length of time, Mr Williams?

MR WILLIAMS: I will take you to the case law that the FPM cites in a little while. It is best to answer your question in that context. But broadly speaking our case is that, yes, the way that those cases operate, it is incumbent on the Authority

to explain itself, to explain the duration of the investigation and if it fails to proffer that explanation then the General Court or in this case the Tribunal may reach the conclusion that the authority has failed to sufficiently explain the duration of the investigation, at which point the prima facie case stands. But I think it is best to look at that in the context --

MR JUSTICE MORGAN: But a prima facie case is only a means to an end. The end is to answer the issue did the investigation take an unreasonable length of time? Whether that is relevant isn't for today, it is for later, but Mr O'Donoghue is going to submit that if the investigation took an unreasonable length of time and there was a knock on effect on the 10 per cent statutory cap, then his client should not be worse off as a result, instead there should be substituted a lower penalty which would have been the penalty if the investigation had taken only a proper length of time. That is the issue, isn't it, for the hearing of the appeal?

MR WILLIAMS: Well I think the direct answer to your question, Sir, is that on the authorities on which FPM relies the structure of the argument is that the court takes a view as to whether the investigation on the face of it took an excessive period and then says but can the authority explain the period which it has taken? The question is then whether they provide that explanation and one sees in the case law that the court concludes in the absence of an explanation of the period the conclusion is that it is too long. I understand the way you put it to me, Sir, but I think what I am going to develop is that there are good reasons why the test should work in that way.

MR JUSTICE MORGAN: Well let me just drill down and then I will let you develop it. The question is have you given a good explanation, and you will submit at the hearing of the appeal you have given an explanation, Dr Grenfell gives

an explanation, and the Tribunal feels that Dr Grenfell is probably doing his best to assist the Tribunal but he deals with matters in a very general way. We don't know if we would reach the same conclusion as Dr Grenfell would reach and because we don't know, we accept his explanation. Is that ...

MR WILLIAMS: I am going to come to deal with -- I think there are two parts to the answer to that question. The first is what is the structure of the legal issue. The submission I make is that effectively the authority which fails to sufficiently justify the duration of its explanation takes the risk of an adverse finding on this issue. It is a matter for the Tribunal to judge whether the expert explanation is adequate, recognising that there are good reasons why an authority in the position of the CMA won't feel in a position to give a blow by blow account of what it was considering and what it was doing in investigations at an internal level.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: That is part of the legal test.

As far as I think the point you have made about Dr Grenfell goes to a slightly different issue, which is whether, given the status of Dr Grenfell's evidence at the moment, the explanation in itself calls for particularisation. That is something which I am going to deal with in concrete when I get to that issue, Sir.

MR JUSTICE MORGAN: All right. You have explained that so you continue please.

MR WILLIAMS: So, the point I was making before we had that exchange was that of course the appellant in the position of FPM has the safeguard of the duty of candour in the context of all of this which does put a different complexion on the issue relative to private litigation between private parties. So that is necessity.

The second aspect is relevance. This does overlap to a significant degree with necessity but we continue to have concerns that even the order as formulated today seeks material which isn't relevant to the ground of appeal. It is now common ground that ground 5(b) shouldn't --

(lost connection).

Sorry, I don't know how that happened, my computer developed a life of its own for a moment there.

MR JUSTICE MORGAN: Just to say where we lost you. You said relevance overlaps with necessity and --

MR WILLIAMS: Sir, the point I was going to make --

MR JUSTICE MORGAN: That is the last thing I wrote down, so if you pick it up there.

MR WILLIAMS: It is now common ground that ground 5(b) can't amount to an audit of the CMA's investigation and a complete review by the Tribunal of the steps taken by the CMA at every stage. It does seem to us that aspects of the order even as reformulated this morning still come very close to seeking a review at that level of generality.

The third aspect of the legal test is proportionality. The reformulation of the application this morning in some respects addresses the concerns that the CMA expressed about the proportionality of the order sought previously.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: But there are still concerns about proportionality both in terms of the volume of material and the level of searches that are being sought, but also in two other respects.

We make a point about privilege. The point is simply that in ordering searches of this nature the Tribunal should be mindful of the question of whether the

material that is being sought is likely to include, and to include to a significant degree, privileged material, given the nature of the issues. We say that that is a factor going to proportionality, that is to say the Tribunal shouldn't order searches if it is likely that a large proportion of the material or the great bulk of the material will be privileged. Concerns of that nature do continue to arise in the context of the reformulated order.

MR JUSTICE MORGAN: Are you going to develop your submissions on privilege later?

MR WILLIAMS: Yes I am going to in the context of the order.

MR JUSTICE MORGAN: Thank you.

MR WILLIAMS: The other aspect of proportionality is a broader public interest consideration, which I have already alluded to, which is that it is in our submission a matter of concern for the public interest if a party is able to make an allegation of delay of this sort that triggers an obligation on the CMA to divulge internal consideration of its own case work and its consideration and resolution of the issues which of course arise in the course of the CMA's important work. The CMA is entitled to conduct its case work in confidence and we say one would need strong reasons before contemplating an order which would require the CMA effectively to shine a light on its internal workings.

MR JUSTICE MORGAN: Just help me, Mr Williams. Mr O'Donoghue didn't think there was any precedent for the order he is seeking. There hasn't been -- can you hear me all right?

MR WILLIAMS: Yes I can.

MR JUSTICE MORGAN: He didn't think there was an earlier case in which the Tribunal will ordered disclosure of the internal investigations of the Authority

for the purpose of determining delay and I take it you are not aware of any earlier order to that effect either.

MR WILLIAMS: No I am not, Sir, no.

MR JUSTICE MORGAN: We are familiar in the last few years with persons who are aggrieved challenging regulators and saying that they went about the investigation inappropriately. Have there been orders for disclosure of the internal workings of the regulator in any other case? I am thinking of the *Tchenguiz* litigation which was extremely hard fought against a City regulator and in the end the regulator I think accepted some basis for criticism. I mean, in that sort of challenge, did the court order disclosure of internal matters of this kind?

MR WILLIAMS: I don't know the answer to that question, Sir, at the moment. I think broadly speaking the arguments made by FPM in relation to delay as a whole are, as far as we are aware, unprecedented. Certainly in this jurisdiction. As Mr O'Donoghue says, there is European case law dealing with delay not in exactly the way that FPM puts its case but dealing with delay in other contexts, such as rights of defence and claims of compensation.

I couldn't answer your question, Sir, in relation to other jurisdictions but there is a point to make of course which is that in all of these contexts the duty of candour applies. What one sees in the Tribunal's precedents for dealing with disclosure is that that is an important consideration in tempering orders for disclosure against the Authority.

MR JUSTICE MORGAN: One last question before I let you get on. I recognise the legal principles about duty of candour in the context of judicial review and the general rule is that if a public authority is challenged as to a decision it has made, it has a duty to explain to the court what decision it made, what

reasons it had, what it took into account and what it left out of account. The general rule is that the court does not order disclosure in relation to the decision making, it takes the local authority's witness statement as a statement of fact. But exceptionally the court can order disclosure against the public authority.

Now, is that the sort of approach which you say should be applied here also or not?

MR WILLIAMS: Well, the test that has crystallised in the context of applications for disclosure in proceedings of these nature -- that is the necessary, reasonable and proportionate -- it is a tighter test akin to the test that one might see applied in judicial review. And so in that sense, yes, there is an analogy with other proceedings against public bodies.

The Tribunal's case law also shows that where the CMA in particular has provided witness evidence going to the matters in dispute and provided documentary material that has been identified as relevant, if the Tribunal is satisfied that the CMA has dealt with, complied with its duty of candour, that is a factor going to whether further disclosure ought to be ordered. In that sense the approach taken is analogous to judicial review proceedings. It is for that reason we took exception to what we say is the belated point made in the reply skeleton and dealt with that in terms, because it is a significant issue.

If I could then just start with the way ground 5(b) is put, Sir, you have looked at it already today.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I won't go back to it in the interests of time but broadly speaking there are four points. There is a complaint about the length of the period of the two investigations combined, there is a complaint about the length of the civil case compared to the average, making the point that evidence had been

gathered here in the criminal case beforehand. On that issue about average, it isn't right to characterise that as a target. There are obvious reasons why it shouldn't be seen that way.

First, the average obviously includes settlements and there is a significant difference between the duration of a case which settles and a case which doesn't settle.

Secondly, it is not really a factor in this case because of the additional element of the criminal proceedings. Of course it is only exceptionally that there are both criminal and civil proceedings in the same matter, so the 18-months really isn't on point for those reasons.

There is a complaint that the criminal case shouldn't have held up the civil case and there are some specific complaints about particular aspects of the process, for example you could have interviewed a witness sooner than you did and so on. The Tribunal has this point but the way the notice of appeal is put, the legal test on which that ground of appeal is based is that the period demands explanation. And that in the absence of a reasoned explanation from the CMA the length must be regarded as excessive. That is the way it is put:

"In the absence of a reasoned explanation from the CMA".

MR JUSTICE MORGAN: But that is an evidential point. The averment, the legal averment is that the investigation took an unreasonably long time. That is the issue. The evidential point is that the length of time is out of line with other cases and prima facie it is excessive, a prima facie conclusion can be explained away, but if it is not explained away, it should be the final conclusion.

Certainly Mr O'Donoghue's issue, maybe your issue, but the appellant's issue is that this took far too long, right or wrong. We are going to be asked to adjudicate on that. We are not being asked to adjudicate on whether you have offered

an explanation, we are asked to adjudicate on the ultimate issue; did it take far too long?

MR WILLIAMS: I think the way to deal with this issue, Sir, if I may, is to take you to the *Dutch Beer Cartel* case. I think given the exchanges we are having on this, it is important that we look at that.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: That is the last authority in the bundle.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: I am sorry, Sir, I just need to get the right reference for you.

MR JUSTICE MORGAN: Yes you do that. It looks like it is divider 64.

MR WILLIAMS: Yes that is where it is.

MR JUSTICE MORGAN: I hope this won't be a difficulty. I don't intend it to be. I do not have the electronic bundle for various reasons so I will have to listen to what you say and I will have to study this case with the assistance of my colleagues after the hearing. So if you present your argument in that way that would be the best use of time.

MR WILLIAMS: I am grateful, Sir.

Yes it is paragraphs 293 and 294 are the paragraphs which are cited in FPM's notice of application.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I will just take to you those paragraphs as an illustration of how we say that the General Court applies the principles on which FPM has to rely. Paragraph 293 says:

"The second stage of the administrative procedure, from the receipt of the statement of the objections to the adoption of the contested decision in April 2007, lasted 20 months, thus exceeding, in the absence of further explanation, the time

normally needed for the adoption of the decision."

It says:

"Consequently it should be held that the length of the administrative procedure in question was excessive and stemmed from inaction on the part of the Commission, resulting in a breach of the reasonable time principle."

So in our submission the structure of the issue, I hear the point your Lordship puts to me, but it is quite clear from the way the issues of that nature are analysed in those paragraphs of the case and also in the *Electrotechnical Fittings Cartel* at tab 63 that the structure of the analysis is what stage are we dealing with? What sort of time ought in principle that stage take? Has the authority been able to explain why it took longer than one would normally? So the onus is on the authority to explain the position. If it fails to explain the position that prima facie conclusion will stand and --

MR JUSTICE MORGAN: Well this is just discussing evidence. The issue in that case, it was relevant for some reason, was did the second stage take an excess of time? It is for the relevant Tribunal to say yes it took an excessive time or no it didn't. If it took a very typical, ordinary time then there is no case. If it looks excessive then the persuasive burden shifts to the authority to explain why they took longer than would be typical. If they don't explain it then they haven't justified the length of time and the finding will be that the time was excessive.

But this bit about explaining it, it doesn't mean that the test is have you given an explanation. That is just viewing the evidence. The ultimate question remains; was the time excessive?

MR WILLIAMS: Sir that is right, Sir. But the way the issue is determined in these authorities is in the way that you have just described, Sir, which is to say that

the burden is on the authority to explain the duration of its investigation and if it fails to explain it, then what appears on the face of it to be an excessive period will be held to be excessive. So the onus shifts to us. And the point I make, Sir, is that that is an understandable test in this context, because it is understandable that the legal test gives the authority a degree of scope to determine in how much detail it explains the matters. Because, as I said earlier on, the direction of travel of FPM's inquiry is to probe the inner workings of the CMA, its inner management and conduct of its case work and seek to expose those matters to scrutiny before the Tribunal.

MR JUSTICE MORGAN: Well it is a question of evidence. Having regard to everything everybody says, including the explanation from the authority, was the length of time excessive? You are offering an explanation, you are proposing to call a witness. Can the appellant cross-examine Dr Grenfell? I mean it is not enough for you just to produce a piece of paper. I think you are accepting that the appellant can cross-examine Dr Grenfell.

MR WILLIAMS: Yes I am, Sir. I did lose you slightly there but I think I got the gist of what you said.

MR JUSTICE MORGAN: My basic question was you are accepting that they can cross-examine, so in the paragraphs 21 and 22 where Dr Grenfell says without particulars we have difficulties or there were difficulties, he can be cross-examined as to what the difficulties were, is that right?

MR WILLIAMS: Yes. And as I said I am going to come to that particular issue about further particulars of that paragraph.

MR JUSTICE MORGAN: You may be about to help us on that but just to get the principle, he can be cross-examined what the difficulties were and he will answer the questions. He might go into a great deal of detail which is not at

present in his witness statement. Do you say that the appellant must accept what Dr Grenfell says, and can't say to Dr Grenfell "well that is not right Dr Grenfell" or "that is an exaggeration" or "you are saying that was a difficulty but it wasn't a difficulty". Are they able to do that?

MR WILLIAMS: Yes. I think if I can just break the question down into two parts. First of all we accept of course that Dr Grenfell can be cross-examined and broadly speaking the position we take is that either Dr Grenfell offers a satisfactory explanation or an adequate explanation or he doesn't. Of course he can be cross-examined on that.

I think the point that you have raised in the course of exchanges with Mr O'Donoghue this morning is the fairness of that exchange, or the fairness of that procedure if Dr Grenfell starts to give reasons in oral evidence that he hasn't given previously. That is something that we have been giving consideration to over the short adjournment, and I will come back to that.

MR JUSTICE MORGAN: All right.

MR WILLIAMS: But as a matter of principle, we say that the legal test entitles the authority to in a sense draw a line in its explanation for the understandable reason the legal test shouldn't oblige the authority to provide detailed explanations of the difficult issues it may be grappling with and encountering in the course of its case work. This legal test shouldn't drive an authority to have to provide that sort of confidential detail.

MR JUSTICE MORGAN: Let me say this much: I am only speaking for myself, and my colleagues may take a different view. I have considerable hesitation about making a far reaching, wide order opening up the internal thinking of the authority for a 7-year period. I can see practical problems with that, I can see possible principled objections to that.

But the other side of the coin is that we are assuming today that it is relevant for the Tribunal to decide did the investigation take an unreasonably long period. Obviously since that has been raised the authority will decide whether it wants to give evidence to answer it. If it wants to give evidence to answer it, that evidence will be received, let's assume, and then evaluated. Dr Grenfell will be cross-examined, we will decide whether we think he has given an impressive explanation or a poor explanation or a quite inadequate explanation. That is a judgment. But if we are going to go into that fact finding, it can't be right that we are to hear evidence on a question of fact relevant to the outcome but the documents which are material to that fact finding will be withheld.

So we have to come up with, speaking for myself, some way of adjudicating on this.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: That is the challenge and at the moment I think the question is, for the Tribunal, was the period unreasonably long? That is an issue of fact for which purpose we need to understand why matters took the time that they did take. I have no view at all as to whether it was too long or not too long, but it is an issue.

MR WILLIAMS: Sir, I understand what you say and as I say I wanted to articulate the principles and what we say is the legal test and how it will operate in practice. I am going to come on to deal with Dr Grenfell in due course and your general observations are clear and helpful.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: So that is the way the notice of application is put. We defended the notice of application, and you have seen our defence. I am not going to take you through our defence in the interests of time. It is quite lengthy and

1 important it provides an outline of what was happening at each stage of the
2 information, and addresses the specific --
3 **MR JUSTICE MORGAN:** Give me the paragraphs. I think I know where they are.
4 **MR WILLIAMS:** The passage starts on 1098 of the bundle. That is the reference
5 I have, Sir.
6 **MR JUSTICE MORGAN:** Yes. What paragraph is that? You deal with ground 5 at
7 paragraph 203. 219 is the existence of unreasonable delay.
8 **MR WILLIAMS:** That is right. Exactly. Yes that is right.
9 So there are a number of themes and issues dealt with in that section. One is, as
10 I say, there is an outline of what was happening at each stage of the
11 investigation. As part of that we deal with the specific criticisms that are made
12 by FPM.
13 Secondly, there is the central point that the CMA didn't in practice progress the civil
14 case until the criminal case was complete. That is material because there is
15 a debate about how long the civil case really was. You will have seen that
16 from the pleadings. Was it 42 months or was it in practice a shorter period?
17 The third point is a point you have heard about already today, which is effectively
18 a caveat to that second point, which is that the CMA opened the civil case
19 before the criminal case was concluded with a view to progressing it and then
20 found that difficulties arose such that it couldn't do that. So in practice the
21 investigations ultimately happened in sequence.
22 I think that the characterisation of that issue towards the end of my learned friend's
23 submissions is there was no decision to pause the investigation, it is simply
24 the case that in practice the investigation didn't move forward. My learned
25 friend called that a de facto pause but the point is that issues were
26 encountered on the ground and the case didn't move forward.

MR JUSTICE MORGAN: So what were the issues? We are not told what they were.

MR WILLIAMS: No, well I am going to come to -- this is the question of particularisation of Grenfell, which I will come on to.

MR JUSTICE MORGAN: Okay. Right.

MR WILLIAMS: So that particular point, the difference between the 28 months and the 42 months was a point that called for explanation. The CMA has provided an explanation in two ways, first of all through the disclosure that the Tribunal has already seen and secondly through Dr Grenfell's evidence. We fully accept that Dr Grenfell doesn't go into detail about what the difficulties were and, as I have already indicated, that is for understandable reasons, because one is now into the realms of the CMA's internal management and conduct of its case work.

The Tribunal will appreciate that in the course of running any case, whether an investigation of this nature or a piece of litigation, issues have to be encountered and resolved and worked through and those are internal matters. It is an unusual and difficult feature of this application and we say it is a troubling feature that because there is an allegation of delay it is said that the CMA needs to shine a light of those internal matters.

We also say that the extent of the mystery about this is actually overstated because the papers that my learned friend took you to this morning relating to the opening of the civil case, they clearly aspire to making progress in parallel but they make clear that the resolution of the civil case was always going and indeed the progress of the civil case was always going to have to wait for the resolution of the criminal proceedings. That is said at paragraph 50 on page 1149. So what one is really dealing with here is the detail of how that

played out in practice and the fact that the matters came to a halt sooner than had been expected.

So I have made my submissions that in the context of that legal test there is no obligation on Dr Grenfell to go into detail about what was happening on the ground, and the purpose of his evidence is really to explain the timeline.

We do however understand the points that have been made this morning about how a trial of that evidence will take place and as you highlighted, Sir, what will happen if Dr Grenfell expands on those reasons or difficulties in oral evidence for the first time.

So if I can deal with that issue, this was dealt with in paragraph 3 of my learned friend's revised draft order. He seeks documents considering why no progress was made in the investigation in that period.

We don't think that is a helpful formulation, Sir, because documents considering why no progress was made doesn't really seem to capture the point. Indeed, one of the possibilities that was canvassed in your exchanges with Mr O'Donoghue was that this might be dealt with for example through a request for further information rather than through disclosure. What we have in mind, not perhaps something which ought to be ordered today but in light of the argument today that the CMA should consider whether it can particularise or provide further particulars of, paragraph I think it is 21 of Dr Grenfell's statement, in terms of the reasons why no progress was made, and I don't mean to draft, Sir, because obviously I have had to take stock over the short adjournment, but we would consider as part of the provision of those further particulars the extent to which there is disclosure going to those reasons.

It seems to us that that is a more constructive way of thinking about particulars of

Dr Grenfell's explanation than jumping straight to a very imprecisely formulated disclosure order. As I say, documents considering why no progress was made doesn't really seem to capture it.

So that is how we think that the issue the Tribunal has raised about Dr Grenfell's evidence might be taken forwards; as you say, trying to grapple with the issue and trying to think how this would work at trial so FPM isn't taken unawares. So that is an approach to paragraph 3.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Moving on, the reply skeleton contended, as I said, for the first time that the CMA is in breach of its duty of candour in this case. I don't know whether one would characterise it as an allegation or an insinuation, but it was certainly a criticism to which the CMA and in particular Miss Radke thought that she ought to respond.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: What Miss Radke's witness statement does is explain a number of propositions which in my submission are not surprising. The first is that the CMA has disclosed the documents going to the actual opening of the civil case.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Secondly, that the CMA has searched for material going to the question of whether there was any other decision whether to open the civil case and Miss Radke explains that no such other decision has been identified.

Mr O'Donoghue sought to suggest that this was careful drafting. It is accurate drafting but it is not careful drafting in the sense that the CMA is an organisation in which structured channels are made for decision making by

responsible officers and in our submission the relevant question is whether any such decision was made. We have included there consideration by the decision maker of whether to open a civil case, but that is the right way to look at the matter.

So the CMA hasn't cherry picked material about the opening of the civil case, which seems to be the thrust of the reply submission, and in my respectful submission that is what one would fairly expect of a body such as the CMA.

MR JUSTICE MORGAN: Can I have your help on this duty of candour? As you say, there is a reference to it in the reply submissions from Mr O'Donoghue. It is paragraph 10, sub paragraph 3, and there is a reference to a case *R v Lancashire County Council ex parte Huddleston* which I haven't read but which I am guessing is a judicial review case.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: I think what was being dealt with in that case was that when an individual or anyone challenges the decision of a public authority the judicial review practice is that the public authority must be candid about its reasons for its decision. If it is candid about that then its witness statement or affidavit is accepted at face value. You don't have cross-examination and you don't have disclosure.

Now, is that the duty of candour that is being talked about in a judicial review context?

MR WILLIAMS: Do you mean being talked about in FPM's skeleton?

MR JUSTICE MORGAN: In the *Lancashire* case and picked up therefore in counsel's argument.

MR WILLIAMS: Yes. It is a duty -- well, it is a duty which applies to certain, to government lawyers in the broad sense who are responsible for litigation on

behalf of public bodies.

MR JUSTICE MORGAN: It is not confined to judicial review?

MR WILLIAMS: We certainly haven't approached this case on the basis we are not subject to candour because it is not a judicial review. You do make an important point.

MR JUSTICE MORGAN: It is important because to know how to enter into this resolution, the jurisdiction we are dealing with is an appeal. It is an appeal on penalty. It is for the Tribunal to reach its own view as to the appropriate penalty but there are phrases like "margin of appreciation" or "deference to the decision made" by the regulator, the CMA in this case.

No doubt there are some overlapping points about it being a public law issue and your having regard to the decision of the CMA, but we are not judicially reviewing their decision, we are making our own decision aren't we, ultimately, on penalty?

MR WILLIAMS: Yes. I think the point you make, Sir, goes to the form of disposal of the matter or the form of procedure by which the matter is disposed of. That is to say in a judicial review it is atypical for there to be disclosure, as indeed it is there is a focused test in these proceedings.

MR JUSTICE MORGAN: It is unusual to have cross-examination. You don't cross-examine the chief executive of the local authority as to whether his witness statement is true or whether he has made it up or whether he has deliberately left things out. You say you have told us those were your reasons, we will now argue about the consequences. But in this case there is going to be cross-examination of Dr Grenfell, he is going to be asked what were the difficulties in paragraph 21? Not only that, he is going to be asked an awful lot more about the 7 years where he hasn't given explanations, he

has just said this happened and then that happened.

So we are not in judicial review territory.

MR WILLIAMS: No, we are not. The point I was making was in a sense a narrow point, Sir, which was that the CMA has given disclosure going to decisions whether to open a civil case and it has done so adhering to a duty of candour.

MR JUSTICE MORGAN: All right.

MR WILLIAMS: It hasn't withheld material going to that question. Whatever else my learned friend says about the scope of the disclosure provided, it does deal with the opening of the civil case and Dr Grenfell also made clear that the CMA hasn't identified material considering whether the civil case -- consideration was given whether to open a civil case when the criminal case was opened. So one then has an intervening period and Miss Radke confirms that for that period too the CMA hasn't withheld material which has been identified. So we resist the idea that there is any gap in the disclosure that has been given to date in relation to the opening of the civil case.

MR JUSTICE MORGAN: Well you are entitled to say to us this is a disclosure application. If the solicitor for the respondent says "I have searched, I have asked myself the right question as to what I am looking for and there are no documents", well then we are entitled to act upon that statement.

MR WILLIAMS: Yes. Sir, this goes to paragraph 2 of today's proposed draft order.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Which is expressed in terms of documents considering whether to open an investigation under section 25.

Now, the question arises consideration by whom and in what context? Our position is that the question is whether consideration was given by the decision maker, and Miss Radke's evidence has addressed that question. The Tribunal has

that on evidence today.

We also note that even if one were contemplating an order along the lines of paragraph 2, and we say there need not be any order, that there is no justification for the order being in such open ended terms. We note that the paragraph 4 is focused on particular groups and particular bodies or their equivalents, and we can't see why an order along the lines of paragraph 2 shouldn't be equally limited.

But as I have said, that issue, the question as to the opening of the civil case has been addressed by the CMA on evidence in response to the criticisms concerning candour.

That is an illustration, Sir, of why, although procedurally this case is different from a judicial review, candour does enter the equation in terms of limiting the scope of the order that might be ordered.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: There is a further point to make about candour, with respect, which is that actually if one looks at the issues which arise under the delay ground, they are not actually issues which raise obvious issues of candour. The questions are in the nature of why did it take you so long to do that? What was to stop you doing that sooner? Those are criticisms which FPM can obviously make looking at the timetable for the organisation, and it is unsurprising that the CMA hasn't found documents showing that it could have opened a civil case sooner. That is a matter to a large extent for us.

MR JUSTICE MORGAN: Hold on. What is going to be said in this argument, it will be -- I am told that you didn't consider opening a civil investigation until March 2016. You knew, the OFT knew, that there was something inappropriate going on, or possibly going, on from 2012. There is an issue

with why not start a civil investigation in 2013, three years earlier? You say there is going to be argument about that.

MR WILLIAMS: And Dr Grenfell will --

MR JUSTICE MORGAN: You can't have an argument without facts. I mean, are you going to be putting forward your reasons based, in fact, why you didn't do it?

MR WILLIAMS: Well, I don't know if you have in mind the paragraphs of the defence in the exhibits but essentially what the CMA has explained in its defence and in the exhibits is that there is a balance to be struck when pursuing simultaneous criminal and civil proceedings, as Mr O'Donoghue emphasised this morning in this case there were thought to be good reasons why the civil case could proceed in parallel with the criminal case after a certain point. I do stress after a certain point because obviously the criminal proceedings were quite well developed at that point. But there were also reasons why it is difficult to progress the civil case when the criminal case is ongoing.

MR JUSTICE MORGAN: Is somebody going to give evidence about that? I have taken the view up to this point that the defence is not evidence.

MR WILLIAMS: Well Dr Grenfell gives evidence going to the assessment as to whether to open the case, having regard to the factors pulling in both directions and so on.

MR JUSTICE MORGAN: It is not good enough to say you have pleaded it if you haven't given evidence to support the pleading. Am I right? The defence is a pleading. It is signed by counsel. They are not witnesses, they are not going to be cross-examined.

MR WILLIAMS: No that is right, Sir.

MR JUSTICE MORGAN: If the defence asserts matters of fact, that "we didn't do it for this reason ... " Well, we had better hear that evidence.

MR WILLIAMS: Well Dr Grenfell does, as you have seen, Sir, give evidence going to the assessment as to whether to open a civil case in the context of ongoing criminal proceedings. And he deals with the issues which arise in seeking to progress the investigations in parallel. And indeed what he says in terms in paragraph 22 is, well, the difficulties which arose in this case are illustrative of a wider problem, that is to say that there are generally reasons why the criminal proceedings ought to proceed first.

So Dr Grenfell is there to deal with that issue and he can be cross-examined about it.

MR JUSTICE MORGAN: He can be cross-examined and he is bound to be cross-examined. But the witness statements so far, he makes a headline point without any back up. He says -- I mean it has been extremely carefully drafted so as to be as limited as possible. He says "we wanted to run the two in parallel" and then he says "it became apparent we would have to wait because of the difficulties". It doesn't say what they are. Then in 22 he says "the difficulties which I have described". Well he hasn't described them. Then he says "they are illustrative of the difficulties of doing it".

MR WILLIAMS: Yes. I have made my submissions about the particulars of that but I think we were dealing with a slightly different question.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Which was the more general reasons why there is sense in progressing the criminal case before the civil case moves forward and Dr Grenfell does deal with that issue and he will be cross-examined about it. I think the point you have just made is that there is limited detail in paragraph 21 about relationships in that particular period.

MR JUSTICE MORGAN: You continue then, thank you.

MR WILLIAMS: So moving to the elements of the order which I haven't dealt with yet, I have dealt with sub paragraphs --

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: -- 2 and 3.

As far as the criminal case is concerned, we are surprised at the continued emphasis that is placed by FPM on the need for disclosure of documents relating to the opening of the criminal case. It is true that the position as currently described is that there are a series of events in the early days, August 2012, March 2013 and that the precise date of the opening of the case hasn't been identified within that window. But there isn't actually any issue between the parties as to when the criminal case was active. It is clearly active from the point at which the warrants were executed and the CMA was gathering evidence in August 2012. So we do think that the suggestion that there is uncertainty or a need for disclosure on this issue is, in our respectful submission, a bit of a spurious point.

The way it is now put in paragraph 1 of the proposed draft order is much narrower than anything we have seen previously and the CMA doesn't resist an order in the form of paragraph 1.

Now that the matter has been narrowed, it doesn't seem to us that one actually needs to make the order, because that request hasn't been put in that way until today. But the CMA will provide that material.

MR JUSTICE MORGAN: Let me understand that. The point was made by Mr O'Donoghue that they didn't know for certain the date on which the criminal investigation was started. You say, well, it is pretty obvious because they were tape recording for some purpose and then they arrested people.

They arrested people in pursuance of a criminal investigation, so whether it started in March 2013 or whether it started when they were tape recording people, does it matter? I understand that. You are happy to say what the date was. But the documents are documents which constitute or reflect a decision to open the investigation. It is not just the timing of opening the investigation, it is why did you open the investigation? You made a decision in, say, early 2013, to open an investigation, why did you do that? What material did you have? Are you agreeing to give that material?

MR WILLIAMS: Well --

MR JUSTICE MORGAN: I must say I expected you wouldn't. Indeed I would have thought there were good grounds for not giving that material.

MR WILLIAMS: No, sorry, Sir, if I wasn't clear, we are prepared to provide disclosure going to the opening of the criminal case. Whether it would be --

MR JUSTICE MORGAN: What do you mean "going to"? Are you going to explain all the reasoning indicating all the evidence you'd assembled? All the thinking, all the assessment of the likelihood of a crime?

MR WILLIAMS: No, Sir, what I was going to say --

MR JUSTICE MORGAN: The drafting of 1 goes far beyond specifying a date.

MR WILLIAMS: Yes I am sorry, Sir, that is the point I was going to clarify. We are prepared to provide documentation falling within paragraph 1 for the purposes of confirming the date on which the investigation was opened, because that is the point that has been made against us. It may be that on that basis that a significant proportion of that document is undisclosable on grounds of relevance or redacted or whatever. But the basis on which and the only basis on which this material has been sought is to put a date on it. The point I was making is that that is in our respectful submission a bit of a spurious point for

the reasons you are putting to me, Sir, but we are prepared to provide a document falling within that discrimination, redacted as appropriate.

In our respectful submission it shouldn't be necessary to order that because this is something which has been boiled down and boiled down and only really sought today and we shouldn't be ordered to provide disclosure.

MR JUSTICE MORGAN: That is a matter of form.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Either the order is you do it or the order recites that you have agreed to provide it and therefore no order is needed in that respect. That is format. Right.

MR WILLIAMS: Sir that, covers 1, 2 and 3, Sir.

As far as 4 is concerned, we continue to have real reservations about this because Mr O'Donoghue understandably disavowed the proposition, as I said earlier on, that these proceedings under ground 5(b) involve an audit of the process. It is true that paragraph 4 has been narrowed to material relating to particular groups but the introductory part of paragraph 4 is still extremely broad and general; showing consideration of the overall progress of the civil and criminal investigations. In our submission that is not a clear and precise formulation. It doesn't in our submission bear really very much resemblance to the submissions that were made to the Tribunal about key milestones, there is no attempt to narrow or focus the order on particular features of the investigation and nowhere to define what a key milestone might be.

We have, as I say, in our defence provided an outline of the investigation. The explanation or the commentary we have provided in the defence is really just explaining what was happening and when. FPM and the McCanns were parties to those proceedings and of course a lot of that is not a surprise for

them. So we do object to an order in the form of paragraph 4, which does seem to us simply to be reverting to a large extent to seeking a sort of roving general inquiry into what was happening in the investigation and when.

MR JUSTICE MORGAN: I think the point seems to be that whereas the draft order in March asks for documents relevant to the progress of the investigation, which would seem to bring in a micro audit, these documents are only documents showing consideration of the progress. So if an officer of the CMA is progressing the investigation and produces a document, that is not relevant under 4. But if his superior or a committee or a working group get together to discuss progress then they are considering progress. I think that is the kind of distinction.

MR WILLIAMS: Well, in our submission, Sir, it really isn't clear or precise and it does give rise to two further problems. The first problem relates to points I have already made, which is that this form of drafting envisages that one can identify consideration of progress, or the progress of the investigation, as distinct from the substance of the investigation, or to revert to the formulation that I used earlier on, the issues which are arising in the investigation on the ground.

Obviously we only saw this formulation for the first time at 12 o'clock today but the concern we have is that if the CMA were required to disclose documents showing consideration of the overall progress it simply wouldn't be possible to isolate, for example, consideration of whether particular milestones had been completed by a particular date, and that one would stray quickly and readily into consideration of substantive matters.

The second concern we have, and I am afraid it is a generalised submission at this stage, is that it isn't clear to us at the moment the extent to which considering

the progress of the investigation is again going to stray into privileged matters.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: In particular in the criminal investigation, which is a criminal prosecution, if one is considering what work streams are happening, what is going on, what progress has been made, it is really very easy to see how an order in those terms is going to take the CMA very quickly and readily into matters which shouldn't be disclosed.

My learned friend will say "well, privilege is a privilege against inspection not a privilege against disclosure" but the point we are making is that there is a fundamental difficulty with the formulation if it seems to target material which takes you straight into this territory because it means that there is a sort of lack of clarity in the first place about what it is that the paragraph is driving at. So we have real concerns that this formulation is not necessary to dispose of the application. It is still really a roving inquiry and it is not proportionate because, as I say, it is not clear where that formulation starts, and material which the CMA really shouldn't be required to provide where the line is between the two.

So those are our submissions on paragraph 4.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Paragraph 5. We object to paragraph 5 for the simple reason that we have accepted that we will comply with the duty of candour. As soon as that point was raised by Mr O'Donoghue we put in a witness statement responding specifically to the criticism and saying well we have not withheld any material which we believe to be adverse to the CMA's case or which supports FPM's case. The idea that we need to be subject to, a public body needs to be subject to a specific order for disclosure of known adverse

documents, it is just in our respectful submission taking inspiration from completely the wrong place.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Sir, do you mind if I take stock of my notes?

MR JUSTICE MORGAN: Yes I said at the beginning of the day we would have a break mid-afternoon. It might be that we could have five or ten minutes at this point and then you could pull the threads together. You are going to deal with particulars of Grenfell and then you are going to deal with the subject of privilege perhaps, aren't you?

MR WILLIAMS: Well I think I have dealt with -- sorry I thought I had dealt with particulars of Grenfell, Sir.

MR JUSTICE MORGAN: Let me make a careful note of what exactly you are proposing to do. You dictate to me what you are agreeing to provide on Grenfell.

MR WILLIAMS: So as far as Grenfell is concerned we don't think that the appropriate course is an order in the form of paragraph 3 of FPM's draft order. The complaint that has been raised is that Dr Grenfell refers to difficulties and doesn't explain what those difficulties are. The point that you have made Sir is, well, what happens if Dr Grenfell expands on that in his oral evidence? What we propose is that the CMA should provide -- I am afraid I don't have instructions on the form of this at the moment -- but further particulars of the paragraph 21, I think it is, in which Dr Grenfell refers to difficulties progressing the civil case. And that as part of that exercise it should consider whether there is disclosure, relevant disclosure.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Or perhaps I should say search for relevant disclosure going to

those particulars.

I will take instructions in the short adjournment as to whether I have captured that. You will appreciate we had quite a lot of ground to cover in the short adjournment.

MR JUSTICE MORGAN: Absolutely, yes.

MR WILLIAMS: But that is the sort of approach which we propose instead of a roving, instead of disclosure going to --

MR JUSTICE MORGAN: And then on privilege, I understand what legal advice privilege is and litigation privilege is. The only thing that was slightly new to me was that one of you referred to a case that said that litigation privilege was apposite not at all stages during the investigation but only at a certain point. Do you remember? The case was called *Eden* somebody.

MR WILLIAMS: Yes that was my learned friend's submission.

MR JUSTICE MORGAN: Yes. Is there any issue on that?

MR WILLIAMS: I think as far as the criminal case is concerned, the criminal case was a prosecution so if one is talking about that case, the application of privilege it doesn't take much explaining.

If one is dealing --

MR JUSTICE MORGAN: What you are saying is it is litigation and so --

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: -- if it were brought into existence for the dominant purpose of the criminal prosecution are privileged, right?

MR WILLIAMS: Yes. And consideration at meetings of issues which have arisen and which have been the subject of legal advice and which report that legal advice will contain privileged material.

The point I was making at paragraph 4 is drawing a line between what is legitimately

disclosable material and material which FPM claims it might be -- drawing a line between material which FPM claims is disclosable within the spirit of the paragraph and material which isn't disclosable, because it takes one into the weeds in all the ways I have been describing, that is extremely difficult.

As far as the civil case is concerned, the concern we have is in particular that if advice is being given on matters relating to the civil investigation at those meetings and the steps being taken, the progress being made and all the rest of it, again we are going to have the same problem.

So it is not a claim for immunity in any sense, which is the way it was put against us we are simply making a practical point that the sorts of inquiries FPM wants us to carried out take us straight into that sort of territory and drafting an order which makes sense in that context, it is extremely difficult and in our submission paragraph 4 doesn't achieve that.

MR JUSTICE MORGAN: What is the name of the *Eden* case about litigation privilege for an investigation? It is not in our bundle of authorities, I think. Do you remember the name of it?

MR WILLIAMS: It is cited in Mr O'Donoghue's skeleton.

MR O'DONOGHUE: My Lord it is the *Tesco* case, which is in the bundle.

MR JUSTICE MORGAN: Oh, is it? Where do you refer to it, Mr O'Donoghue?

MR O'DONOGHUE: Let me get the reference. It is certainly in our skeleton.

My Lord, the essential point from *Tesco* is that it is only at the stage of the statement of objections that the proceedings become sufficiently adversarial for litigation privilege to arise. Incidentally that is a case in which the OFT as it then was was seeking disclosure, so I would be surprised if Mr Williams has a different view, but we shall see. Let me just give your Lordship the reference.

My Lord, the practical point is the material we are interested in, so (inaudible) end of

2018, materials we are interested in --

MR JUSTICE MORGAN: Yes I have got that. It is in paragraph 34(3)(d) of your submission: *Tesco v OFT*.

MR O'DONOGHUE: My Lord, yes. It was the cheese cartel case.

MR JUSTICE MORGAN: Yes. That is the reference, thank you.

MR WILLIAMS: Sir, the point I was making was that even to the extent that litigation privilege doesn't apply one still has issues around legal advice privilege in what is clearly a relevant legal context.

MR JUSTICE MORGAN: Shall we have ten minutes at that point and you can see if you have other additional points to make?

MR WILLIAMS: Yes. I don't think I have very much if I have anything.

MR JUSTICE MORGAN: When you resume I think Mr O'Donoghue has raised an issue about whether Mr Grenfell can be called at all and he has also sought disclosure under 1(a) right?

MR WILLIAMS: Yes. I think, does that mean given the direction of travel we are not going to deal with admissibility?

MR JUSTICE MORGAN: Of what?

MR WILLIAMS: Of Grenfell, Sir. We have made submissions about that in our skeleton.

MR JUSTICE MORGAN: Well I mean I have the written submissions.

MR WILLIAMS: I think I will make two or three headline points.

MR JUSTICE MORGAN: Make headline points. 1(a) at the moment, I think you have covered that had pretty thoroughly in writing. But make headline points to make sure we have all got your case.

There is one other issue that I would like you to assist us with, and that is will the Tribunal be asked to uphold findings as to implementation and if so on the

basis of what material will we be asked to uphold the findings?

I am not completely clear that the two parties see it the same way so I want both sides to explain how they will go about it. Have I explained that question at any rate to you, Mr Williams?

MR WILLIAMS: You have, Sir.

MR JUSTICE MORGAN: We will have ten minutes and we will pick it up after that. So thank you for everything so far. We will sit again at 3.50 pm. Thank you.

(3.40 pm)

(A short break)

(3.50 pm)

MR JUSTICE MORGAN: Right, I have just checked Sir Iain McMillan and Mr Doran are in the meeting, in the hearing. I have got Mr Williams. Mr O'Donoghue?

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: Right you pick it up from there Mr Williams.

MR WILLIAMS: Thank you, Sir.

I can't see Mr Doran but I --

MR DORAN: I am here Mr Williams, don't worry.

MR WILLIAMS: There he is.

Just to round off on Grenfell, Sir, you have the point, but I will make the point by way of conclusion. The CMA does submit there are serious public interest considerations at stake here because there is a real concern that an application of this nature shouldn't give an appellant in the position of FPM a pathway to scrutinise matters that are legitimately internal matters, that is to say strategic thinking, decision making, a resolution of issues which arise in the course of case work. We are not of course claiming public interest immunity but this is a relevant consideration on the application, whether from

the perspective of necessity or proportionality.

The CMA, like any litigant, should be entitled to progress its case work in confidence and without concern that its internal deliberations are going to be opened up without very good reasons. That is undesirable both from the point of view of the impact on competition enforcement but also from the point of view of appeals, because one can already see the risk of a sort of satellite issue in a case like this. We would echo the observations you made, Sir, about the risks of creating a precedent which then sets in train further litigation on a similar theme.

Now we would accept if there was a suggestion of misconduct or misleading a party or anything like that, that would be a reason to open up what the CMA was doing internally, but there is nothing of that nature here at all and in our submission the Tribunal would need compelling reasons to take the view that the CMA should open up its internal thinking and provide detailed consideration of matters such as those which are still sought, in my respectful submission, or which could fall within the scope of paragraph 4 of the order.

So that concludes my submissions on the application under the ground 5(b).

I will deal with the other two applications as quickly as I can.

Ground 1(a), I think the issue does boil down, Sir, as you boiled it down in the course of your exchanges with Mr O'Donoghue. We submit, as you observe, that the issue is whether the reasons stated in the decision are adequate and intelligible. Nothing turns on a comparison with the statement of objections, still less does it turn on the CMA's motivation for drafting the decision as it did when compared with the SO.

The source of this issue, I think as came out in argument, is FPM's notice of application which observed that there were these structural changes between

the SO and the decision and speculated about the reasons for that. They went so far as to say "we are entitled to know why".

In preparing our defence we made clear the whole thrust of this complaint was legally flawed but we took their question at face value and we answered it. We are now being criticised for that.

As you said, Sir, what the defence does is explain the structure of the two documents by answering the question how do they relate to one another and in one respect as they relate to FPM's representations. In essence what is said is that the content is materially the same but it is restructured to make it clearer. You have looked at it so I don't need to labour the point, but --

MR JUSTICE MORGAN: I think I do understand all of that, Mr Williams. Can I just put two specific questions to you? The first is that if it is said that the decision is not properly reasoned, well that is a matter of submission where we will pay close attention to the decision. But if it is said that there was an issue for the CMA to deal with and they haven't dealt with it and in order to prove the existence of an issue you have to go back to the statement of objections, if that line of argument were put, it seems to me it would be permissible for that limited purpose to look at the statement of objections. Would you dissent from that?

MR WILLIAMS: Well I think more pragmatically, Sir, we are not taking a point of principle as to whether one can look at the statement of objections. They have asked a question about why the decision has been restructured and the unsurprising answer is that it has been restructured in response to some of their representations with a view to making the findings clearer.

MR JUSTICE MORGAN: All right.

The second question is, if -- as to which there is doubt -- it is relevant to compare the

decision with the statement of objections, and if it is necessary to form some view as to why the decision didn't repeat verbatim the statement of objections, you have dealt with that in your defence. What you say in the defence is not evidence, it is simply comment, submission, inference, isn't it?

MR WILLIAMS: That is the submission I was going to make before Mr O'Donoghue. Effectively what we provided was commentary on the documents. One can see what is happening here if you look at the documents.

MR JUSTICE MORGAN: I think we don't need to trouble you further on issue 1(a) and disclosure.

Do you want to say anything about whether you can call Mr Grenfell? I think logically this comes first because Mr O'Donoghue says that if you don't call Grenfell he won't ask for disclosure so we need to know can you call Dr Grenfell? If you do call him then he makes his application for disclosure. His point is rule 21.

MR WILLIAMS: Yes. Before one gets to rule 21 there is the question as to whether this is responsive evidence or not. Because I think, Sir, as you picked up in your review, one of the ways in which the issue of delay has been raised has been in the context of turnover years for the purposes of the penalty calculation. We have set this out in our reply skeleton paragraphs 16 to 26. One of the contexts, that was the context at which the point was raised at the administrative stage.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: What then happened was as part of the notice of application the point has taken on a new lease of life and given rise to new grounds of complaint. One of those grounds of complaint is a freestanding complaint that the investigation took too long and that that in itself mitigates the penalty. It is not then feeding through to a specific turnover year, it is a sort of freestanding

mitigation argument.

That is articulated I think around paragraph 99 of the notice of application. You can see ground 5 is itself all concerned with mitigation but that isn't the way the point was put at all at the administrative stage. It is in that context that the authorities or the line of authority I showed you earlier or referred to earlier on is cited. That is the calls for an explanation line of authority.

MR JUSTICE MORGAN: Yes I see. That is quite intriguing, the point about the relevant year before the decision was raised in the objection to the draft penalty. But the ground 5(a) says there is an independent reason for challenging delay, and that is delay goes to mitigation. Now, what you are submitting is that wasn't raised at the administrative stage.

MR WILLIAMS: No that is not the way the point is put in the response to the draft penalty notice, it is all about turnover year.

MR JUSTICE MORGAN: No, absolutely. I understand that.

So now that they say --

MR WILLIAMS: That is --

MR JUSTICE MORGAN: So this is an independent submission. You say that because they are now raising 5(a) and now they say delay has another impact on penalty, you are entitled to say, well, there wasn't a reasonable delay in response.

MR WILLIAMS: Partly that. Yes. The issue has taken on a different complexion. It is put as a freestanding complaint because of course in the context of the turnover years the CMA has guidance and there is a statutory framework for dealing with the penalty, whereas what is being said under ground 5 is it is a factor going to mitigation, so it is a different argument, it raises different considerations and it specifically raises this test of calls for an explanation.

So we have then provided the explanation that was called for.

So we say this is straightforward responsive evidence within the meaning of the authorities in *Tesco* at paragraph 124, I think (a).

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: In one sense one doesn't need to get into the ins and outs of rule 21.

In my respectful submission Mr O'Donoghue is misreading rule 21, I think it was (b). I am just going to have to go back to it, if I may, Sir.

MR JUSTICE MORGAN: Yes please.

MR WILLIAMS: Because as you picked up in the context of 21(2)(c) the focus of (c) is on evidence which wasn't provided to the respondent at the time, and you said well that is not on point at all. Actually in my submission (2)(b) is in the same vein. The question under 2(b) is whether it was provided to the respondent and 2(c) is where it wasn't available to the respondent. Those are two sides of the same coin. 2(b) is policing evidence that is relied on by an appellant and, whether the appellant had made the evidence available to the respondent or whether it was otherwise available to the respondent.

Be that as it may, if one looks at 21(2)(d) and (e), we say it is self-evident that we would suffer serious prejudice if we were shut out from answering the call for an explanation because we wouldn't be able to meet the ground at all.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: And on that basis we say the evidence is necessary for the Tribunal to determine the case. So taking all those points together we say that the application to exclude the evidence really goes nowhere, Sir.

MR JUSTICE MORGAN: I understand.

So that is that. Anything else you want to say in response to Mr O'Donoghue?

MR WILLIAMS: No, Sir. You actually picked up one of the points I was going to make on that admissibility issue, which is that there is a difference between issues which are directed at the conduct of the party in question and issues which are directed at the conduct of the authority.

MR JUSTICE MORGAN: Well we needn't trouble you further on rule 21. I have a question for you. Anything else you want to say about Mr O'Donoghue's submissions?

MR WILLIAMS: No, but I do have an answer to your question on implementation, Sir.

MR JUSTICE MORGAN: That is my question, yes. Tell me how you see it.

MR WILLIAMS: I put this together, obviously, over the short adjournment, so I will tell you how I see it. I can't promise it is the last word because there is quite a lot in ground 1(a). But broadly speaking the way it breaks down, you may have seen there is a debate in the first instance about which of these findings are actually findings of implementation at all, and what is meant by implementation.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Broadly speaking, as we understand it, the objection is to findings of implementation in dealings with customers as distinct from other forms of implementation, like going to meetings and monitoring prices and things like that. So one has to analyse what the findings in question are and we have proceeded on the basis that to the extent they are not actually findings of implementation of the sort that we think FPM is concerned about, the finding is not really in issue. So there is a matter of --

MR JUSTICE MORGAN: Say there is a finding that customers were charged higher prices because of the cartel. Say there is such a finding. Will you be asking

us to make the same finding or uphold the finding? I know you say it is so irrelevant to your case that you will do no such thing.

MR WILLIAMS: If you could just give me one moment.

The important point to make -- I will come to your question in a moment Sir, if I may -- is these are all findings of implementation by FPM. And Sir, we have made clear in our defence and in our preparations for this CMC that we are not relying on other parties to the infringement to prove that FPM did in fact implement the infringement in dealings with customers. That is why we are not going to be calling those witnesses. FPM says we are going to ask the Tribunal to draw adverse inferences and we say there is no adverse inference to draw because we simply don't rely on a CPM or a Stanton Bonna witness to support the proposition as to how FPM dealt with its customers.

MR JUSTICE MORGAN: But did the decision make a finding that there had been implementation in relation to customers?

MR WILLIAMS: A whole range of findings are challenged and for the most part I think we say FPM is misconstruing the findings. There are a small number of findings, and you will forgive me if I speak cautiously because I don't have the detail in front of me, but there are a small number of findings which are closer to the coal face and which come closer to FPM saying "well, this is how I dealt with this customer". Insofar as the CMA made those findings it relied on either documentary evidence or video evidence and statements made by FPM personnel in those documents or, in the meetings. So the CMA will be relying on that contemporaneous evidence. Obviously one possibility --

MR JUSTICE MORGAN: What is the technical position? Do you have to prove the same fact over again to the Tribunal relying on that evidence, or something else?

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: You do?

MR WILLIAMS: Technically the burden of proof is on us, that is right, Sir.

MR JUSTICE MORGAN: So even in the Tribunal, if you want to us to make a finding of fact it is not enough for you to say well the CMA made a finding of fact, you have to invite us on the relevant material to make that finding?

MR WILLIAMS: Yes, Sir.

MR JUSTICE MORGAN: Is that right? And you are not calling oral evidence from the two other companies in the cartel? You will do it some other way?

MR WILLIAMS: That is right. And it is because of the nature of the issues, as I was just explaining, Sir.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: If we had been talking about contact between the other parties and FPM that would be a different matter, but we are dealing with FPM's, effectively its internal conduct. And you will have seen they contest those findings but they don't put up any witness evidence themselves.

One of our points is that actually legitimately if they wanted to take issue with the documents you would have expected them to put witnesses up.

MR JUSTICE MORGAN: Well, I follow that. And of course insofar as a finding is not challenged in the notice of appeal, then we don't go into it, we take it as an unchallenged finding, is that right?

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Okay understood. I understand that.

Well, that is the answer to my question. So unless you tell me otherwise I will invite Mr O'Donoghue to make a brief reply on the points that have been argued.

MR WILLIAMS: No.

MR JUSTICE MORGAN: Mr O'Donoghue, do you wish to reply on those points?

Submissions in reply by MR O'DONOGHUE

MR O'DONOGHUE: My Lord, I really want to focus on the primary disclosure application.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: I think that is all I will say. I am conscious of the time I will make a handful of points, if I may.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: My Lord, the starting point is we are acutely conscious that there should not be wide ranging micro audit nature disclosure against the CMA and it is worth recording in this context that the reason we are in this position is for two reasons: first of all as a headline matter the delays in these investigations prima facie are striking. But in any event the critical point is that the CMA chose voluntarily to put in, in its defence, Mr Grenfell's evidence which, as your Lordship remarked, is carefully crafted. And they voluntarily chose to disclose one main document and two formal emails.

Now, the CMA having opened that door, as a matter of fairness we are entitled to test the evidence on that point because it goes to a disputed issue. Insofar as this door has been opened, it has been opened by the CMA. It then becomes a question of reasonableness and necessity and proportionality as to whether it is fair to the appellant that the CMA be allowed to make this partial disclosure, to use a card analogy, to disclose the Ace of Hearts and keep the rubbish two of Clubs to themselves. So that is what set this hare running and that is an important point of context in assessing the precedential value in relation to this application. It is largely a problem, if I can call it that, of their

own making by choosing to volunteer certain evidence and choosing not to volunteer the full suite of evidence. So that is the starting point.

The second point, your Lordship has well in mind, is the way one tests disclosure under the *Claymore* test is what is the issue in the notice of appeal and is disclosure of documents reasonable and necessary and proportionate in relation to that issue? So the starting point at this stage is the pleaded issues.

If I can just give your Lordship the references, if one goes to the notice of appeal, it is bundle page 69 and it is paragraph 7.5 of the notice of appeal, then one has a summary which encapsulates what is our ground of appeal.

So 7.5 (a) NOA, electronic bundle page 69.

MR JUSTICE MORGAN: Thank you.

MR O'DONOGHUE: It is crystal clear from that, and incidentally also from paragraph 107, that we are challenging as a factual matter the length of the investigations. It has nothing to do with explanation, it is a factual dispute about the length, reasonable or otherwise, of the investigations. That is how the disclosure issues in my submission should be tested.

Indeed, we note from paragraph 21 of Dr Grenfell's statement, electronic bundle 1143 --

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: -- at paragraph 23 of his statement, his conclusion is, and I quote:

"I believe that the time taken to complete the Competition Act Investigation was reasonable."

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: The CMA's own witness has perfectly understood what the issue in this case is and it is a factual point about delay.

For those reasons, Mr Williams' submission, with respect, on the *Dutch Beer* case are completely off beat, certainly at this stage. It may well be a bit of a point for the main trial although we doubt it. That is going to a completely different point and at this stage we are at an anterior stage where we are concerned with the issues and the evidence and the prima facie case. So, with respect, that doesn't get him anywhere.

The fourth point is just to clarify two things in relation to the duty of candour. The reason we mentioned this point in our reply skeleton was to show that, even in the context of judicial review, there are some disclosure obligations on the public authority. But, as your Lordship has well in mind, this is appeal on the merits where the Tribunal is entitled to substitute its own view for that of the CMA, subject to certain constraints. Therefore it is entitled to form a view on the facts and on the evidence as part of the merits function. So whatever the ins and outs of judicial review, there can be no doubt whatsoever that in the context of a merits appeal the evaluation of this evidence is something well within the Tribunal's compass and judgment.

The fifth point we wish to make is in relation to the suggestion that there would be further and better particulars in relation to Dr Grenfell. Our concern, which I think the CMA recognises, is further particulars simply takes us back down the rabbit hole. What we need are the documents that allow one to test those particulars, and the further particulars in themselves simply do not take it any further. That is the essential concern. I will come back to the drafting -- his comments on the order paragraph by paragraph but that is our overarching concern.

The sixth point is in relation to the Radke statement. If I can make a number of points. First of all, as I indicated this morning she is clear and careful to make

a distinction between decision making documents of a formal nature and documents showing consideration of certain matters. That is an important distinction which is captured in our draft order and I made the point this morning, which hasn't been disputed, that if Jessica Radke's approach was adopted in relation to decision documents only, all of the documentation concerning the pausing of the investigation because it did not reflect, the CMA says, a formal decision, would not be disclosed. We say that is too narrow and is unfair to the appellant.

That is the first point.

The second point on Jessica Radke's statement is she is careful to say that the CMA did not at any stage consider the opening of a similar investigation prior to April 2016. The comment she makes in her statement is tied directly to the opening of the civil investigation at the same time as the criminal investigation was commenced. That is a different point which concerns the period from 2012 or possibly a little earlier.

The final point on Jessica Radke's statement relates to the duty of candour. If the Tribunal can go to paragraph 18 of her statement.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Two points. First of all, it is clear from earlier in her statement she only joined the CMA in 2017. Then at paragraph 18 she says:

"I am not aware" of adverse documents.

And there is no indication, as one would expect in the context of practice direction 51U, that she has asked the relevant individuals for the relevant period as to whether they are aware of adverse documents for these other periods, of which she wasn't in situ at all. So if it is being suggested that this is a complete statement in connection with the duty of candour, it plainly is not

on its own terms. Indeed, it is manifestly inadequate. It entirely omits from consideration all of the previous years and all of the key individuals. This is a cause for concern not a source of comfort.

MR JUSTICE MORGAN: Understood.

MR O'DONOGHUE: Finally, if I can turn to the order itself paragraph by paragraph. Just to clarify, on sub paragraph 1 I think we are on the same page. What we seek are essentially the formal documentation opening the criminal investigation. Mr Williams makes light of the point that the precise date the investigation commenced is no big deal, it rather depends when it commenced. If, for example it, transpires it commenced, say, in 2010 or 2011 and nothing happened until 2012 or 2013, that would be one thing. If it commenced two weeks before the first recording, that might be another.

The simple fact is at this stage we are unaware when exactly it commenced. That is clearly relevant to the question of delay because one cannot begin to consider the question of reasonable delay if one doesn't have the starting point. It is a bit like trying to clap with one hand. We need that date, it should have been provided much sooner and we are happy that it will be provided now.

Sub paragraph 2, an important paragraph, because this covers consideration of whether to open a civil investigation between the start of the criminal investigation until March 2016 when it was formally opened. This is a critical part of disclosure because if, for example, there was some serious consideration, albeit not a final formal decision, to open a civil investigation for this earlier period, that would be extremely significant. We are entitled, certainly at a high level, in the way that I will explain in the sub paragraph, to have sight of those documents.

Some criticism was made in relation to paragraphs 3 and 4 in particular. In my

submission, in relation to sub paragraph 3 it is blindingly obvious what that deals with. It is dealing specifically with the coyness in Dr Grenfell's statement, which is that having decided to start the investigation in April 2016, within a week or two weeks they reached the precise opposite conclusion and it was paused for more than a year. So that is why we use the phrase "why no progress was made". That is very carefully tied to a very short period and to a very specific, informal decision to pause the investigation.

In my submission, one can always improve aspects of drafts but what that paragraph is directed at is plain and clear and arises from their own evidence and the problems with that evidence.

Particular criticism was made of sub paragraph 4. In our submission the two key phrases are, one, "consideration" and, two, "overall progress". What "overall progress" means is that we are interested in high level, serious, important considerations, not low level micro management of hours or days in the investigation. We have, on the limited material we have provided, given the specificity that we can. We have identified the Pipeline Steering Group, we think there should be something analogous in the context of the criminal side. There is a massive asymmetry of information and, whilst the CMA has been critical of the sub paragraph, at no stage of the two witness statements or today has it sought to assist the Tribunal in any way as to how this could be improved. It is a negative, one way submission. If the CMA cannot come forward with something that is able to assist FPM and the Tribunal in this connection then it can hardly complain that the wording from its perspective is not as beautiful as it would like. Now is the time for the CMA to put forward a specific proposal. It has information in its sphere, it knows perfectly well how these are constituted in terms of working groups and consideration, and if

it wants to make this proportionate it has had every opportunity.

You have my point on sub paragraph 5, which is based on paragraph 18 of the Radke statement. There is no comfort whatsoever that the adverse documentation has been disclosed and indeed every indication that it has not, because she only joined very late in the day and has simply asked herself whether there were any adverse documents. She doesn't even seem, for example, to have asked Dr Grenfell or the other individuals she mentions in relation to the other periods. So there is a manifest inadequacy there. Sub paragraph 5, on that basis, is entirely justified and proportionate.

My Lord, that is all I wish to say by way of commentary on the drafting. Those are my submissions in reply on the main disclosure application. You have my submissions on the other points --

MR JUSTICE MORGAN: Yes. We have written submissions, we have had oral submissions, we will take time to consider everything that is being said. We will not indicate our conclusion at this hearing, we will put it in writing and the decision will be made available, I hope, without delay.

Housekeeping

MR O'DONOGHUE: My Lord, there is one further point, if I may. Forgive me for interrupting.

MR JUSTICE MORGAN: No, I have finished, you continue.

MR O'DONOGHUE: Your Lordship will have picked up from our reply skeleton we have a concern in relation to Mr Mulholland and Dr Chowdhury.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: They are two individuals of which no issue has been taken in relation to their evidence. The CMA is hedging its bets on the

cross-examination of these individuals and we would like, if possible today, to take that off the table. We make the simple point that this isn't some sort of roving commission where they can wrack up costs and ask arid questions. The questions have to go to a disputed issue and, as far as we can see from the defence on the evidence presented by these individuals, there is no dispute. Both these individuals have full time jobs and if they can be released today rather than having this hanging over them, we would respectfully seek that.

Now, of course, we have the option ultimately, the nuclear option, of not calling them but we would much rather that this is done in a correct way, which is, in circumstances where there is no challenge to their evidence, there simply is no basis for cross-examination.

MR JUSTICE MORGAN: Right. Let me see what Mr Williams is able to say about those two witnesses.

Mr Williams, you have heard what has been said, what is your position?

MR WILLIAMS: The position is different as between the two witnesses. Our overall position is that we aren't in a position at this stage to indicate definitively which witnesses we want to cross-examine.

As far as Mr Mulholland is concerned, we have said we do want to cross-examine him. What Mr O'Donoghue is asking is effectively the Tribunal to direct that we shouldn't be entitled to cross-examine him, even if we want to on further consideration.

MR JUSTICE MORGAN: I think it is not quite that. I think what he is saying is he wants to know, first of all, are you able to say today you don't want to cross-examine them? Now, you are not able to say that. He might also want us to rule on whether you should be allowed to, which might involve you

explaining what you want to cross-examine them about. Are you happy to tell us what you will want to ask them about or would you prefer not to tell us what you want to cross-examine them about?

MR WILLIAMS: Well, I can put the matter at a broad level. The Tribunal will have seen the way in which the ground develops, which is that FPM says that it had a compliance policy and it complied with that policy and that ought to be a mitigating factor. We have said, well, if one looks at FPM's position in the proceedings as between the CMA and FPM, FPM doesn't in any way seem to have improved or changed its culture as regards competition law compliance because it denies that any of the things it had done are wrong, right up until the point where it put in a notice of application.

I am not saying today that we will want to cross-examine Mr Mulholland in relation to those matters but the fact that we haven't specifically taken points in our pleading about what he said in his witness statement doesn't mean that no issue arises in relation to FPM's application of the compliance policy.

The Tribunal -- it is a somewhat nuanced issue --

MR JUSTICE MORGAN: When will you be in a position to say that Mr Mulholland is released or definitely needed?

MR WILLIAMS: Well, we had in mind that it would be sensible to organise a pre-trial review for September because this case is a bit of a mix of submission and evidence and it is not completely obvious how the hearing should be structured. If one thinks of a conventional trial structure, with openings, evidence and closing, it is not clear to me -- and I haven't spoken to Mr O'Donoghue about this -- it is not clear to me how one would balance the trial, given there is a relatively small amount of evidence and quite a lot of argument. Some of the issues which might conventionally be regarded as

matters for argument relating to penalty depend on the witness evidence, so one does need to think about it.

So this does seem to us to be a matter where a pre-trial review would be useful to iron those matters out, or at least to schedule a pre-trial review so we have an opportunity to come before the Tribunal if we need it.

So we would anticipate having made a decision for a pre-trial review in early September.

The other point to make is --

MR JUSTICE MORGAN: What I could say -- not deciding anything or the three of us are not deciding anything -- we could say that, if we permit you to keep your options open on Mr Mulholland, that we could require you by 1 September, if that is a week day, to indicate whether you wish to cross-examine him?

MR WILLIAMS: Yes. I think we wouldn't have any difficulty with something along those lines, subject to the dates not being the first dates after people return from holiday and so on and so forth. We are very happy with that kind of arrangement so that one can draw a line.

MR JUSTICE MORGAN: Right. What about Dr Chowdhury?

MR WILLIAMS: Well, her evidence is in a slightly different position because we have made a case in relation to the subject matter of her evidence which is that it is irrelevant in principle. So it is fair to say that, on that basis, any cross-examination of Dr Chowdhury is likely to be very limited, if there is going to be anything at all. But we haven't seen FPM's reply and, as matters stand, we haven't made any kind of decision about that. So, given it would be sensible in our submission to have a pre-trial review, we would suggest it is a matter that is dealt with at that stage in the same way.

MR JUSTICE MORGAN: You may say it is irrelevant, and that submission might be accepted by the Tribunal, but of course if it is not accepted and her evidence is relevant, if she is not being cross-examined then the Tribunal has to accept her evidence. There might be exceptions but that is how it would work. So you may want to cross-examine on an alternative or full bag basis that, if this is relevant, she overstates things or she gets it wrong or whatever.

MR WILLIAMS: There are a number of possible approaches. I think what we can say in relation to both Mr Mulholland and Dr Chowdhury is that we don't think that any cross-examination will be so lengthy that it will affect the trial estimate.

MR JUSTICE MORGAN: Right. It is really -- the way Mr O'Donoghue puts it is he wants to know as early as possible, and today is the earliest possible so he would quite like to know today. Right.

What you are saying is that you will be in a position to say by a pre-trial review, if there is one in early September. Until then you should not be required to abandoned cross-examination of these two witnesses, right?

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Right. Well, then I will ask Mr O'Donoghue for his response.

MR O'DONOGHUE: My Lord, very briefly, this is deeply unsatisfactory. Just to give your Lordship the references. Mr Mulholland records in a largely clerical fashion the training sessions he did as a compliance officer. In the defence at paragraph 260, bundle 1111, the CMA says:

"The CMA does not dispute that those steps have been taken, and it was aware of them when it reached the Decision."

We now learn from Mr Williams that the up-shot of his cross-examination, if there is

any, is he wants to make a jury point of Mr Mulholland, "well, you did all this training but it didn't work very well", or something along those lines. Mr Mulholland will have to travel from Northern Ireland and, with the greatest respect, if it is to be faced with a jury point of that nature -- that isn't good enough -- he should --

MR JUSTICE MORGAN: I have lost you, Mr O'Donoghue.

(Pause)

You are still distorted.

Mr O'Donoghue, the last thing I heard was you said Mr Williams has a jury point and he wants to put a jury point. It is burdensome to bring Mr Mulholland over from Northern Ireland to a hearing in London. That is the last thing I heard from you.

MR O'DONOGHUE: My Lord, yes. If that is the up-shot of it, that really is not a good enough reason.

Some importance was attached to the reply but I can state categorically today, if there is a reply -- that will depend -- we will not say a single word about Dr Chowdhury or Mr Mulholland, so there is no magic in waiting for that.

We have made very clear today who we wish to cross-examine, Dr Grenfell and Mr Williams, and there is no reason why the CMA cannot do likewise today.

On Mr Mulholland, the other jury point that Mr Williams makes that he wants to put to him is that, because FPM has the temerity to bring an appeal therefore they are some sort of recalcitrant because they can't see the error of their ways and that is something to be held against them. Again, that is an even less appropriate jury point to put to Mr Mulholland. He can make that submission in any event for what it is worth, in my submission not very much, but that really is not a reason for someone to traipse from Northern Ireland to London

to hear that sort of point.

MR JUSTICE MORGAN: I am tempted to point out to you that Northern Ireland is not very far away.

MR O'DONOGHUE: My Lord, as things stand there are difficulties in --

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: The basic point that someone shouldn't come to London simply for a bit of sport is a fair one. There has to be something serious behind it and, based on their pleading, there is nothing.

In relation to Dr Chowdhury we are even more mystified. Just to give your Lordship the reference, it is paragraph 55 of the defence, bundle 1051. The CMA, and I quote:

has taken a "decision not to litigate the issue of effects on this appeal."

So her evidence goes to the question of effect. Now, that issue is not being litigated by the CMA, that is the concession of the defence. Again, she is a busy professional, if he wants to put some footling points to her for the sake of good order, that really is not a good enough reason for her to be tied up for perhaps something as long as two or three weeks in some sort of limbo wanting to know whether she will be needed or not. They should get off the fence today. The pleadings are clear, they aren't going to change on these issues and they should make an election and stick to it.

MR JUSTICE MORGAN: Well, if I give them seven days to make an election, do you accept that is fine?

MR O'DONOGHUE: My Lord, yes. We are anxious that these people can be released as soon as possible.

MR JUSTICE MORGAN: I see, right. So if they say they want to cross-examine then you are stuck with it and they will be allowed to cross-examine, you are

not asking me to shut them out from cross-examining?

MR O'DONOGHUE: Well, my Lord, in my submission if they wish to do that they need to explain briefly, by reference to the concessions in the pleadings, what is the purpose of all this. Because what we have heard today doesn't amount to a row of beans. It seems to be a bit of sport or jury points.

MR JUSTICE MORGAN: Well, the Tribunal could say that they have got to, within 14 days, make their election and, if they elect to cross-examine, they have to explain why it is appropriate they should be allowed to cross-examine. Then the Tribunal will rule on that on paper. Although, I have to say that if they put up any kind of plausible reason for cross-examining, we would be constrained to permit it. You want the evidence in, you want it in, if they have any plausible reason for cross-examination it would be a very strong thing to stop them cross-examining, I think you would have to accept that wouldn't you?

MR O'DONOGHUE: My Lord, yes, but with the considerable caveat that the pleadings must mean something. The pleadings make concessions and their feet should be held to the flames on those concessions.

MR JUSTICE MORGAN: Right. I think you have all had your submissions on that. Can I just go through anything else that I --

MR WILLIAMS: Sir, I am very sorry, I didn't want to interrupt sooner. For the first time in reply my learned friend made some quite serious criticisms of Miss Radke's statement, which I really do feel I need to respond to. I will be as brief as I can but this is a witness statement from a professional solicitor, dealing with serious matters.

Very briefly, he said Miss Radke didn't join the CMA until the date she joined it but that is rather missing the point. She is the director of litigation with responsibility for this litigation, it is in that capacity that she gave the witness

statement, Sir.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Secondly, he took you to paragraph 18 in relation to what Miss Radke is aware of but he didn't take to you paragraph 8, which deals with the basis for the statement.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: Which includes the contribution and input of others.

Thirdly, I think he said that Miss Radke doesn't deal with the period in between the opening of the case in April 2016 and the position at the beginning of the criminal case, but she does deal with that in terms in paragraph 13.

Now, I know Mr O'Donoghue criticises us for focusing on decisions. I have made my submission about that, the CMA is an organisation that functions on the basis of structured decision making but it simply isn't right to say that she doesn't deal with the intervening period. She deals directly with the intervening period.

MR JUSTICE MORGAN: Thank you. We have all those.

Let me just review the other matters to see if there is any other matter. I think there is one or two, so let me collect them.

(Pause)

MR O'DONOGHUE: My Lord, there is obviously the consent order which we have discussed from our perspective. The trial date is a tentative fixture, I don't know if that is --

MR JUSTICE MORGAN: Yes. What I am going to raise is I am going to raise whether you want a direction for a reply. I am going to raise the question of the trial and then one of you drafted some helpful -- I think Mr O'Donoghue -- some helpful pre-trial bundles et cetera, directions, so can we deal with the

reply first?

It sounded, Mr O'Donoghue, as if you do intend to serve a reply?

MR O'DONOGHUE: My Lord, to a large extent it depends on the disclosure outcomes, I apprehend. If we are doing a reply, we will mainly deal with that.

MR JUSTICE MORGAN: Right. So when we know what we are doing about disclosure, if we order something in that respect then you would wish to have permission to serve a reply so you could make points about disclosure?

MR O'DONOGHUE: Potentially.

MR JUSTICE MORGAN: Yes. Let me just pick up Mr Williams immediately on that. Mr Williams, I think a reply might help you. If they are going to shoot out your delay case based on disclosure, I think you would rather like to know that in a reply, wouldn't you?

MR WILLIAMS: Well, to respond neutrally, we had understood that if there was disclosure on delay that they would want to file a reply but that it was contingent. We had understood that.

MR JUSTICE MORGAN: Okay. So if there is a reply dealing with disclosure, contingent upon there being disclosure, you don't have a principled objection?

MR WILLIAMS: No. We understand that they are entitled to that.

MR JUSTICE MORGAN: The Tribunal could set a timetable, depending on the bulk of disclosure. Obviously we want the reply as early as possible but there will have to be a period for any disclosure, followed by a period for assimilating the disclosure and drafting a reply. Speaking for myself, I think 28 days from disclosure to reply would be as short as one could realistically make it? Would you dissent from that?

MR WILLIAMS: I think 28 days would be reasonable. I mean, one has to bear in mind that, as regards the rest of the case, they have had it for a very long

time. The period for filing a notice of application is itself two months so, in that context, four weeks does seem reasonable and it is probably necessary in order for the matter to close before the summer, given that we are already at late May.

MR JUSTICE MORGAN: Absolutely.

Mr O'Donoghue, do you want to say anything -- I dare say not -- on the question of a reply, having heard that?

MR O'DONOGHUE: Save to reiterate the point your Lordship made, which is that the volume will be a factor. I would therefore entirely agree that if there was 28 days, with liberty to apply in the event that it was unexpectedly large, that is the practical way to deal with that.

MR JUSTICE MORGAN: The Tribunal will consider that when we know what we are doing about disclosure and what it amounts to.

Now, fixing the trial, is the time estimate still five days?

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: It is, Sir. I do wonder, having heard the argument today, whether it might not be sensible to have another day in reserve. It partly depends on whether the hearing will go over a working week or whether the Tribunal would sit four days but just the fact that we have had a day's argument about these matters and the trial will obviously have to deal with everything.

MR JUSTICE MORGAN: Does the five days include judicial pre-reading?

MR WILLIAMS: No, I don't think it does.

MR JUSTICE MORGAN: Really we would need one day. I mean, one could usefully read for far longer but it must be a minimum of one day reading, would you agree?

MR WILLIAMS: A minimum, yes, Sir.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Do you think one day is just unrealistic and should be two days pre-reading?

MR WILLIAMS: I would have thought re-reading the pleadings and the evidence and skeletons by that stage -- I mean, going through that once will be probably the best part of a day, if not a day. That is before you read anything else, I would have thought.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Right. Well it may be that that will depend upon the individual members of the Tribunal as to how much they favour pre-reading and how much they favour absorption. It sounds like one to two days pre-reading, five days in an actual hearing.

In terms of hearing dates, I have collected dates from my colleagues. We can list this case, as I understand it, for the week beginning Monday, 5 October. That would also mean there could be a bit of overrun before members of the Tribunal get into difficulty with other cases.

Now, I think, speaking for myself, if we begin the hearing on Monday the 5th I will have done one to two days pre-reading before Monday the 5th. I would have to check with my colleagues but let me ask about the position of the parties. Are the parties able to agree a listing with a hearing beginning on Monday the 5th? Or can you reply to us in the next day or so with the position on that so we can fix the hearing more or less straight away?

MR WILLIAMS: Speaking for myself, it is already provisionally marked in my diary for that week, with the following week also earmarked as a possibility. So for myself it is going to work but I can't speak for everybody.

MR JUSTICE MORGAN: No. I take it your junior is in the same position as you.

Mr O'Donoghue, how are you placed for that time in October?

MR O'DONOGHUE: Well, on the basis that we effectively advocated for this date originally, we have kept it free as well.

MR JUSTICE MORGAN: Right. I am very pleased to hear that. That does make life easier.

The Tribunal will confirm this because I will need to consult with my colleagues after the hearing but unless -- I know they are able to sit from the 5th. The only concern might be will they have an opportunity to pre-read before the 5th. Let's take it as my expectation that you will be notified in the course of tomorrow that the case will be listed for one to two days pre-reading, five days in hearing, the hearing to begin 10.30 am on Monday, 5 October for five days. We won't increase the listing to six days but we will see how we go.

So that is that.

There were some pre-trial directions, Mr O'Donoghue, in paragraph 54 of your written argument. Is there any difficulty, Mr Williams, about what Mr O'Donoghue has helpfully suggested?

MR WILLIAMS: No, I think we positively agreed with those directions in our reply skeleton.

MR JUSTICE MORGAN: Right. So we can put those in an order. Thank you.

Now, any other points that you need to raise either of you?

MR O'DONOGHUE: My Lord, no.

MR WILLIAMS: I think there is an administrative question about a case number for the disqualification proceedings, which is broadly a separate proceeding, but I have just been asked to mention that, Sir, so it is addressed at some point.

MR JUSTICE MORGAN: Yes. When we make the consent order there is a blank

space in that order which will have to be filled in and it will be filled in.

Let me just confirm with my colleagues whether they have questions. Can I ask Sir Iain and Mr Doran if they want to raise anything before we conclude the hearing?

SIR IAIN: Nothing from me, thank you, Chairman.

MR DORAN: Nothing, thank you.

MR JUSTICE MORGAN: Right, so I think I can indicate to the parties that we will, in a moment, conclude the hearing.

Can I thank counsel and the solicitors for everything they have done to prepare the bundle and the submissions. At one level it is a disclosure application, which might be thought to be relatively ordinary work. My own view is that this disclosure application does raise matters that are not straightforward. We want to get our decision right and come to the right decision for the right reasons, so we will take time to express ourselves in a written decision. So thank you for everything and you will hear as I have indicated in due course.

The members of the Tribunal will now leave the hearing and we will not return.

Thank you.

(4.55 pm)

(The hearing concluded)