Neutral citation [2020] CAT 13

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1337/1/12/19

Salisbury Square House
Salisbury Square
London EC4Y 8AP

3 June 2020

Before:

THE HONOURABLE MR JUSTICE MORGAN
(Chairman)
EAMONN DORAN
SIR IAIN MCMILLAN CBE FRSE DL

Sitting as a Tribunal in England and Wales

BETWEEN:

FP McCANN LIMITED

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard remotely on 20 May 2020

RULING (DISCLOSURE)

APPEARANCES

Mr Robert O'Donoghue QC and Mr Richard Howell (instructed by Pinsent Masons LLP) appeared on behalf of the Appellant.

Mr Rob Williams QC and Mr Tristan Jones (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

A. INTRODUCTION

1. This Ruling is given in the course of an appeal by FP McCann Ltd ("FPM") against the Decision dated 23 October 2019 of the Competition and Markets Authority ("the CMA") to the effect that FPM and two other companies were liable for an infringement of competition law and whereby the CMA imposed substantial fines on FPM and the two other companies.

2. On 20 May 2020, we conducted a case management conference ("CMC") in relation to this appeal.

3. FPM was represented by Mr O'Donoghue QC and Mr Howell and the CMA was represented by Mr Williams QC and Mr Jones. We are grateful to them for their assistance.

4. The issues which were considered at the CMC included two issues as to disclosure which was sought by FPM from the CMA and an issue as to the admissibility of a witness statement which had been served by the CMA.

5. We heard detailed argument on the issues as to disclosure and as to the witness statement and at the end of the CMC we informed the parties that we would give a written Ruling on those matters, which we now do.

6. In this Ruling, it is necessary to refer to a large number of documents including documents relating to the more formal stages in the civil investigation which led to the Decision dated 23 October 2019, which is the subject of the pending appeal. Those documents are lengthy and it is not necessary for the purposes of this Ruling to set out large extracts from all of them. We will therefore attempt to summarise relevant parts of the documents for the purpose of explaining our reasons for this Ruling. However, it may be necessary to examine the same documents in greater detail at the hearing of the appeal and we emphasise that what will matter at that stage is what is stated in the documents themselves rather than our present summary which is only for the purposes of the more limited issues with which we are now dealing.

B. THE STATEMENT OF OBJECTIONS

7. On 13 December 2018, the CMA sent to FPM, and two other companies, a Statement of Objections ("SO") pursuant to section 31 of the Competition Act 1998. The CMA provisionally found that these three companies had participated together in a single continuous infringement through an agreement or a concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of certain pre-cast drainage products to customers in Great Britain. For convenience, in this Ruling, we will refer only to the parts of the SO (and the similar documents) which relate to FPM and we will not summarise the position in relation to the other two companies.

8. The SO was a lengthy document running to 207 pages. At paragraphs 2.56 to 2.71, the SO described the course of the CMA's investigation. The SO referred to a criminal investigation carried out pursuant to section 192 of the Enterprise Act 2002 and then to the civil investigation pursuant to the Competition Act 1998. The SO stated that material obtained during the criminal investigation and considered relevant to the civil investigation was placed on the civil case file. The SO set out dates and matters which were already known to FPM. The SO did not go into detail as to matters which were internal to CMA as to the conduct of these investigations.

9. Section 4 of the SO was headed "Conduct of the Parties" and was a lengthy section comprising paragraphs 4.1 to 4.292. Paragraphs 4.243 to 4.290 had the heading "Implementation of the arrangement within [the other two companies] and FPM". Paragraphs 4.270 to 4.279 concerned FPM alone.

10. Section 6 of the SO described the CMA's proposed action and referred to the subject of financial penalties. At paragraph 6.10(d), the SO referred to the subject of implementation of the agreement by FPM and the two other companies.

11. FPM was invited to make written representations to the CMA in response to the SO.

C. THE RESPONSE TO THE SO

12. On 22 February 2019, FPM did respond to the SO. The main part of the response ran to 83 pages and, in addition, FPM provided a number of annexes. In an introductory section, FPM stated that the investigation had been significantly delayed and imposed an excessive burden on its business and on certain individuals. FPM went on to explain in detail its position that there was no evidence that it had made an agreement of the kind alleged against it by the CMA. In a lengthy section, comprising paragraphs 5.1 to 5.166, FPM replied to Section 4 of the SO. In a number of places, FPM contended that there had been no implementation of the alleged agreement which supported a finding that there never had been any such agreement.

D. THE DRAFT PENALTY STATEMENT

13. On 28 June 2019, the CMA sent to FPM and the two other companies a Draft Penalty Statement ("DPS"). The DPS stated that the CMA was considering reaching an infringement decision and imposing financial penalties on all three companies. The DPS set out the six steps which the CMA proposed to follow to arrive at the appropriate penalty. At the end of step 4, the possible penalty identified by the CMA in relation to FPM was £28m. Step 5 involved the application of the statutory limit on the penalty provided by section 36(8) of the Competition Act 1998 and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 ("the 2000 Order"). Section 36(8) imposed a limit of 10% of the turnover of the undertaking and the 2000 Order specified that the relevant turnover was the applicable turnover for the business year preceding the date on which the decision of the CMA was taken or, sometimes, the year immediately preceding that business year. The CMA explained that FPM's worldwide turnover for the year ended 31 December 2018 was £254,496,765 of which 10% was £25,449,676. As this was lower than the earlier figure of £28m, the statutory limit would operate to reduce the penalty to £25,449,676.

14. FPM was invited to respond to the DPS.

E. THE RESPONSE TO THE DPS

15. On 19 July 2019, FPM did respond to the DPS. FPM made a large number of points in its response and these included references to the length of time which the CMA investigations had taken and the alleged unfairness of taking the year to 31 December 2018 as determinative when applying the statutory limit referred to above. At paragraph 1.5 of its response, FPM stated:

> "The proposed penalty on FPM is distorted by the protracted nature of the CMA's investigation. It is 77 months since the CMA commenced its criminal investigation and later its civil investigation of the alleged infringement, more than three and half times the average length of CMA investigations of this nature. Step 5 of the CMA's Penalty Guidance adjusts a penalty to prevent a maximum penalty from being exceeded. This 'statutory maximum' penalty must not exceed 10% of an undertaking's 'applicable turnover', being the worldwide turnover of the undertaking in the business year preceding the date of the CMA's decision. As FPM's turnover has grown by a factor of three in the six years since the CMA first opened its criminal investigation in 2013, this cap has grown significantly and has led to the proposal of a disproportionate penalty being imposed on FPM. FPM considers that the CMA's proposed penalty would effectively cause it to be penalised for its success as a company in the period since the CMA opened its investigation with much of this growth driven by acquisition, and therefore wholly irrelevant to the FPM business during the period 2006-2013 and completely unrelated to the alleged infringement. The CMA must take account of this in its proposed penalty; otherwise, companies that grow largely through acquisitions unrelated to an infringement would be penalised disproportionately."

16. FPM referred in other parts of the response to the DPS to the adverse effect, when calculating the appropriate penalty, of the alleged delay which occurred in the CMA's investigations; see, for example, paragraph 2.12. When considering step 4 in the DPS, dealing with proportionality, FPM set out a table showing, amongst other things, the variations in its turnover for the years 2006 to 2018. The response to the DPS dealt in detail with the proposed step 5. FPM set out its turnover for the years 2013 to 2018 and calculated 10% of that turnover for each year. This showed that the turnover for the year to 31 December 2018 was higher than any earlier year and much higher than some earlier years. At paragraphs 6.3 to 6.6, FPM was highly critical of the time taken by the CMA's investigations in this case. At paragraphs 6.7 to 6.10, FPM commented on the changes in its turnover over the years and the reasons for those changes. At paragraph 6.12, FPM stated:

> "As a result of the disproportionate impact of the cap on the calculation of the draft penalty, FPM considers that the CMA should carefully consider this factor in its proportionality assessment at step 4 and/or its 'margin of appreciation' assessment discussed further below. Otherwise the penalty is largely determined by a disproportionate factor (a cap determined by a turnover figure from a financial year five years after the end of the alleged infringement), wholly unrelated to the infringement itself."

F. THE DECISION

17. On 23 October 2019, the CMA published its Decision in relation to FPM and the two other companies. It concluded that the three companies had infringed the Chapter I prohibition (of the Competition Act 1998) and Article 101 (of the Treaty on the Functioning of the European Union) by participating together in a single continuous infringement through an agreement or a concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of certain pre-cast concrete drainage products to customers in Great Britain.

18. The Decision summarised the CMA investigations in the same way as they had been described in the SO. Section 4 of the Decision (comprising paragraphs 4.1 to 4.328) was headed "Conduct of the Parties". Section 4 of the Decision was differently laid out from Section 4 of the SO.

19. Section 6 of the Decision dealt with the CMA's actions and financial penalties. The Decision approached the issue of penalty by following the same six steps as in the DPS. At the end of step 4, the Decision identified a possible penalty of £28m. In the course of dealing with step 4, the CMA referred to the submissions made by FPM in its response to the DPS as to the alleged delay in the CMA's investigations. Paragraphs 6.77 to 6.79 of the Decision stated:

> "6.77 FPM has made representations that the CMA's assessment of proportionality by reference to its 2018 accounts means that FPM has been '*disproportionately penalised by the length of the CMA's investigation'*, given that FPM's turnover has grown significantly in the period since 2013.
>
> 6.78 As regards the length of the CMA's investigation, the CMA has proceeded as expeditiously as possible, in circumstances where both the criminal and civil investigations were large and complex. [*footnote 1136*]
>
> 6.79 In line with the Penalty Guidance, the penalty should ensure that the undertaking is deterred from breaching competition law in the future. The

> CMA considers that it is appropriate to assess proportionality and deterrence by reference to FPM's most recently available audited accounts because these accounts provide the most accurate reflection of FPM's size and financial position at the time the penalty is being imposed."

20. Paragraphs 6.77 to 6.79 contained lengthy footnotes which we have not set out above. However, it is relevant to refer to footnote 1136, which was a footnote to paragraph 6.78. That footnote stated:

> "1136 The CMA notes that it has been established by the European Courts that, although there is a principle that administrative procedures should be conducted within a reasonable time, a decision can only be challenged on the 'reasonable time' principle if the parties' rights of defence have been infringed and in any event cannot lead to a reduction of the fine imposed (see: Judgment of 26 January 2017, *Villeroy & Boch SAS v Commission*, Case C-644/13 P, EU:C:2017:59, paragraph 79 and Judgment of 12 July 2018, *The Goldman Sachs Group v Commission*, T-419/14, EU:T:2018:445, paragraph 261)."

21. As to step 5 of the assessment of the penalty, the CMA followed the same course as had been taken in the DPS and applied a statutory limit of 10% of the turnover of FPM in the year to 31 December 2018 resulting in a penalty of £25,449,676.

G. THE NOTICE OF APPEAL

22. FPM has appealed the Decision to the Tribunal. The Notice of Appeal is a lengthy document running to 55 pages. There are seven main grounds of appeal but some of these grounds are sub-divided so as to put forward further grounds. At the hearing of FPM's application for disclosure, reference was made to Grounds 1(a) and (b) and Grounds 5(a) and (b) but it may also be necessary to refer to Ground 6(b). It is appropriate to set out FPM's own summary of its grounds of appeal, as follows:

> "(1) As concerns the CMA's findings on the implementation of the alleged infringement: (a) The CMA erred in law in failing to give adequate reasons. (b) To the extent that the CMA found FPM implemented the alleged infringement, it erred in fact.
>
> (2) The decision to impose the maximum penalty in this case was an unlawful breach of the CMA's statutory duty properly to assess the penalty against the statutory maximum in each case. The CMA erred in law: (a) by applying its purported statutory guidance as to the appropriate amount of a penalty dated 18 April 2018 ("Guidance"). The Guidance is ultra vires s.38 of [the Competition Act] 1998, void and of no effect in that it abrogates the CMA's statutory duty properly to consider the level of a penalty against the statutory

maximum in each case; and/or (b) because the Decision was inconsistent with the aforesaid statutory duty in this case.

(3) As concerns the implementation and/or market effects of the alleged infringement: (a) The CMA erred in law in treating a lack of implementation and/or market effects as irrelevant to penalty. These were substantial factors that justified a lower fine, since an infringement which is in fact implemented is necessarily more serious than one which is not (or is to a lesser extent). (b) The CMA erred in fact: (i) to the extent that it found that the alleged infringement was implemented by FPM and/or (ii) in failing to accept FPM's representations that the alleged infringement did not have an effect on the market for the products. (c) In the premises, the CMA erred in law and/or in the exercise of its discretion in selecting the maximum starting point of 30% of FPM's relevant turnover at step 1 of the Guidance.

(4) The CMA erred in law and/or in the exercise of its discretion in the application of steps 1 & 2 of the Guidance by failing to give adequate weight to FPM's real commercial situation during the Relevant Period.

(5) The CMA failed to make adequate allowance for factors mitigating the penalty: (a) As concerns the length of the CMA's investigations, the CMA (i) erred in law in deciding that its own unreasonable delay during an investigation was incapable of constituting a mitigating factor; and (ii) erred in fact in deciding the length of its investigations was reasonable. (b) The CMA erred in fact and/or in law and/or in the exercise of its discretion in making an allowance of only 5% for FPM's cooperation during its investigations. (c) The CMA erred in fact and/or in the exercise of its discretion in making no allowance for FPM's competition law compliance programme.

(6) The CMA erred in law in assessing the proportionality of the penalty: (a) In providing inadequate reasons; and/or (b) By failing to take into account the fact that a large part of FPM's turnover in the business year preceding the Decision was the result of acquisitions after the end of the Relevant Period. Further and/or alternatively, the CMA contravened the principle of equal treatment.

(7) The CMA erred in law in failing to reduce the amount of the penalty it had proposed despite withdrawing its provisional case as concerns (a) the duration of the second tenet; (b) the implementation of the alleged infringement; and/or (c) the need for the general deterrence in the construction industry."

23. In relation to Ground 1, FPM's Notice of Appeal refers to the fact that Section 4 of the Decision is different from Section 4 of the SO, particularly in relation to the subject of implementation of the agreement restrictive of competition. At paragraph 36 of the Notice of Appeal, FPM states that it does challenge any findings made by the CMA as to implementation and goes on to say that FPM challenges "liability". This gave rise to argument as to how a challenge to findings (if any) as to implementation could be a challenge to liability in a case where the infringement which has been found to have occurred was an infringement by object and not an infringement by effect. Whilst we had written

submissions on that point from the parties, we are not asked to give any ruling on it at this stage. Paragraph 36 of the Notice of Appeal then proceeded to particularise FPM's case as to non-implementation of the infringing agreement.

24. Ground 1(a) of the Notice of Appeal asserted that the Decision did not give adequate reasons on implementation or otherwise of the infringing agreement. FPM contended that, in this context, the Decision should be read in the light of the SO and that the Decision did not itself explain why it was expressed differently from the SO.

25. In relation to Ground 1(b), the Notice of Appeal gave particulars of FPM's case that it had not implemented the infringing agreement.

26. As to Ground 5(a) which asserts that the alleged delay in the CMA's investigations could be a mitigating factor, there was discussion at the hearing of the disclosure application as to precisely how it was said that the alleged delay could be a mitigating factor. We will not comment on what is encompassed within Ground 5 (a) but we note that one point which is made is that the alleged delay was relevant because the statutory limit on the penalty was based on the turnover in the business year ending before the date of the Decision so that the date of the Decision directly affected the choice of the relevant business year.

27. Ground 5(b) is important for the purposes of the disclosure application because FPM asserts that the CMA erred in fact in holding that the length of its investigation was reasonable. The ground of appeal specifically refers to paragraph 6.78 of the Decision. The Notice of Appeal contends that given the absence of a reasoned explanation by the CMA of the delay, the length of the investigations must be regarded as excessive.

28. Although not highlighted at the hearing of the disclosure application, we note that Ground 6(b) refers to the statutory limit of 10% of the turnover in the business year before the Decision and refers to the alleged delay by the CMA in the conduct of its investigations.

H. THE DEFENCE

29. The CMA has served a Defence to the appeal. The Defence extends to 100 pages. The Defence seeks to analyse FPM's case in the Notice of Appeal as to implementation and identifies the relevant findings in the Decision.

30. As to Ground 1(a), the alleged inadequacy of reasons, it is contended that the reasons in the Decision were perfectly adequate and that conclusion was not affected by the fact that the reasoning in the Decision was not the same as the reasoning in the SO as regards implementation. It was also said that the CMA was not obliged to explain the differences between the SO and the Decision. Nonetheless, the CMA did carry out a detailed analysis of the differences between the two documents. That analysis put forward reasons for the differences. At paragraph 68 of the Defence, it was stated that these points were apparent on a careful reading of the Decision.

31. In relation to Ground 5(a), the CMA submitted that this ground was hypothetical as there had not been unreasonable delay on the part of the CMA, relying on its answer in relation to Ground 5(b). In the alternative, if Ground 5(a) were not hypothetical, it was said that delay by the CMA could not amount to "mitigation" of the seriousness of the infringement. Insofar as Ground 5(a) related to the use of the turnover in the business year before the Decision, the choice of that year was made by the 2000 Order and the business year before the Decision was correctly chosen in view of the purpose of the provision dealing with deterrence and proportionality.

32. In relation to Ground 5(b), the Defence relied on the witness statement of Dr Grenfell, the Executive Director of Enforcement at the CMA, which was served with the Defence.

33. In his witness statement, Dr Grenfell addressed questions as to the time taken by the CMA (and its predecessor the Office of Fair Trading, the "OFT") in relation to the criminal investigation and the civil investigation in this case. Dr Grenfell referred to some brief facts as to the criminal investigation and expressed the view that it was reasonable to continue that investigation until

June 2017. Dr Grenfell then dealt with the civil investigation in 2½ pages. He exhibited certain documents. The first of these was a paper (partially redacted) dated 9 March 2016 recommending the opening of the civil investigation even before the conclusion of the criminal investigation. Later documents showed that, on 14 March 2016, this recommendation was accepted by the relevant Group within the CMA and Dr Grenfell himself agreed with the recommendation whereupon the civil investigation was opened. In his witness statement, Dr Grenfell commented that there were challenges in running the criminal and civil investigations simultaneously and that, shortly after opening the civil investigation, it was seen that the civil investigation would need to wait until the criminal investigation had concluded. Dr Grenfell referred more than once to "difficulties" in conducting simultaneous investigations but he did not give any detail as to what these "difficulties" were.

34. Reverting to the Defence in relation to Ground 5(b), paragraph 230 set out the timeline for the civil investigation which Dr Grenfell confirmed was accurate in his witness statement. It seems that although the civil investigation was opened in April 2016, nothing was done in relation to it until the end of the criminal investigation in June 2017. Thereafter, the Defence gave a little, but not very much, information as to the course of the civil investigation. The Defence stated that the CMA had now amply explained the passage of time in relation to the investigation. At paragraph 236, the Defence referred to suggested reasons why a civil case should be deferred pending the completion of a criminal case.

I. THE APPLICATIONS FOR DISCLOSURE

35. In preparation for the CMC in this case, the solicitors for FPM indicated that FPM wished to apply at the CMC for an order that the CMA disclose certain documents in relation to the issues raised in relation to Grounds 1(a) and 5(b) of its grounds of appeal. FPM did not issue a formal application for disclosure but provided a draft of the order which it would seek. By this draft order, FPM sought disclosure by the CMA of all documents relevant to:

    (1) The CMA's decisions to open its criminal investigation and its civil investigation;

(2) The progress and timing of the criminal and civil investigations, including decisions to delay, suspend or otherwise interrupt the same; and

(3) The change in the structure and content of the Decision as concerns the alleged implementation of the alleged infringement found therein by the CMA compared with the provisional findings of the CMA in the SO.

36. At the hearing of the CMC, Mr O'Donoghue QC on behalf of FPM put forward a revised draft order (in relation to the issue under Ground 5(b) but not Ground 1(a)) which referred to disclosure of all documents:

(1) constituting or reflecting a decision to open the criminal investigation;

(2) considering whether to open a civil investigation into the conduct under investigation in the criminal investigation between August 2012 and 9 March 2016;

(3) considering why no progress was made in the civil investigation 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, any equivalent body or its members; and

(5) constituting "known adverse documents" within the meaning of the Civil Procedure Rules ("CPR") Practice Direction 51U ("PD 51U") in relation to the CMA's case in response to Ground 5(b) of FPM's appeal.

37. The parties have provided us with detailed written submissions in relation to the CMC and, in particular, in relation to the issue of disclosure. The parties have also provided us with further written submissions by way of reply. In response to something which was said in FPM's submissions, the CMA served a witness statement from Ms Radke, a Director of Litigation at the CMA. Ms Radke made the following points:

(1) the CMA had disclosed the decision-making documents relating to the opening of the civil investigation in April 2016;

(2) the CMA had not made a decision to open a civil investigation at the time the criminal investigation was opened;

(3) between the opening of the criminal investigation and the opening of the civil investigation, there had not been a decision by the CMA to open the civil investigation;

(4) after the civil investigation was opened, there was no formal decision to "pause" the civil investigation pending the completion of the criminal case and therefore there were no documents relating to any such decision;

(5) the CMA had not carried out a search in relation to the criminal case save for documents relating to the opening of the criminal investigation to the extent that such documents might address a decision to open a civil investigation;

(6) the CMA had not completed a full audit of the case file on the day-to-day conduct of the criminal and civil investigations as such a review was not necessary or proportionate as the scale of the task would be very substantial;

(7) a large proportion of the material at issue would raise questions of legal privilege which would need to be considered on a document-by-document basis;

(8) she was not aware of any documents which were contrary to CMA's defence in relation to Ground 5(b).

J. THE POINTS WHICH NEED TO BE CONSIDERED

38. As explained earlier, FPM seeks disclosure of documents in relation to the issues arising under Ground 1(a) and Ground 5(b). The principal application for disclosure related to Ground 5(b). However, FPM also submit that if it does not obtain the disclosure which it seeks, it will object to the CMA relying on the evidence of Dr Grenfell.

39. We will deal with the application in relation to Ground 1(a) first as it is more straightforward and can be dealt with succinctly. We will then deal with the issue as to the evidence of Dr Grenfell as we consider it is more logical to deal with that before we consider the application for disclosure in relation to Ground 5(b). We will then deal with that application for disclosure in relation to Ground 5(b).

(1) Disclosure in relation to Ground 1(a)

40. In support of its application for disclosure in this respect, FPM draws attention to the differences between Section 4 of the SO and Section 4 of the Decision and the different things which they say on the subject of implementation of the infringing agreement. FPM then asserts that the CMA gives evidence in its Defence as to the reasons for these differences. FPM submits that the CMA cannot have it both ways by relying on this evidence and yet withholding the documents of which disclosure is sought.

41. In response to this application, the CMA draws attention to the fact that Ground 1(a) asserts that the Decision does not give adequate reasons for its findings as to implementation of the infringing agreement. The CMA submits that the explanation for the differences between the SO and the Decision in relation to implementation are simply irrelevant to the issue whether the Decision gave adequate reasons for its conclusions. The CMA also said that the explanations which it offered in the Defence were based on an objective reading of the documents themselves and were not evidence as to those matters.

42. We conclude that FPM is not entitled to the disclosure which it seeks in relation to Ground 1(a). That ground of appeal asserts that the Decision did not give adequate reasons for its findings in relation to implementation of the infringing agreement. Whether the Decision did or did not give adequate reasons will be determined by considering what the Decision stated. It may not be necessary or appropriate to consider the different terms of the SO when determining this issue. If FPM were to contend that it was necessary to consider the SO in order to understand what the issues were, with which the Decision had to deal, then it might be appropriate to consider the SO for that limited purpose. At this stage, we do not know if that submission will be made and it would not be right to speculate as to whether we would be prepared to consider the SO in order to identify the issues with which the Decision had to deal. But even if we did consider the SO for that purpose, the adequacy of the reasons in the Decision will not turn on the CMA's internal thinking as to the drafting of the SO and the Decision.

43. It is true that the CMA in its Defence did plead various explanations for the differences between the SO and the Decision. We consider that those explanations were unnecessary. In any event, the explanations are properly to be regarded as submissions made on the basis of a reading of the SO and the Decision. Contrary to FPM's case, those explanations are not evidence but are assertions in a pleading. The CMA has not served a witness statement for the purpose of giving evidence as to the reasons for the differences between the SO and the Decision. If the CMA were to apply to tender evidence as to the reasons for the differences, we would not permit it as such evidence would plainly be inadmissible. Quite simply, the issue raised by Ground 1(a) does not involve the Tribunal making findings of fact as to the reasons for the differences. If FPM is right that the Decision does not give adequate reasons in relation to some of its findings, then the CMA cannot avoid that result by giving evidence about the drafting of the Decision or giving evidence about its internal thinking which was not revealed in the Decision.

44. Accordingly, we consider that the disclosure sought by FPM is irrelevant to the issue raised by Ground 1(a) and we will not order such disclosure.

(2) Dr Grenfell's evidence

45. FPM's position has been that, in view of the fact that the CMA has served a witness statement from Dr Grenfell, FPM ought to have disclosure in relation to Ground 5(b). FPM have also said that if it does not obtain disclosure in relation to Ground 5(b), then it objects to the CMA being able to rely on the evidence of Dr Grenfell. It also emerged at the hearing of the CMC, that if the CMA was not able to rely on the evidence of Dr Grenfell, then FPM would not seek disclosure in relation to Ground 5(b). In view of the nature of the objection to the evidence of Dr Grenfell, to which we refer below, it seems to us to be more logical to consider that objection first and then to consider the implications of our decision on that point in relation to what had been said about disclosure in relation to Ground 5(b).

46. In objecting to the CMA relying on the witness statement of Dr Grenfell, FPM relied on Rule 21 of the Competition Appeal Tribunal Rules 2015 ("the 2015 Rules") and on the 2015 Competition Appeal Tribunal Guide to Proceedings at paragraphs 7.71 to 7.78, where Rule 21 is considered. FPM also relied on *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 31 ("*Tesco*") at [124] which considered a similar but not identical rule in the Competition Appeal Tribunal Rules 2003 ("the 2003 Rules") and on *Ping Europe Limited v Competition and Markets Authority* [2018] CAT 8 ("*Ping*"), which considered the earlier decision in *Tesco* and Rule 21 of the 2015 Rules.

47. FPM submitted, on the basis of what was said in *Tesco* at [124](d)-(f) that there was a rebuttable presumption against the admission of this evidence. It was further submitted that:

(1) the evidence was available to the CMA at the time of the Decision and could have been made available to FPM;

(2) it was the function of the Tribunal to review the Decision on the basis on which it was taken and not on the embellished basis set out in the Defence relying on the new evidence;

(3) the CMA had not given proper reasons for rebutting the presumption against the admission of the evidence;

(4) in particular, the CMA should not be permitted to rely on new evidence when it resisted disclosure in relation to Ground 5(b).

48. In its response to these submissions and in support of the admission of the evidence of Dr Grenfell, the CMA submitted:

(1) although FPM had alleged in its response to the DPS that there had been delay on the part of the CMA in its investigation, the Notice of Appeal has raised a new legal proposition which is that the length of the investigations should be regarded as excessive in the absence of a reasoned explanation from the CMA;

(2) further, FPM's complaint in its Notice of Appeal about the alleged delay is more detailed than what it said in its response to the DPS;

(3) the CMA has responded to the new legal proposition and to the further detailed complaints in its Defence and in support of its Defence it wishes to adduce the evidence of Dr Grenfell;

(4) in *Tesco* at [124](f), it was recognised that the CMA ought to be permitted to adduce new evidence which is to rebut a new allegation by the appellant or to answer new evidence from the appellant; that is what the CMA seeks to do in this case;

(5) this is not a case where the CMA is seeking to adduce new evidence to support an allegation which it is making against FPM but is responsive evidence in answer to an allegation by FPM against it.

49. Rule 21(1) and (2) of the 2015 Rules provides:

"**21.— Evidence**

(1) The Tribunal may give directions as to—

(a) the provision by the parties of statements of agreed matters;

(b) the issues on which it requires evidence, and the admission or exclusion from the proceedings of particular evidence;

(c) the nature of the evidence which it requires to decide those issues;

(d) whether the parties are permitted to provide expert evidence;

(e) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally; and

(f) the way in which evidence is to be placed before the Tribunal.

(2) In deciding whether to admit or exclude evidence, the Tribunal shall have regard to whether it would be just and proportionate to admit or exclude the evidence, including by reference to the following factors—

(a) the statutory provision under which the appeal is brought and the applicable standard of review being applied by the Tribunal;

(b) whether or not the substance of the evidence was available to the respondent before the disputed decision was taken;

(c) where the substance of the evidence was not available to the respondent before the disputed decision was taken, the reason why the party seeking to adduce the evidence had not made it available to the respondent at that time;

(d) the prejudice that may be suffered by one or more parties if the evidence is admitted or excluded;

(e) whether the evidence is necessary for the Tribunal to determine the case.

…"

50. We make the following comments on the application of Rule 21(2) of the 2015 Rules in this case:

(1) pursuant to paragraph 3 of Schedule 8 to the Competition Act 1998, the Tribunal must determine FPM's appeal on the merits;

(2) in relation to FPM's appeal against the penalty, provided that the CMA has remained within its margin of appreciation, the Tribunal's primary task is to assess the justice of the overall penalty;

(3) because the evidence in question concerned the internal activities of the CMA, the substance of that evidence was available to the CMA when it took the decision within Rule 21(2)(b); it may be that this rule is directed

to a case where it is the appellant who wishes to adduce the evidence rather than the respondent (as in the present case) but we need not decide that and we have simply applied the rule literally;

(4) the factor in Rule 21(2)(c) does not apply as the substance of the evidence was available to the CMA; in any case, the rule appears to apply to a case where someone other than the respondent is seeking to adduce the evidence;

(5) we will consider the factors in Rule 21(2)(d) and (e) later when we have considered other submissions;

(6) the ultimate question posed by Rule 21(2) is whether it would be just and proportionate to admit or exclude the evidence in question.

51. Both FPM and the CMA invited us to consider the decision of the Tribunal in *Tesco* at [124] which was in these terms:

> "124. The following points emerge from the Tribunal's case law as regards adducing new evidence:
>
> (a) an appellant may challenge a decision on any ground it so wishes and may do so on the basis of evidence that was not available to the OFT when it took the decision: *Case 1001/1/1/01 Napp Pharmaceutical Holdings Limited v Director General of Fair Trading [2002] CAT 1* , paragraph 117;
>
> (b) the OFT should normally be prepared to defend an impugned decision on the basis of the material before it when it took that decision: *Napp [2001] CAT 3* , paragraph 77;
>
> (c) it is not the task of an appellant, nor of the Tribunal, to supplement the evidence relied on by the OFT: *Case 1121/1/1/09 Durkan Holdings Ltd & Ors v Office of Fair Trading [2011] CAT 6* , paragraph 110;
>
> (d) there is a rebuttable presumption against permitting the OFT to advance a new case or to rely on new evidence that could properly have been made available, or relied upon, during the investigation: *Napp [2001] CAT 3* , paragraph 77;
>
> (e) the above presumption is justified by the fact that an appeal is brought against the decision as taken and the Tribunal's task is to review, on the merits, that decision, not a subsequently enhanced or re-cast version of the decision; it also ensures that the procedural requirements of the administrative procedure are respected: *Napp [2001] CAT 3*, paragraph 77;

> (f) the presumption is rebuttable to account for circumstances where, for example, an appellant makes a new allegation or produces new evidence, such that the OFT is permitted to adduce rebuttal evidence on appeal (as opposed to adducing evidence that was necessary to prove the infringement found in a decision); and
>
> (g) the Tribunal must be vigilant to ensure the fairness of the appeal process. The procedures of this Tribunal are designed to deal with cases justly, in close harmony with the overriding objective in civil litigation under rule 1.1 of the Civil Procedure Rules 1998."

52. At the time of the decision in *Tesco*, the relevant rule was the old Rule 22 of the Competition Appeal Tribunal Rules 2003 and the old Rule 22(2) was not the same as what is now Rule 21(2)(b) and (c) of the 2015 Rules. While the different wording of the rules can make a difference, we do not think that it makes a difference in this case. We were also referred to the more recent decision of the Tribunal in *Ping* which did consider Rule 21 of the 2015 Rules. For present purposes it is not necessary to refer further to that decision.

53. The decision in *Tesco* summarises the law as to when an appellant should be allowed to adduce new evidence which it had not put forward prior to the decision under appeal. The case also discussed the approach which should be taken to an application by the CMA to adduce new evidence which it did not have, or did not rely upon, when it made its decision. There is a rebuttable presumption against permitting the CMA to advance a new case or to rely on new evidence that could properly have been made available or relied upon at the time of the decision. The reason for this approach is that the appeal to the Tribunal is for the purpose of enabling the Tribunal to review, on the merits, the decision under appeal and is not for the purpose of allowing the CMA to make an enhanced or re-cast decision.

54. In considering our decision on this point, we take account of the following:

(1) the allegation that the CMA had been guilty of unreasonable delay, in a way which prejudiced FPM, was clearly raised by FPM in its response to the DPS;

(2) in its response to the DPS, FPM pointed to the overall length of the investigations and stated that the time taken in this case was significantly

more than the average length and longer than other cases to which it referred;

(3) FPM did not make specific criticisms of individual steps in the criminal and civil investigations but it is likely that FPM would not have had enough information to enable it to do so;

(4) the evidence as to the internal activities of the CMA and the explanation for the time taken by the investigations was available to the CMA;

(5) in the Decision, the CMA appeared to say that the question of delay was not material but went on to make the finding that it had proceeded as expeditiously as possible and that the criminal and civil investigations were long and complex;

(6) in the Decision, the CMA could have set out an explanation for the time taken by the investigations and could have included some or all of what is now stated in Dr Grenfell's witness statement but they did not do so;

(7) it is to be inferred that the CMA did not set out an explanation for the time taken because FPM's response to the DPS did not refer to matters of detail (as explained above) and because the CMA did not wish to discuss what it regarded as internal matters;

(8) in its appeal, FPM has raised a specific ground contending that the CMA erred in fact in concluding that it had proceeded as expeditiously as possible and has made a number of general, but also detailed, complaints about the time which was taken;

(9) in its appeal, FPM has also contended that the time taken should be held to be excessive in the absence of a reasoned explanation for the time taken;

(10) the evidence in question is part of the CMA's attempt to provide a reasoned explanation for the time taken.

55. Reverting to the factors set out in Rule 21(2)(d) and (e) of the 2015 Rules, we consider that there would be prejudice to the CMA if it were prevented from providing an explanation for the time taken and we also consider that the evidence in question is necessary for us to decide, on the merits, the issue of fact as to whether the time taken by the investigations was unreasonably long. Of course, if we excluded this evidence and if FPM persuaded us that, in the absence of the evidence, we should conclude that the time taken was excessive, FPM would then be better off. However, Rule 21(2) requires us to have regard to whether it would be just and proportionate to admit or exclude the evidence and that is the ultimate question. In order to answer that question, we need to balance up the considerations referred to earlier and they point in different directions. Our conclusion is that the balancing exercise comes down clearly in favour of the conclusion that the just and proportionate thing to do is to admit the evidence in question. Applying the approach in *Tesco* at [124], we conclude that, if and insofar as there is a presumption against the CMA being permitted to give evidence and reasons which are an elaboration of its finding in paragraph 6.78 of the Decision, then the CMA have rebutted any such presumption. When we come to consider the application for disclosure in relation to Ground 5(b), we will wish to consider what further steps should be taken to enable FPM adequately to deal with that evidence at the hearing of the appeal. We also comment that it was not FPM's primary case that we should exclude this evidence as their position was that we should admit the evidence and also order disclosure in relation to the issue of delay.

(3) Disclosure in relation to Ground 5(b)

56. We will take the scope of this application for disclosure from the revised order put forward by FPM in the course of the hearing in place of the earlier draft order.

57. FPM accept that it does not have an automatic right to disclosure of these documents. It also accepts the disclosure will only be ordered in this case where the Tribunal is persuaded that such disclosure is "*necessary, relevant and proportionate to determine the issues*"; this formulation is taken from *Claymore*

Dairies Limited v Office of Fair Trading [2004] CAT 16 at [113] and is not in dispute.

58. In support of its application, FPM submitted:

(1) the issue raised by Ground 5(b) is whether the CMA erred in fact in holding that it had proceeded as expeditiously as possible;

(2) its appeal on this point is a full merits appeal;

(3) at this stage in the argument, the application is made on the basis that the CMA seeks to defend that appeal in reliance on the points raised in their Defence and in reliance on the witness statement of Dr Grenfell;

(4) it is not fair to expect FPM to cross-examine Dr Grenfell without the disclosure which is sought;

(5) the documents exhibited by Dr Grenfell have been selective and inadequate;

(6) there were no documents relating to the criminal investigation between March 2013 and April 2016 even though FPM pleaded that the time taken in that period was unreasonable;

(7) there were no documents showing whether the CMA considered opening a civil investigation before April 2016;

(8) there were no documents showing why the civil investigation was suspended in 2016 until June 2017;

(9) there were no documents as to the civil investigation after June 2017;

(10) although the CMA have said that it was highly likely that many of the documents which are sought would be privileged, the application was for disclosure not inspection; the CMA should not be allowed to make a blanket claim to privilege;

(11) litigation privilege cannot be claimed throughout the civil investigation as it is an administrative proceeding: see *Tesco Stores Ltd v OFT* [2012] CAT 6 at [46]; the position may be different when the CMA issued the SO;

(12) insofar as the documents which are sought touch upon the criminal investigation, FPM only seeks the production of documents created for the dominant purpose of the civil investigation and those documents were not created for the sole or dominant purpose of the criminal investigation and would not attract litigation privilege;

(13) there may have been a waiver of privilege as a result of the disclosure of Dr Grenfell's witness statement and its exhibits;

(14) there has been no claim to public interest immunity;

(15) the fact that the documents sought might be sensitive was not an answer to an application for disclosure;

(16) in its reply submissions, FPM accepted that the starting point for the Tribunal would be to consider the main stages of the investigation and the time which they took both individually and overall and that the Tribunal would not carry out an audit of every step of the investigation; however, it was also said that consideration of the detail of particular steps might be required.

59. In response to this application, the CMA submitted:

(1) the issue in relation to Ground 5(b) is whether the CMA have provided a reasoned explanation for the time taken in the investigations;

(2) FPM can cross-examine Dr Grenfell;

(3) a full explanation of the time taken in the investigations would involve sensitive internal matters and the CMA would prefer to maintain confidentiality in respect of them;

(4) if the explanation provided by the CMA is insufficient then it is open to the Tribunal to hold that it has not discharged the burden of explaining the time taken and that will operate to FPM's advantage;

(5) there are strong public interest reasons why the CMA should not be ordered to disclose sensitive internal matters; if the CMA were required to disclose these matters, this would have a chilling effect on its investigations and discussions to the detriment of effective competition law enforcement;

(6) the application for disclosure in relation to internal matters is highly unusual;

(7) documents relating to the opening of the criminal investigation are not relevant and it would be onerous to disclose them;

(8) documents relating to the criminal investigation would be highly likely to attract legal privilege and it would be onerous to disclose them;

(9) the CMA was not advancing a blanket claim to privilege; each document would need to be considered individually in relation to a possible claim to privilege; the process would be costly; the result would be partial;

(10) it would not be appropriate to carry out an audit of each step in the investigations;

(11) the CMA has already provided the documents as to the formal decision to open the civil investigation; no more disclosure is required;

(12) as to disclosure in relation to the progress of the civil investigation, Dr Grenfell has provided an explanation of the time taken;

60. The CMA submitted that the issue raised by Ground 5(b) was whether it had provided a reasoned explanation for the time taken in the investigations. That issue was to be determined by examining the explanation which it had provided. It was not relevant to that issue to examine the underlying facts as to whether the time taken had been unreasonably long and, for that reason, the documents sought were not relevant to the issue raised by the appeal.

61. We are unable to accept this submission from the CMA as to the definition of the issue raised by Ground 5(b). The issue raised by the appeal is, quite clearly, whether the CMA was guilty of unreasonable delay in carrying out their investigations. That issue will be considered by the Tribunal on the merits. Any documents which go to the resolution of that issue are *prima facie* relevant. Of course, when the Tribunal considers that issue, it will consider whatever evidence is before it and what explanation for the delay has been put forward and proven but that does not change the nature of the issue to be determined which is as we have described.

62. Having held that documents relating to the alleged delay in the investigations are potentially relevant to the issue raised by Ground 5(b), the real issue is whether disclosure of all or some of those documents would be proportionate and necessary to enable the Tribunal to deal with the appeal justly and at proportionate cost in accordance with the governing principles set out in Rule 4 of the 2015 Rules.

63. As a preliminary comment, in a case where the issue is whether a party has delayed unreasonably in the conduct of litigation, or a similar process, there is no single right answer as to how detailed the investigation of that issue ought to be. The appropriate answer very much depends on the nature of the dispute in which such an allegation is made. For example, if a client sued a solicitor for damages for professional negligence and the main allegation was unreasonable delay by the solicitor in the conduct of litigation, then it would be likely that the trial of the claim would involve a detailed audit of the solicitor's conduct. Conversely, if, following a trial in court, a successful claimant sought an award of discretionary interest on the debt or damages recovered and the defendant submitted that the claimant should not recover such interest for the full period

of the litigation because the claimant had been guilty of unreasonable delay in the conduct of the litigation, then the court would normally decide that issue by reference to the facts known to both parties as to the conduct of the litigation. Obviously, the procedure adopted would be influenced by a likely claim to legal professional privilege in the second case, which would not be available in the first case, but the procedure chosen would also reflect what was appropriate to deal with the matter fairly but yet in a proportionate way.

64. The criminal investigation in this case was opened not later than March 2013. FPM wish to say that the criminal investigation must have been opened earlier, at some point in 2012. On FPM's case the criminal and civil investigations together lasted some 7 years. No doubt, the CMA do have case files for these investigations and, unless some of the documents are no longer available, these will be extensive case files covering the period of 7 years.

65. If one were to carry out a detailed audit of the course of the investigations over 7 years and to have disclosure of documents for that purpose, the volume of documents would be likely to be voluminous. As regards the criminal investigation, it seems highly likely that any document of any real relevance would be the subject of litigation privilege; a subject to which we refer further below. The only documents relating to the criminal investigation which were not subject to litigation privilege would be those which were not brought into existence for the dominant purpose of the criminal investigation but these documents would include many documents which were of lesser relevance. Some documents in relation to the civil investigation would be the subject of litigation privilege (in the later stages) and others might be the subject of legal advice privilege. In order to give disclosure, the CMA would naturally wish to consider whether to claim privilege from inspection. For that purpose, the CMA would have to examine individual documents. Although the CMA did not raise this point and although we do not base our decision on it, we draw attention to the possible need for the CMA to redact references to anonymise personal details or to approach third parties for consent to the provision of documents to FPM. The process of disclosure would be protracted, onerous and costly. If there were disclosure in relation to the case files for 7 years, FPM would receive a considerable number of documents. It would be a major exercise for FPM to

have to examine them. That would involve FPM in considerable cost. A hearing at which there was a detailed examination of the disclosed documents could be very lengthy and costly.

66. Happily, both sides recognise that it would not be appropriate to have the scale of disclosure which might be appropriate if there were to be a detailed audit of the investigations over a period of 7 years. There seemed therefore to be an acceptance that it would not be appropriate for the Tribunal to order disclosure of all of the case files for that period. The issue then becomes: is it proportionate and necessary for the Tribunal to order disclosure of only some of the documents and, if so, which ones?

67. In its revised draft order relating to disclosure, FPM seeks disclosure of documents constituting or reflecting a decision to open its investigation under section 192 of the Enterprise Act 2002. At the hearing, FPM explained that it wanted to know, in particular, when that investigation was opened. As to that, FPM already has some information. It knows that the CMA's predecessor, the OFT, covertly recorded meetings of the parties to the infringing agreement on 29 August 2012, 27 November 2012 and 28 January 2013 and that on 12 March 2013 the OFT made a number of arrests of persons, including representatives of FPM. It is likely that the criminal investigation had been opened before 12 March 2013. FPM would like to establish an earlier date for the opening of the criminal investigation so as to identify a longer period for the duration of the investigations in this case. In response to this request for disclosure, the CMA has agreed to provide to FPM the date which it considers was the opening of the criminal investigation. If the CMA does this, then we do not consider that it is necessary for there to be disclosure of documents which relate to the identification of that date.

68. FPM's request for disclosure in relation to the opening of the criminal investigation is possibly wider than requesting only documents relating to the date of the opening. If so, and if FPM are seeking to obtain documents which revealed the OFT's thinking as to the strength of its case and the appropriateness of opening a criminal investigation, we would not order disclosure of such documents. Our principal reason for this conclusion is that it is very likely that

such documents would be the subject of litigation privilege. At the hearing, both parties referred to the principles which apply as to litigation privilege and legal advice privilege but we were not addressed in detail on those matters. FPM took the stance that questions of privilege were for the next stage following disclosure if the CMA objected to inspection on the grounds of privilege. Similarly, we were not addressed on any facts which might be relevant as to the existence of litigation privilege in relation to the opening of the criminal investigation. However, we take the view that applying the legal principles as set out in *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006, [2019] 1 WLR 791, it seems likely that any further documents sought by FPM as to the criminal investigation would be the subject of litigation privilege. In those circumstances, we do not think that it is necessary or proportionate at this stage to require the CMA to carry out a detailed search and to make a specific claim to privilege. If FPM do wish to pursue this aspect of the matter then we do not rule out its doing so but we will not order disclosure of any further documents in relation to the criminal investigation at this stage. We add that if the CMA was not entitled to claim privilege in relation to such documents, we would in any case have been hesitant about requiring it to disclose these documents to FPM in view of the CMA's legitimate interests in maintaining confidentiality as to its internal decisions as to its investigations.

69. The next category of documents sought by FPM are documents showing any consideration by the CMA (or the OFT) as to whether to open a civil investigation between August 2012 and 9 March 2016. August 2012 was the date of a covert recording of a meeting of the parties to the infringing agreement. 9 March 2016 was the date of a memorandum disclosed by Dr Grenfell. The factual position in relation to this period is dealt with in the witness statement of Ms Radke. She describes the searches for documents and the other inquiries which have been made and she gives evidence that there are no documents which relate to a consideration of the possibility of opening a civil investigation at the time that the criminal investigation was opened. She also states that neither Dr Grenfell nor his predecessors in his post took any decision to open a civil investigation before April 2016 and that no documents relating to any such

consideration have been identified. We believe that we can, and should, act on this evidence from a solicitor. Accordingly, we will not order the disclosure of documents in this category.

70. The next category of documents sought by FPM are documents showing any consideration by the CMA as to why no progress was made in its civil investigation between 13 April 2016 and June 2017 (the time when the criminal investigation was brought to an end). As to that category, Ms Radke has stated that there was no formal decision to "pause" the civil investigation in that period and hence no documents relating to any such decision were produced. We need to consider this statement together with the statement made by Dr Grenfell that soon after the opening of the civil investigation, it became apparent that the civil investigation would need to wait for the criminal investigation to conclude. Dr Grenfell then stated that this was because of the difficulties in running the two investigations at the same time. Dr Grenfell does not give any detail as to what these difficulties were but he does suggest that the difficulties in this case were the same as the difficulties which typically arise in that respect but, again, he does not give detail of what these typical difficulties were.

71. We consider that FPM is entitled to know, in advance of the hearing of the appeal, at which Dr Grenfell is due to give evidence, what the CMA says are the difficulties which typically arise in relation to conducting criminal and civil investigations at the same time. One way for the CMA to inform FPM of its case in this respect, is for it to provide that information in a letter to FPM's solicitors. The Tribunal has power to order the CMA to give information to an appellant: see Rule 19(2)(e) of the 2015 Rules in particular and a similar power may also be provided by other rules. Because the CMA is saying that these difficulties are typical and are of a general nature, we do not consider that there is a sufficient risk of there being an inappropriate intrusion into sensitive matters relating to individual cases which would justify us not requiring this information to be provided. In any case, it is not satisfactory for the CMA to tender evidence that these difficulties typically arise without stating what are the difficulties to which it is referring. Another way of providing the information, and a way which we consider is likely to be better for all concerned, is for the CMA to produce a witness statement in which a witness with experience of the matter

explains what the typical difficulties are. That witness should then be available for cross-examination and can be asked all proper questions subject to any objections to such questions which the Tribunal will deal with as and when they are raised. We think it likely that Dr Grenfell would be able to give this evidence but we do not require the CMA to select him as its witness on this topic if it considers that it would prefer to call a different witness.

72. The above possibilities do not in terms deal with the issue whether the typical difficulties which will be referred to did in fact arise in this case. At this point, we will consider the next category of documents before coming to our overall conclusion. The next category concerns documents showing the consideration by certain persons at the CMA of the civil and criminal investigations. The certain persons referred to by FPM are the Pipeline Steering Group or any equivalent body or its members. This category of documents has the merit that FPM are recognising that it is not proportionate to carry out an audit of the investigations or to produce all the documents which show the detailed steps which were taken, why they were taken and why they were taken at the time they were taken. We consider that the right approach in relation to this category and the immediately preceding category is as follows:

(1) The CMA shall provide information as to the typical difficulties as described above;

(2) If the CMA wishes to contend, as we assume it does, that these difficulties applied in this case, then it can either rely on inference in support of that contention, or it can identify and disclose to FPM any specific documents which it says support that contention;

(3) If the CMA does not disclose any specific documents in accordance with (2) above, then any question of drawing an inference will be a matter for submission and the Tribunal will be aware that the CMA has not disclosed any specific documents to support the suggested inference.

73. There is a point of detail as to when, in or after June 2017, the CMA took active steps to resume the civil investigation which had been opened in April 2016.

We consider that the CMA should identify that date and also identify what step it took which it considers amounted to the resumption of the civil investigation. This information should be provided at the same time as the information is provided pursuant to paragraph 72 above.

74. The last category of documents sought by FPM are described as "known adverse documents" as defined in CPR PD 51U. Paragraph 2.7 of PD 51U defines "adverse document" as a document where it or any information it contains contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute. "Known adverse documents" are defined by paragraph 2.8 of PD 51U to refer to documents (other than privileged documents) that a party is actually aware (without undertaking any further search for documents than it has already undertaken or caused to be undertaken) both (a) are or were previously within its control and (b) are adverse. "Aware" is defined by paragraph 2.9 of PD 51U in a way which identifies the person or persons in an organisation who is relevant for this purpose; it may be necessary to check the position with certain persons who have since left the organisation.

75. On balance, we consider that it is not appropriate to order disclosure of this category of known adverse documents. The issue in this case is whether the OFT and the CMA were guilty of unreasonable delay in their investigations. The CMA says that there was no unreasonable delay. Any document adverse to that contention could, in principle, be an adverse document. However, such documents will extend to matters which would only need to be investigated if the Tribunal were to carry out a detailed audit of the investigations. As no such detailed audit will take place, the CMA ought not to be required to give disclosure of such documents. In addition, we note that Ms Radke has confirmed that, having carried out searches and made inquiries, she is not aware of any documents which are contrary to the CMA's Defence in relation to Ground 5(b).

76. We have expressed a number of conclusions as to the steps to be taken in relation to Ground 5(b). We now need to stand back and ask ourselves if the combination of those steps will enable the Tribunal to deal with Ground 5(b) justly and at proportionate cost to the parties.

77. The overall result of our conclusions can be expressed as follows:

(1) FPM will now be told the date of the opening of the criminal investigation;

(2) FPM know the steps in the criminal investigation which directly involved it;

(3) the documents which are of principal relevance to the criminal investigation are likely to be the subject of litigation privilege;

(4) the CMA has said that it did not consider opening the civil investigation before March/April 2016;

(5) the CMA has said that it did not make any progress in the civil investigation before June 2017;

(6) FPM will now be told when the CMA took the first active step in relation to the civil investigation in or after June 2017 and the nature of that step;

(7) FPM will know the subsequent steps in the civil investigation which directly involved it;

(8) the SO was dated 13 December 2018 and the documents which are of principal relevance in relation to the civil investigation are likely to be the subject of litigation privilege from around that time;

(9) the CMA will notify FPM of its case in relation to the difficulties it relies upon in relation to running a criminal and a civil investigation at the same time;

(10) if FPM contends that the CMA was guilty of unreasonable delay, then that allegation is more to do with what the CMA ought to have done; the things which the CMA ought to have done (but did not do) will not necessarily be shown by the disclosure of documents, unless there was to be an audit of the CMA's investigation which FPM does not seek;

(11) if FPM contends that the CMA ought to have run the two investigations in tandem then that contention can be put forward in the light of the CMA's case to the contrary which the CMA will particularise;

(12) if FPM wishes to contend that there were other steps which the CMA ought to have taken to avoid delay, then FPM ought to be able to advance its case in those respects on the basis of the material which it has and/or which will be provided to it.

78. Standing back, we consider that the way forward which has been identified in our reasoning will enable the Tribunal to deal with Ground 5(b) in a just way and at proportionate cost. No further disclosure is necessary or proportionate and no further disclosure will be ordered. We will therefore make an order which reflects the reasons set out above.

The Honourable Mr Justice Morgan Chairman Eamonn Doran Sir Iain McMillan CBE FRSE DL

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 3 June 2020